



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

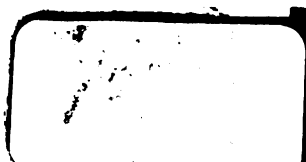


U.S. Army
Department

L. Eng. C 17 d. $\frac{24}{2(2)}$

= L L.

U.S. Army
2 000
6544 40.



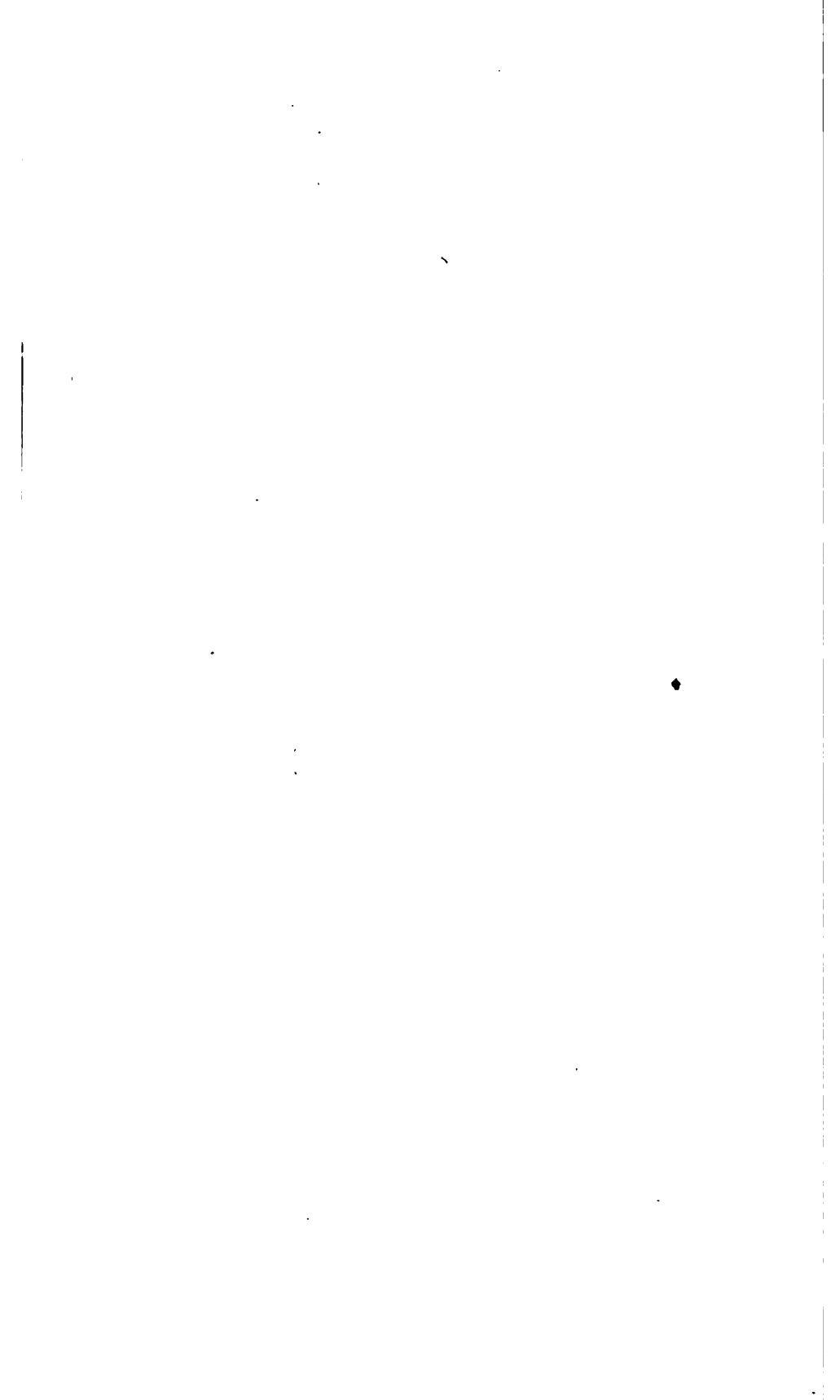
U.S.A.

510

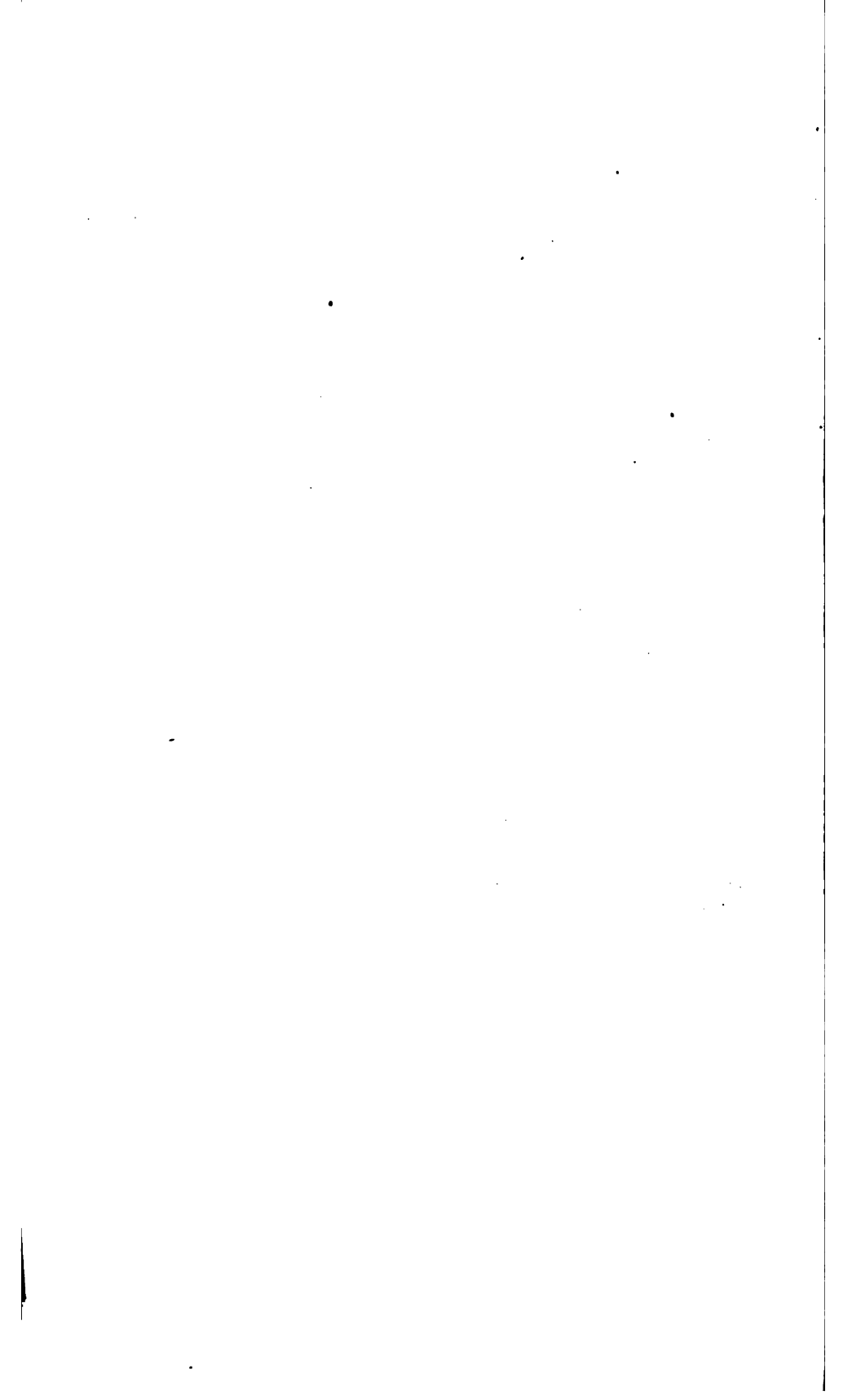
W 554

Library of the General Counsel
Treasury Department

Library of the General Counsel
Treasury Department







A SELECTION
OF
LEADING CASES IN EQUITY,
With Notes.

BY
R. T. WHITE AND O. D. TUDOR,
OF THE MIDDLE TEMPLE, ESQs., BARRISTERS-AT-LAW.

With Annotations,
CONTAINING REFERENCES TO AMERICAN CASES,

BY
J. I. CLARK HARE AND H. B. WALLACE.

Fourth American, from the Fourth London Edition.

WITH
ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS,

BY
J. I. CLARK HARE.

IN TWO VOLUMES.

VOL. II.
Part Second.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS AND PUBLISHERS,
No. 535 CHESTNUT STREET.
1877.



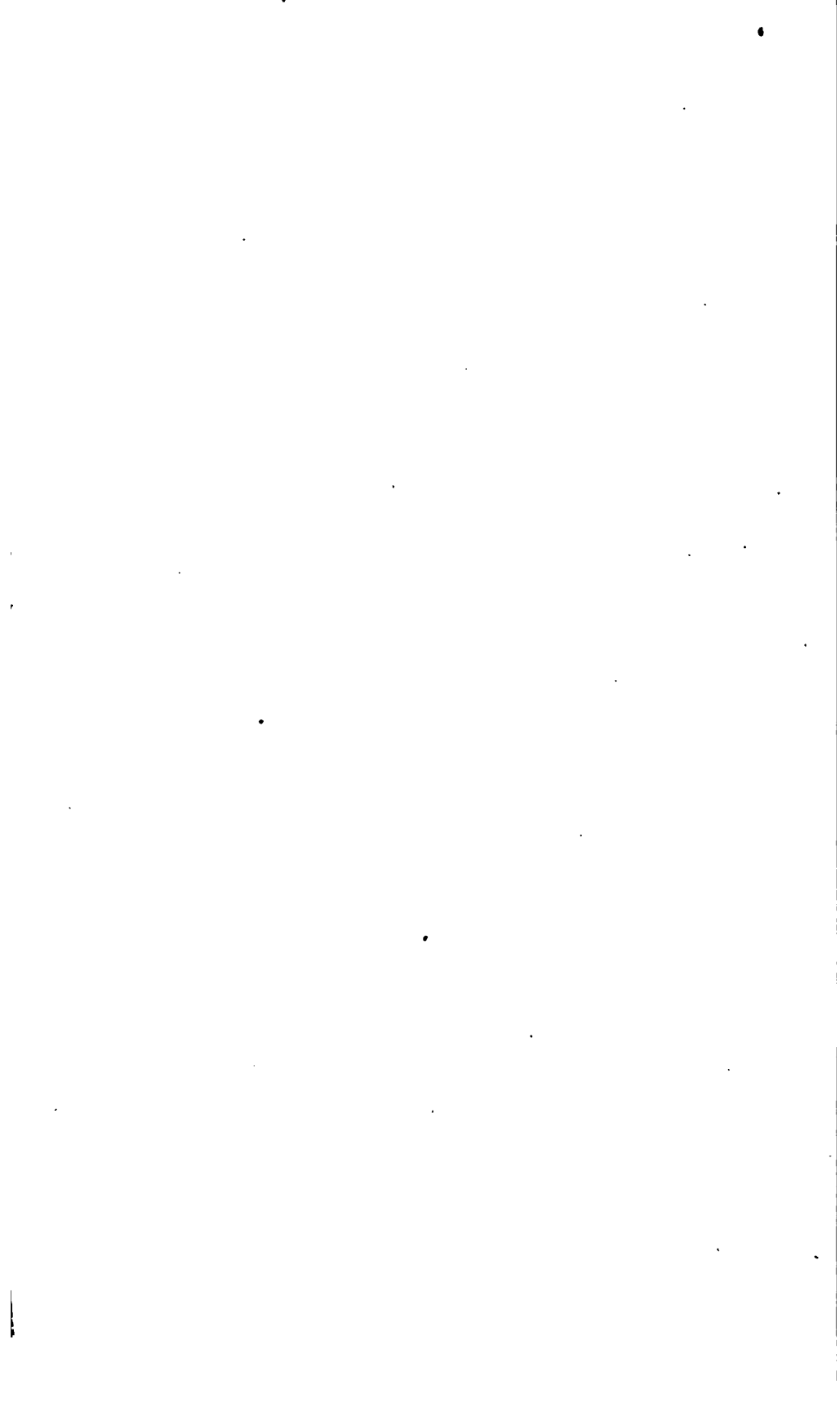
k
W 584c
1876/77
v. 2
pt. 2

LIST OF CASES REPORTED

IN

VOLUME II, PART II.

	PAGE
BRIGE <i>v.</i> STOKES (Liability of trustee for co-trustee's receipts)	1742
CASBORNE <i>v.</i> SCARFE (Equity of redemption)	1945
EYRE <i>v.</i> SHAFTSBURY (COUNTESS OF) (Infants—Guardian and ward)	1416
FORDING <i>v.</i> GLYN (Power in the nature of a trust)	1833
HARD <i>v.</i> HARRIS (Restrictions on redemption of mortgage dis- countenanced in equity—Mortgage cannot be made irre- deemable)	1949
HUGUENIN <i>v.</i> BASELEY (Voluntary settlement—Undue influence)	1156
HUNTINGDON <i>v.</i> HUNTINGDON (Mortgage of wife's estate of inheri- tance for the benefit of her husband—Wife's estate considered only as a surety)	1922
OXFORD'S (EARL OF) CASE (Jurisdiction of equity as to proceed- ings at law)	1291
PEACHY <i>v.</i> SOMERSET (DUKE OF) (Relief against penalties and for- feitures)	2014
PENN <i>v.</i> BALTIMORE (LORD) (Power of equity over property out of its jurisdiction by a decree in personam)	1806
REES <i>v.</i> BERRINGTON (Release of surety by the creditor giving time to debtor)	1867
ROW <i>v.</i> DAWSON (Chose in action assignable in equity)	1531
RYALL <i>v.</i> ROWLES (Assignment of debts without notice to debtor— Order and disposition)	1533
SETON <i>v.</i> SLADE (Specific performance with compensation)	1041
SLOMAN <i>v.</i> WALTER (Penalty relieved against)	2022
STAPILTON <i>v.</i> STAPILTON (Compromise—Family arrangement)	1675
TORNBOUGH <i>v.</i> BAKER (Executor of mortgagee in fee entitled to money secured on mortgage)	1941
TOWNLEY <i>v.</i> SHERBORNE (Liability for acts of co-trustee)	1738
WARMSTREY <i>v.</i> TANFIELD (LADY) (Possibility assignable in equity)	1530



*SETON v. SLADE.
HUNTER v. SETON.

[*513]

JULY 2 AND 8, 1802.

REPORTED 7 VES. 263.

SPECIFIC PERFORMANCE WITH COMPENSATION.]—*Specific performance decreed, the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit with interest, if the title should not be made out and possession delivered by the time of payment, having been received and kept without objection; and the vendee, upon the construction and the circumstances, not being entitled to insist on the time, as the essence of the contract.*

An agreement signed by one party only, good to charge him within the Statute of Frauds.

THE plaintiff in the first of these causes being entitled to an estate called Kilorough, in the county of Glamorgan, under a contract entered into in 1799, by the trustees of the Marquis de Choiseul, to convey to him and his heirs, in consideration of 8500*l.*, employed Josiah Phipps to sell the estate by auction or private contract: and the following memorandum, in writing, dated the 12th of April, 1800, was signed by the defendant Robert Slade, but not by the plaintiff, or any one on his behalf:—
“I Robert Slade, of Doctors’ Commons, in the city of London, Esquire, have this day purchased of Josiah Phipps, the estate described in the within particular, at and for the sum of 10,000*l.*, including the timber and underwood growing thereon, have paid a deposit of 1000*l.*, do hereby undertake and agree to pay the remainder of the purchase-money, and complete my purchase, within two months from the date hereof, the proprietor making a *good title thereto at his own expense, and executing a [*514] proper conveyance, to be prepared at my expense; and I do further agree to pay for the fixtures, household furniture, at a fair valuation, and for the growing crops, seeds, fallows, &c., in the same way, according to the custom of the country; and possession to be given upon the completion of the contract, to which time all out-goings are to be cleared up, and I am entitled to the rents and profits. Upon failure of my complying with the terms and conditions before mentioned, the deposit money shall be forfeited, the proprietor shall be at full liberty to re-sell the estate, and the deficiency, if any there shall be by such second sale, together with all charges attending the same, shall be made good at my expense.”

The bill in the first cause prayed a specific performance of this agreement, which was resisted under the following circumstances, appearing by the answer and the evidence.

The defendant, the day after he signed the agreement, (the 13th of April), wrote to Phipps from Brighthelmstone, stating objections to the title, and that, if the title should not be out, and possession delivered to him by the 12th of June then next, he should insist upon having the deposit money returned to him with interest. Phipps's letter in answer, dated the 19th of April, stated the plaintiff's answer, as given verbally by his solicitor, thus:—"Mr. Seton desired I would inform you, that he accedes to your request respecting the interest as a matter of course." The defendant, about the beginning of May, informed Phipps he had sold out stock for the purpose of being ready with his purchase-money, and expressed his surprise that no abstract had been delivered. He afterwards pressed Phipps for the abstract, and proposed that Phipps should copy and send in his name, to the plaintiff, a note written by the defendant, expressing, that, finding no progress made in the delivery of the title, he called to remind Phipps, that, in the event of its not being completed at [515] the expiration of the *two months, he expects, in compliance with the promise the plaintiff made, in answer to his letter from Brighthelmstone, to have his deposit-money returned with interest, and requesting authority to fulfil the engagement on the plaintiff's part. Phipps declined writing that letter. On Saturday, the 7th of June, the abstract was left at the defendant's solicitors, with a note, stating that the plaintiff had only a title under an agreement, but all necessary parties were ready to convey, and making a proposal for that purpose. On Monday, the 9th, the plaintiff's solicitor called there to say, that he would not vouch for the authenticity of the abstract, as it was not prepared by him, but by the solicitors for the trustees of the Marquis de Choiseul. Nothing further passed till the 13th of June, on which day the defendant wrote to Phipps, demanding his deposit with interest, and stating his reasons, that the two months within which the plaintiff agreed to complete the contract were expired, and the defendant's solicitors had not received an abstract till within these few days; and so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him, without noticing a suit in Chancery against the trustees of the Marquis and Marchioness de Choiseul, previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited.

The defendant afterwards recovered his deposit, with interest, in an action.

Several objections were taken to the abstract, the principal of which (mentioned in the defendant's letter of the 13th of April) were, the suit instituted by the Marquis de Choiseul and his creditors to remove his trustees, and for an account of their conduct; and a prior contract with a person named Darby, who gave notice of his claim. He was made a defendant, and put in an answer, amounting, on the whole, to a disclaimer. Afterwards, being examined as a witness, by his depositions he renewed his claim. The Lord Chancellor held, that he could not get

*rid of the disclaimer upon the record without a strong case upon affidavit; and, therefore, he was a good witness; but the defendant reading his dispositions, must admit that he has no interest. The defendant then declined reading his evidence. [*516]

The second cause was instituted upon a bill by the trustees of the Marquis de Choiseul, praying a specific performance of their contract with Seton.

Mr. Romilly and Mr. Bell, for the plaintiff Seton.—The question is, whether the vendor was bound to make out his title by a certain day; and farther, whether, if he could make a title at a subsequent time, that would not be sufficient in this Court. In all the decisions upon this point, time has been considered a circumstance merely, not of the essence of the agreement. It is true, in modern cases parties have been discharged, where in former times they would have been bound, the late decisions having restrained the unlimited extent of the older cases. But they have never gone the length, that, if the agreement is not performed at the particular day, it shall be at an end. In the common case of relief against the penalty of a bond, prior to the statute,¹ could any declaration of the parties have prevented that? The result is, that the non-performance at the day is a circumstance to show abandonment, but only a circumstance. In *Gregson v. Ridalle*,² the agreement was for a particular day, with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, to have the legal estate conveyed. The defendant resisting, a reference was directed to see whether a good title could be made, Lord Loughborough expressing an opinion, that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent *was to hold it evidence of a waiver of the agreement, but it never was held to make it void. [*517] Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery it should be void. Lord Thurlow said, such a clause might be inserted, and the parties would be just as forward as they were then.

That case is much stronger than this. Here there was no necessity for performance at the day.

Mr. Richards and Mr. Leach, for the defendant Slade.—The general principle is, that in equity, as at law, the plaintiff must

¹ Stat. 4 & 5 Ann. c. 16.

² In Chancery, before the Lords Commissioners, 12th June, 1783; before Lord Thurlow, 12th June, 1784; cited by Mr. Romilly, from his own note.

show that he has performed everything incumbent on him. There is no instance of a decision treating the time as immaterial, without circumstances amounting to a waiver, though the language of the Court has been more extensive. Upon the face of this agreement, it is to be performed within two months: and there are no circumstances showing a waiver. Under this express engagement, would this Court have restrained an action against the auctioneer for the deposit of 100*l.*, or have prevented the vendor from setting up the estate again if the vendee had made default? No authority goes to that extent; and it is to avoid this that the clause is introduced. Then, the vendee has an equal right to hold the vendor to the time. It is idle to say the time is not material; if it is not adhered to, it may be the ruin of the party acting upon that, contracting debts, &c. A decision always referred to upon this subject is *Gibson v. Patterson*,¹ the report of which is corrected in *Lloyd v. Collett*,² and *Harrington v. Wheeler*.³ *Lloyd v. Collett* is a direct decision for this defendant; differing only in the circumstance that no abstract was there delivered within the time. In all these cases, and *Pincke v. Curtis*,⁴ and *Fordyce v. Ford*,⁵ the language of the Court is directly opposite to what it was formerly—that time is material. In *Spurrier v. Hancock*⁶ the time was extended by the tacit consent of both parties. It is important that this [*518] defendant, the very day after he *signed the agreement, expressly stated his title to insist upon the time; and Phipps, in his answer, assents to that.

[LORD CHANCELLOR ELDON.—There have been several very hard cases under the description of the specific performance of agreements, upon the principle of compensation; that for instance, where a person contracted for an estate in Essex, with the object of becoming a freeholder of that county, and it turned out to be in Kent; yet he was held to it.⁷ So in a case before Sir T. Sewell, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe-free, and he was compelled to take it subject to the tithe.⁸ The value of the tithe is not a compensation. I incline much to think, notwithstanding what was said in *Gregson v. Riddle*, that time may be made the essence of the contract; but I do not recollect a case where an abstract was delivered for the purpose of preparing a conveyance; at the delivery no objection made that it was delivered too late; and between the delivery and the time for the execution of the conveyance, no objection stated, either to the time of the

¹ 1 Atk. 12.² 4 Bro. C. C. 469; 4 Ves. 689, n. (b).³ 4 Ves. 686; *Wynn v. Morgan*, 7 Ves. 202.⁴ 4 Bro. C. C. 329.⁵ 4 Bro. C. C. 494.⁶ 4 Ves. 667.⁷ *Shirley v. Davis*, in the Court of Exchequer, cited 6 Ves. 678.⁸ *Lord Howland v. Norris*, 1 Cox, 59.

delivery or the nature of the title. The abstract certainly was delivered very late: but it is upon the party to say it was too late. If he receives the abstract without objection, does he not authorise the other to suppose he is, during the currency of the rest of the time, preparing his conveyance, and the thing is to go on?]

For the defendant.—The delivery of the abstract was a mere mockery. It could not possibly be imagined that it could be looked through in time. It was incumbent upon the vendor to have some communication with the vendee, to do away the effect of his letter. It would be a new decision, that the delivery of the abstract to the solicitor, the vendee having declared absolutely that he would not let it go beyond the time, shall amount to a *new contract. No diligence could have enabled the vendor to perfect his title by the 12th [*519] of June, on account of the claim of Darby, and the suit in Court.

Mr. Romilly, in reply.—This agreement is not the same as if the vendor had undertaken expressly to make out his title in two months. The defendant's undertaking is conditional, to pay his purchase-money. There is no such principle, that time is essential here as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of equity from a great part of their jurisdiction. The only ground for the redemption of a mortgage is, that the time is essential at law; yet, in equity, as the real transaction is a loan of money, and the party may be put in as good a situation, it shall not be so considered. In those cases, a dictum of Lord Thurlow has been frequently alluded to—that, if a clause was inserted, excluding the jurisdiction of this Court, if the mortgagor should not redeem within a year, still the mortgagor would be entitled to redeem. There are no words in this agreement showing the parties meant this time strictly. It was inserted merely because it is usual to fix a time. The vendor could not have re-sold at the end of two months, and charged the defendant with the deficiency. The defendant's letter shows he did not understand the period of two months to be binding, desiring a fresh agreement for that purpose. Phipps's letter proves nothing. He was not agent for any such purpose, and the information was given to him only, and the answer is merely that Seton acceded to his request as to the interest, as a matter of course, as it certainly was: not that if the contract should not be performed within two months, there should be an end of it. The objection that it was impossible that the conveyance could be prepared in time, should have been made when the abstract was delivered. But suppose the title perfect; that it had received the sanction of eminent conveyancers; that many estates had been sold under that abstract; and that the person to whom it was sent was already conversant with the title; in that case,

[*520] the conveyance *might have been prepared in time. The defendant held the vendor bound till the 12th of June.

LORD CHANCELLOR ELDON.—If it were necessary, for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

To say time is regarded in this Court as at law is quite impossible. The case mentioned, of a mortgage, is very strong—an express contract under hand and seal. At law, the mortgagee is under no obligation to reconvey at that particular day; and yet this Court says, that though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is, in this Court, considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *prima facie* import of the terms of the agreement itself, which does not import, at law, that once a mortgage always a mortgage. But equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so, in the case of a mortgage, that you shall not, by special terms, alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. So, in the instance of a mortgage, with interest at 5*l.* per cent., and a condition to take 4*l.* if regularly paid; or at 4*l.* per cent., with a condition for 5*l.*, if not regularly paid. At law you *might in that case, recover the 5*l.* [*521] per cent., for it is the legal interest. But this Court regards the 5*l.* per cent. as a penalty for securing the 4*l.*: and time is no further the essence than that, if it is not paid at the time, the party may be relieved from paying the 5*l.* per cent., by paying the 4*l.* per cent., and putting the other party in the same condition as if the 4*l.* per cent. had been paid: that is, by paying him interest upon the 4*l.* per cent. as if it had been received at the time.¹ So in this Court, before Courts of law dealt with a bond under a penalty, as they do now, time was the essence there; but this Court relieved against the penalty long before a Court of law, and there are many other instances.

But there is another circumstance. The effect of a contract

¹ See *Thompson v. Hudson*, 2 L. R. Eq. 612; 2 L. R. Ch. App. 255; 4 L. R. Ho. Lo. 1.

for purchase is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate from the sealing of the contract, is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee. Therefore, I do not take a full view of the subject upon the question of time, unless that is taken into consideration: and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also.

The cases seem to have varied a good deal. The cases before Lord Thurlow proceed upon this, that in the nature of the thing there must be a decree of good faith between the parties, not to turn round the contract upon frivolous objections. As to the contract of the party, the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry that, unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the *thing, or objections arising out of circumstances, [*522] not merely as to time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained: even the latter cases, which have given great weight to the objection, particularly *Harrington v. Wheeler* (4 Ves. 686), referring to older cases, particularly two in the House of Lords,¹ the objection was not put merely upon the conduct in not making the title in time, but upon the circumstances connected with the thing and the value of it.

But I need not address myself to the consideration of what is the precise principle, with so much industry; for no authority would support me in saying, that, under the particular circumstances of this case, the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant Slade only; but that makes him within the statute² a party to be charged. I do not say whether terms might or might not be introduced, that would make time expressly of the essence of the contract.³ It is enough to say, that, if this agreement has that effect, there never was an agreement that would not; for, upon that point, the agreement is as loose as possible. There is no passage in it eo intuito; not that sort of passage in *Gregson v. Riddle*, The clause as to liberty to re-sell, &c., is not considered of much

¹ *Hayes v. Caryll*, 1 Bro. P. C. 126, Toml. See *Wingfield v. Whaley*, 1 Bro. P. C. 209, Toml. edit.

² 29 Car. 2 c. 3.

³ They clearly might. See *Hudson v. Bartram*, 3 Madd. 440; *Boehm v. Wood*, 1 J. & W. 410.

importance in this Court; but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the plaintiff might have sold after the two months were expired, admits of this answer,—that it is assuming the whole question. If you make out that he would have been at liberty to resell, that does not make out that he lets the other off; but, under the circumstances he would not have been at liberty to resell. The [*523] evidence clearly imports that the defendant did not *understand it to have bound them in that mutual respect in which he seems in his letter to think it reasonable they should be bound. But I will construe it, for the purpose of this case, as if it had mutually bound them; and that, if the title was not made out by the day, then the defendant should be at liberty to say he was off; for if that clause had been in this agreement he might have waived the benefit of it; and it must have been made out that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale, the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff in that respect. There is no evidence of that: on the contrary, the defendant applies to the auctioneer as such agent, and he refuses to act as such, and refers him to the plaintiff. But he applies again to the auctioneer, and never to the plaintiff. One clause of this letter is very important, marking the knowledge of the title in the law-agent of the vendee, and that he was able, in the first instance, the day after, to state the material objections, viz., the proceeding in Chancery, and Darby's claim. That is distinct evidence that the defendant did not then understand that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding or not, that was his understanding. By the last words, he seems desirous of having an agreement, which would for the first time give a mutuality as to time. But he does not choose to give up the one till he gets the other, reserving to himself the power to deal with the first agreement as he thinks fit, though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence that he did? There is a good deal of reasoning in support of the argument, that Phipps's letter is not merely a statement that [*524] he would pay interest, *but, with regard to some circumstances, that the contract was to be off, viz., the deposit money to be returned with interest, connected with the dissolution of the agreement, which might either be within or after

the expiration of the two months; but, if the former, it ought to be shown to be clearly the effect of something that passed subsequently, and was acceded to. The letter of Phipps in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it an undertaking to the extent he proposed, or as completely settling that mutuality he desired, giving him a right to insist upon the time as the essence of the contract? No; for afterwards he goes again to Phipps, not an agent, to bind the plaintiff for this purpose, and, not being able to prove the date further than that it was between the 13th of April and the 5th of June. This proves that the defendant, by repeated inquiries addressed to his solicitors, who knew a good deal of the title, was informed from time to time that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed that Phipps should write that letter. Being told Phipps would not write that letter, he does not write himself, or direct his solicitors to apply; but, upon the 7th of June, by his solicitors, he receives the abstract, they knowing the history of the title and the estate, and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the abstract, stating distinctly that the plaintiff had only a title under an agreement, but that all necessary parties were ready to convey, and making a proposal for that purpose, which might or might not be completed within the time. The abstract was delivered on the 7th of June. No objection was made to receiving it. It was kept till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another: and if the solicitors had returned the abstract upon the objection, *the plaintiff was at liberty to say he had undertaken to remove all objections, [*525] or to tender a conveyance; and he might have proceeded to prepare a conveyance, which, under the circumstances, was to be prepared by the defendant; and he might have tendered that conveyance so as to have a right to an action, or to file a bill, as upon an agreement which he had undertaken to make good within the time.

This case is not like *Lloyd v. Collett* (4 Bro. C. C. 469; 4 Ves. 689, n.), in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract if it came too late? He had either an intention to execute the contract, or a hope that he had time to get through the abstract, in order to carry it into execution; but the evidence in this respect is totally silent; and it is clear, upon the objections stated in the solicitors' depositions, that at some period or other he had gone into the abstract.

As to the other circumstances stated by the defendant, his selling out stock, &c., there is no evidence whatsoever. As to his

intention of making this place his residence, there is nothing in the contract having the least reference to that; and upon an intention, not disclosed in the contract, or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances, therefore, whether the time is or is not an objection, founded upon the authorities the Reports of this Court furnish,—which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff,—there is no authority that has not some reference to the conduct of the party in the mean time; and upon the conduct, this defendant has no right, under the circumstances, to say this contract was not performed within the two months.

There must, therefore, be a decree for a specific performance; and as to all the rest, a reference to the Master, to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very [*526] important as to the *costs, but not whether he shall take the title or not. According to old cases, it was sufficient if the title was made by the time of the report.¹

“A Court of equity,” says Lord Redesdale, “frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case:” *Davis v. Hone*, 2 S. & L. 347. See also *Lennon v. Napper*, 2 S. & L. 684; *Parkin v. Thorold*, 2 Sim. N. S. 6, 8; *Roberts v. Berry*, 3 De G. Mac. & G. 284, 289. Where, for instance, as in the principal case, the contract has not been completed at the time mentioned, or where the vendor has not the same interest in the estate as that which he has contracted to sell, or there is some deficiency in the quality or quantity of it, the party not able strictly to perform the contract on his part, could, at law, have no remedy by way of damages against the other; but in equity, in many cases, he would be able to obtain specific performance, if adequate compensation can be made for the non-literal performance of the contract. These cases it is proposed to examine in this note.

1. *As to the Contract not having been completed at the Time mentioned.*—At law, in all cases, time is considered as of the essence of the contract. “As to the contract of the party,” Lord Eldon observes, in the principal case, “the slightest objection is an answer at law.

¹ See *Jenkins v. Hiles*, 6 Ves. 646.

But," he adds, "the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the time*, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, *not merely as to time*, but the *conduct* of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained."

The objection, therefore, as to the delay in equity, may be considered, 1st, As arising from the conduct of either party; 2nd, As arising from the state of the title.

1st. *As to Delay arising from *the Conduct of either Party.*—Although Lord Hardwicke, in *Gibson v. Patterson*, [*527] 1 Atk. 12, is reported, though, perhaps, incorrectly (see 4 Bro. C. C. 497; 4 Ves. 630, n.), to have said, that the vendor's negligence in not producing his title-deeds, &c., within the time limited for that purpose, was no objection to specific performance, that doctrine has since been clearly overruled. In *Milward v. Earl of Thanet*, 5 Ves. 720, n., where the parties, differing as to the construction of the agreement, delayed the bill for specific performance for seven years, it was dismissed by Lord Alvanley, M. R., who observed, that Lord Kenyon was the first who set himself against the idea that had prevailed, that, when an agreement was entered into, either party might come at any time; but that it is now perfectly well known, that *a party cannot call upon a Court of equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager*. See also *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 690, n.; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfrey*, 5 Ves. 818; *Alley v. Deschamps*, 13 Ves. 225; *Walker v. Jeffreys*, 1 Hare, 352; *Southcomb v. The Bishop of Exeter*, 6 Hare, 213, 218; *Dorin v. Harvey*, 15 Sim. 49; *Alloway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 150; *M Murray v. Spicer*, 5 L. R. Eq. 527, 537. And a continual claim without any active steps in support of it, will not keep alive a right which would otherwise be barred by laches: *Lehmann v. McArthur*, 3 L. R. Eq. 496.

"In these cases," observes Lord Romilly, M. R., "where one person says, 'I will have nothing more to do with the contract,—I put an end to it,'—if the other party to the contract, who insists on its being carried into execution, does not file his bill speedily—a time which is not very accurately fixed, though the cases have determined that it must not exceed a year—he shall not be allowed to insist that the contract shall be carried into execution: *Colby v. Gadsden*, 34 Beav. 418. But this rule will be relaxed where the strict application of it would work injustice: *Walker v. Jeffreys*, 1 Hare, 353; *Jones v. Jones*, 12 Ves. 188.

At law, unless the vendor has his abstract and title-deeds ready at

the appointed time, his remedy is gone, and the purchaser may recover back his deposit: *Berry v. Young*, 2 Esp. Ca. 640, n.

In equity, however, the rule is, that it is not solely incumbent upon the vendor to move by making a tender of the abstract, but it is also incumbent upon the purchaser to ask for it at the appointed day (*Guest v. Homfrey*, 5 Ves. 818, 823), or on such other day as will leave sufficient time for the completion of the contract (*Jones v. Price*, 3 Anstr. 924); *otherwise equity will consider the time as [*528] waived.

So, if the abstract be delivered to the purchaser *after* the day appointed, and he makes no objection to the delay, he will be considered as having waived it: *Smith v. Burnam*, 2 Anstr. 527; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Paine v. Meller*, 6 Ves. 349.

If a vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated, in the condition for sending in the objections, that time in that respect should be of the essence of the contract (*Upperton v. Nickolson*, 6 L. R. Ch. App. 436). In such a case, the time within which objections will be considered as waived, will depend upon the general principles of the Court, and the conduct of the parties. (*Ib.*)

Where, however, a vendor has taken no steps whatever to complete the contract, and the purchaser has immediately, when the time elapsed, insisted upon his deposit and refused to perform his agreement, equity will not decree specific performance of the contract, or grant an injunction to restrain the purchaser from proceeding at law to recover his deposit *Lloyd v. Collett*, 4 Bro. C. C. 469; *S. C.*, 4 Ves. 689; *Ormerod v. Hardman*, 5 Ves. 737; *Warde v. Jeffrey*, 4 Price, 294; secus, if he has endeavored to make out his title, and has not been guilty of gross laches or negligence (*Fordyce v. Ford*, 4 Bro. C. C. 495; *Radcliffe v. Warrington*, 12 Ves. 326); and although, after the period at which the contract ought to have been completed, some time elapses before the completion of the repairs of a house described as being in good repair (*Dyer v. Hardgrave*, 10 Ves. 805); or before the expiration of a lease of property, when it was stated that the purchaser would, several months before, be entitled to possession (*Hall v. Smith*, 14 Ves. 426; and see 13 Ves. 225); the purchaser will not be able to resist specific performance unless he can show that he wanted the house for his own occupation before the time when the repairs would be completed, or the lease would expire.

But a Court of equity will not decree specific performance of a contract, when the purchaser has lain by and delayed completing it, even although he may have paid part of the purchase-money: *Harrington v. Wheeler*, 4 Ves. 686; *Alley v. Deschamps*, 13 Ves. 225

where Lord Erskine says, "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event, either to abandon it, or, considering time as nothing, to claim a specific *performance, which is always the subject of discretion." And see *South- [529] Eastern Railway Company v. Knott*, 10 Hare, 122; *Firth v. Greenwood*, 1 Jur. N. S. 866; *Alloway v. Braine*, 26 Beav. 575.

Nor will equity aid a purchaser who has taken trifling and vexatious objections to the title, and has shown a disinclination to perform the contract, especially when the value of the property has increased by the dropping of lives, or otherwise (*Hayes v. Caryll*, 1 Bro. P. C. 126, Toml. edit.; *Spurrier v. Hancock*, 4 Ves. 667; *Pope v. Simpson*, 5 Ves. 145; *Main v. Melbourn*, 4 Ves. 720; *Burke v. Smyth*, 3 J. & L. 193; or where the purchaser was in reality unable to pay the purchase-money (*Gee v. Pearse*, 2 De G. & Sm. 325; *Aberaman Iron Works v. Wickens*, 5 L. R. Eq. 485, 507, 508); and, where either the vendor or purchaser has not completed the contract on his part at the appointed time, if the contract be inequitable, or the price unreasonable,—that is to say, inadequate in one case, or exorbitant in the other,—equity will not afford its aid by decreeing specific performance: *Whorwood v. Simpson*, 2 Vern. 186; *Lewis v. Lord Lechmere*, 10 Mod. 503.

2nd. *As to Delay arising from the State of the Title.*—Where delay may be accounted for upon the ground of the state of the title, it will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material; that is to say, where time has not been made by the contract of the parties, or is not, from the nature of the property, of the essence of the contract. In such case, if a vendor file a bill for specific performance, it is sufficient if he can procure a good title at the time of the decree. *Langford v. Pitt*, 2 P. Wms. 630, is a leading case on this subject: there it was urged by the defendant's counsel, that, even by the plaintiff's own showing, he had not, at the time of entering into the articles for sale, a good title. But Sir Joseph Jekyll, M. R., said, "It is sufficient if the party entering into articles to sell, has a good title at the time of the decree, the direction of the Court being in all these cases to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement:" see *Jenkins v. Hiles*, 6 Ves. 646; *Wynn v. Morgan*, 7 Ves. 202; *Eyston v. Simmonds*, 1 Y. & C. C. C. 608; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Sidebotham v. Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; *Chamberlain v. Lee*, 10 Sim. 444; *Phillipson v. Gibbon*, 6 L. R. Ch. App. 428.

The title, however, ought generally to be made out at the time of the report (*Kirwan v. Blake*, cited 2 Moll. 581, 582; *Cowgill v. Lord Oxmantown*, 3 Y. & C. *Exch. Ca. 377); but a purchaser will not in all cases be discharged if a title cannot be made at that [*530]

time. "Where," says Lord Eldon, "the Master's report is, that the vendor, getting in a term, or getting administration, &c., will have a title, the Court will put him under terms to procure that speedily:" see *Coffin v. Cooper*, 14 Ves. 205; in which case it was held, that the purchaser could not insist on being discharged from the contract, the vendor having procured a good title by means of an Act of Parliament, although upwards of a month after the Master's report. See also *Lord Stourton v. Sir Thomas Meers*, stated 2 P. Wms. 631; *Clay v. Rufford*, 5 De G. & Sm. 784; *Devenish v. Brown*, 26 L. J. N. S. (Ch.) 23.

A purchaser, by buying up the title of a third party which might, had it remained outstanding, have constituted a valid objection to the vendor's title, will not be able, on the ground that the vendor has not got that title in himself, be able to object to specific performance. See *Murrell v. Goodyear*, 1 De G. F. & Jo. 432; there the assignees of an insolvent put up for sale an estate which had been impressed with the character of personalty, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as reality, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir, abruptly gave notice to determine the contract, and immediately afterwards bought up the title of the heir. It was held by the Lords Justices, affirming the decision of Sir John Stuart, V. C., that he could not avail himself of this purchase to defeat his contract, and that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir.

But where the vendor does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time when he showed title (*Long v. Collier*, 4 Russ. 269; *Scoones v. Morrell*, 1 Beav. 251; *Wilkinson v. Hartley*, 15 Beav. 183); secus where the suit was occasioned solely by the conduct of the purchaser, as where he simply disputes the authority of the vendor to sell, and does not ask for his title (*Peers v. Sneyd*, 17 Beav. 151): or where the requisitions were not made until after the bill filed (*Lyle v. The Earl of Yarborough*, Johns. 70), and also where, although the requisitions were made before the bill was filed, the *non-compliance of the vendor was [*531] attributable to the circumstance of the purchaser having claimed abatement or compensation, in respect of which his bill had been dismissed with costs. *Ib.*

But in a recent case, although the vendor had been right on all points in which objections had been taken before the bill was filed, yet, as he

might with reasonable diligence have informed himself before selling of a defect in the title, discovered before the certificate approving of the title was signed, the Court of Appeal directed that no costs should be given on either side except the costs of the original hearing before the Vice Chancellor, which costs the vendor was to pay to the purchaser: *Phillipson v. Gibbon*, 6 L. R. Ch. App. 428.

As to when a title is made, see *Parr v. Lovegrove*, 4 Drew. 170.

There is a disinclination to extend the rule which the Court has adopted, of compelling a purchaser to take the estate although a title is not made out till after the time fixed by the contract, to any case to which it has not already been applied, since the rule has in many instances been productive of great hardship; accordingly it has been held that a purchaser will not be bound where a new suit is necessary, or an account of debts remains to be taken in a suit. See *Lechmere v. Brasier*, 2 J. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & My. 296; *Coster v. Turnor*, 1 Russ. & My. 311; *Magennis v. Fallon*, 2 Moll. 566, 580; *Chamberlain v. Lee*, 10 Sim. 444; *Blacklow v. Laws*, 2 Hare, 40. So, in *Fraser v. Wood*, 8 Beav. 339, the defendant in 1842 contracted to purchase an estate. A suit for specific performance having in the same year been instituted by the vendors, it appeared that they claimed under a testator who died in 1809, and subject to his debts: that a creditors' suit had been instituted in 1813, and a decree for an account made in 1817, since which time nothing effectual had been done in the suit, and no report of debts had been actually confirmed. After so great a delay, no further time was given to the vendors to complete their title, and the bill for specific performance was dismissed with costs.

But if, as in the principal case, a purchaser is aware of the objections to the title, or he receives the abstract after the day appointed (*Pincke v. Curteis*, 4 Bro. C. C. 329; *Hipwell v. Knight*, 1 Y. & C. Exch. Ca. 401); or proceeds with the purchase, although the time fixed for the completion of the contract may have elapsed, and a much longer period may be requisite in order to make a good title (*Wood v. Bernal*, 19 Ves. 220; *Smith v. Barnam*, 2 Anst. 527; *Paine v. Meller*, 6 Ves. 349; *Ward v. Jeffrey*, 4 Price, 294; *Smith v. Sir Thomas Dolman*, 6 Bro. P. C. 291, Toml. edit.; *Ex parte Gardner*, 4 Y. & C. Exch. *Ca. 503; *Wood v. Machu*, 5 Hare, 158), he will be held to have waived his right to object to the delay, and not be enabled [*532] to resist specific performance. And see *Hoggart v. Scott*, 1 Russ. & My. 293.

It has been decided that a purchaser does not waive his right, by extending, at the request of the vendor, the time for the completion of the purchase; and if it be not then completed, he will be at liberty to abandon the contract: *Parkin v. Thorold*, 2 Sim. N. S. 1; but see *S. C.*, 16 Beav. 59.

Lord Chancellor Hart even thought, that if a purchaser proceeded with the purchase *under protest*, he could not be held to have waived his right to object, on account of the delay: *Magennis v. Fallon*, 2 Moll. 576.

In the *Marquis of Hertford v. Boore*, 5 Ves. 719; specific performance was decreed of a contract which had not been abandoned, although it had lain dormant for fourteen months. But see *Milward v. Earl of Thanet*, 5 Ves. 720; *Garrett v. Lord Resborough*, 2 D. & Walsh, 441.

If one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law: *Guest v. Homfrey*, 5 Ves. 818; *Heaphy v. Hill*, 2 S. & S. 29; *Watson v. Reid*, 1 Russ. & My. 236; *Walker v. Jeffreys*, 1 Hare, 341.

The time within which objections are to be made to a title, may be enlarged by the consent of the vendor: *Cutts v. Thodey*, 13 Sim. 205.

Where a vendor turns a purchaser out of possession of a house, where actual possession by residence in the house was an essential part of the contract he will be held to have abandoned, and will be unable to enforce, the performance of the contract (*Knatchbull v. Grueber*, 3 Mer. 124); but where a purchaser was let into the receipt of the rents and profits, under a contract which was to be completed at a definite period, from which time the purchaser was to receive the rents and profits, and, on the other hand, pay interest on the purchase-money, and the purchaser, finding that he could get neither the purchase-money nor the interest, gave notice to the tenants to pay no more rent to the purchaser, it was held upon a bill filed by him against the purchaser for specific performance of the contract, that he had not by giving such notice abandoned it: *Colby v. Gadsden*, 34 Beav. 416, 420.

*The vendor may, it seems, insist upon the contract being [*533] rescinded, where such circumstances exist as render it improbable that the purchase-money can be paid for a long time, as the bankruptcy of the purchaser, or his death, and the inability of his representatives to get in his assets (*Mackreth v. Marlar*, 1 Cox, 259; *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Sir James Lowther v. Lady Andover*, 1 Bro. C. C. 396; *Rome v. Young*, 3 Y. & C. Exch. Ca. 199); and the omission to require repayment of the deposit will not deprive the party of his right to insist that the contract is rescinded, where he has taken other sufficient steps for that purpose (*Watson v. Reid*, 1 Russ. & My. 236; *Southcomb v. The Bishop of Exeter*, 6 Hare, 224).

Where the vendor's bill for specific performance is dismissed on the

ground of his laches in instituting the suit, and without any decision on the question of title, the Court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies: *Southcomb v. The Bishop of Exeter*, 6 Hare, 225.

It is not sufficient for a party who intends to rely upon a waiver of title, to allege upon his pleading the facts constituting the waiver: he must show how he means to use the facts, by alleging that the title has been waived thereby; *Clive v. Beaumont*, 1 De G. & S. 397.

Compensation for Delay.—In all cases where the Court decrees specific performance, notwithstanding the time for completing the contract has elapsed, care will be taken that proper compensation be made, and the parties, in fact, put in the same situation as if the contract had been strictly fulfilled. Thus, ordinarily, the purchaser will be entitled to the profits of the estate from the time when the contract ought to have been completed (*De Visme v. De Visme*, 1 Hall & T. 418; 1 Mac. & G. 346); and the vendor, whether the estate be in possession or reversion, will be entitled to interest upon the purchase-money from the same time (*Sir James Louth v. Countess Dowager of Andover*, 1 Bro. C. C. 396; *Davy v. Barber*, 2 Atk. 490; *Owen v. Davis*, 1 Ves. 82; *De Visme v. De Visme*, 1 Hall & T. 418; 1 Mac. & G. 346; *Monro v. Taylor*, 8 Hare, 70; 3 Mac. & G. 713; *Grove v. Bastard*, 1 De G. Mac. & G. 69; *Bailey v. Collett*, 18 Beav. 179); even if the money be lying dead, if the delay has arisen from the fault of the purchaser (*Calcraft v. Roebuck*, 1 Ves. jun. 221; *Enraght v. Fitzgerald*, 2 Ir. Eq. Rep. 87); secus, if the fault has been with the vendor (*Howland v. Norris*, 1 Cox, 59); but the purchaser should give notice that the money is not making interest (*Calcraft v. Roebuck*, *1 Ves. jun. 221; *Powell v. Martyr*, 8 Ves. 140; *Roberts v. Massey*, 13 [534] Ves. 561; *McCann v. Forbes*, 1 Hogan, 13; *Dyson v. Hornby*, 4 De G. & Sm. 481; *Kershaw v. Kershaw*, 9 L. R. Eq. 56; and see *Regent's Canal Company v. Ware*, 23 Beav. 375,—a case where notice was given by a railway company); but even then, if he had not appropriated it for the vendor, or has in any way benefited by it, he must pay interest (*Winter v. Blades*, 2 S. & S. 393).

Where a purchaser makes default in payment of the purchase-money, until payment of which the vendor is not bound to give up possession, and the vendor, who occupies the property for the purpose of his business, continues the business not on account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default; he will not be compelled to pay the purchaser an occupation rent from the time when the purchase ought to have been completed—although the purchaser will be ordered to pay interest on the purchase-money from that day: *Leggatt v. Metropolitan Railway Company*, 5 L. R. Ch. App. 716.

In ordinary contracts, where no time is fixed for completion, interest

will generally be payable by the purchaser from the time he takes possession (*Ex parte Manning*, 2 P. Wms. 410; *Birch v. Joy*, 3 Ho. L. Ca. 565; and see *Smith v. Dolman*, 6 Bro. P. C. 291, Toml. edit., where a receiver had been appointed); especially if he has received the rents and profits (8 Ves. 148, 149; and see *Fludger v. Cocker*, 12 Ves. 25; *Binks v. Lord Rokeby*, 2 Swanst. 222, 226; *Att.-Gen. v. Christ Church*, 13 Sim. 214; but see *Blount v. Blount*, 3 Atk. 636).

But where there is a weighty objection to the title, the purchaser is not bound to take possession, nor, consequently, to pay interest until it is cleared up; *Forteblow v. Shirley*, cited 2 Swanst. 223; *Carrodus v. Sharp*, 20 Beav. 56.

Upon a sale of a reversion, interest is payable from the time appointed for completing the purchase. For "upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question of interest on the purchase-money. The advantage obtained by the delay, and wearing out of the prior life interests, is equivalent to the receipts of the rents of a property in possession: *Bailey v. Collett*, 18 Beav. 179, 182. And see *Davey v. Barber*, 2 Atk. 490; *Owen v. Davies*, 1 Ves. 82.

In *Kershaw v. Kershaw*, 9 L. R. Eq. 56, a purchaser contracted for the purchase of certain real estate at the price of 38,500*l.*, which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards, difficulties having arisen in completing the purchase, he paid *38,000*l.* into a bank to a separate account, [*535] and gave notice to the vendors, that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum paid in was deficient by 500*l.* On discovering the deficiency, the purchaser paid into the bank 500*l.*, with interest at 5 per cent. up to that time. It was held by Lord Romilly, M. R., that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l.* into the bank.

In the case of sales *by the order of the Court*, if the estate be in possession, the purchaser will be entitled to the rents and profits from the quarter day preceding his purchase, he paying his money before the following one (*Mackrell v. Hunt*, 2 Madd. 34, n.); but he will not be allowed to deduct the property tax (*Holroyd v. Wyatt*, 1 De G. & Sm. 125); if the estate be *reversionary*, the purchaser will be entitled to any benefit from the dropping of lives, from the time of confirming the report absolute, and will, consequently, be liable to pay interest from that time; *Ex parte Manning*, 2 P. Wms. 410; *Davy v. Barber*, 2 Atk. 489; *Child v. Lord Abingdon*, 1 Ves. jun. 94; *Champernowne v. Brooke*, 3 C. & F. 1; 4 C. & F. 589; 2 Y. & C. Exch. Ca. 510; 3 Y. & C. Exch. Ca. 505; *Wallis v. Sarel*, 5 De G. & Sm. 429. The case of

Blount v. Blount, 3 Atk. 636, appears to be misreported; and in *Trefusis v. Lord Clinton*, 2 Sim. 359, interest was, contrary to the ordinary practice, ordered to be paid from the time of the purchase. See *Robertson v. Skelton*, 13 Beav. 91.

Where the interest is more in amount than the rents and profits, even if there be an express stipulation, "that interest is to be paid on the purchase-money, from whatever cause the delay may have arisen," if the delay in completing the contract is attributable to fraud or wilful delay on the part of the vendor, he will be left in possession of the rents and profits until a good title be shown; and from that period only will he become entitled to interest, and the purchaser to the rents and profits: *Vickers v. Hand*, 26 Beav. 630.

Where, however, the delay in such a case is occasioned by the state of the title, and is not attributable to the fraud or wilful default of the vendor, the vendor will be entitled to interest according to the express terms of the stipulation: *Esdaile v. Stephenson*, 1 S. & S. 122; *Rowley v. Adams*, 12 Beav. 476; *Sherwin v. Shakspeare*, 5 De G. Mac. & G. 517; *Bannerman v. Clarke*, 26 L. J. N. S. (Ch. 77; *Lewis v. South Wales Railway Company*, 10 Hare, 113; *Vickers v. Hand*, 26 Beav. 630, overruling **De Visme v. De Visme*, 1 Mac. & G. 336; *Lord Palmerston v. Turner*, 33 Beav. 524; *Williams v. Glen-* [*536] *ton*, 34 Beav. 528; 13 W. R. (M. R.) 1030; 1 L. R. Ch. App. 200.

If there has been delay in making out the title, and the property has deteriorated by dilapidations or mismanagement and unhusbandlike conduct, a compensation will be allowed to the purchaser (*Foster v. Deacon*, 3 Madd. 394; *Lord v. Stephens*, 1 Y. & C. Exch. Ca. 222; and see 3 Y. & C. Exch. Ca. 508; *Carrodus v. Sharp*, 20 Beav. 56; *Phillips v. Silvester*, 20 W. R. (M. R.) 406; and if he has paid his purchase-money, under an order into Court, he will be entitled to interest on the amount fixed for compensation, from the time of his making such payment (*Ferguson v. Tadman*, 1 Sim. 530); but a purchaser will not be entitled to compensation for deterioration after the time when he actually did take, or ought to have taken possession (*Binks v. Lord Rokeby*, 2 Swanst. 226; *Minchin v. Nance*, 4 Beav. 332; *Phillips v. Silvester*, 20 W. R. (M. R.) 406; or if he has himself occasioned the deterioration, as, by causing the tenant to quit before the completion of the contract (*Harford v. Purrier*, 1 Madd. 532).

Timber blown down after the contract will belong to the purchaser (*Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273); and if common timber be felled after that time by the vendor, a pecuniary compensation must be made to the purchaser (*Magennis v. Fallon*, 2 Moll. 588); but where the timber is ornamental, such act would be a ground for rescinding the contract (*Magennis v. Fallon*, 2 Moll. 584, 585).

If the vendor, after he has agreed to sell property to another, lays out money in improving it, he cannot call upon the purchaser to repay

him the money for the improvement. See *The Master of Clare Hall v. Harding*, 6 Hare, 296; *Monro v. Taylor*, 8 Hare, 60; *Sherwin v. Shakspeare*, 5 De G. Mac. & G. 517.

In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors, down to the time when the purchaser could prudently take possession, that is to say, down to the time when a good title was shown: *Carrodus v. Sharp*, 20 Beav. 56.

The vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not in fact paid till after that day: *Cuddon v. Tite*, 1 Giff. 395.

Where time is of the Essence of the Contract in Equity.—In Ordinary cases, where there is nothing special in the nature of the property, [*537] *or of the purposes for which it is intended to be purchased, although a particular day may be fixed for the completion of the contract, the Court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is merely formal, and that the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case, and the nature of the title to be made.

Upon the same principle, in the case of a mortgage, the Court looking at the real contract, which is the pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly; taking it to be clear, that the general intention should override the words of the particular stipulation: *Hipwell v. Knight*, 1 Y. & C. Exch. Ca. 415, 416.

It was at one time the doctrine of the Court, that the parties could not make time of the essence of the contract. Thus, in *Gregson v. Riddle*, 1784, cited by Sir Samuel Romilly, in the principal case, from his own note, the agreement was for a particular day, with a proviso, that, in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, to have the legal estate conveyed; the defendant resisting, a reference was directed, to see whether a good title could be made, Lord Rosslyn expressing an opinion that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success; the utmost extent was to hold it evidence of a waiver of the agreement, but it never

was held to make it void. Mr. Mansfield for the defendant, said, the intention was clearly to make it void, and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted, and the parties would be just as forward as they were then.

This doctrine seems to have been founded upon a supposed analogy between an agreement for sale and a mortgage, in which, according to the well-known maxim, "*once a mortgage, always a mortgage,*" the express contract of the parties, even under seal, will not take away the power of redemption.

In the principal case, however, Lord Eldon said, he was much inclined to think, notwithstanding **Gregson v. Riddle*, that time might be made the essence of the contract; and it has since [*538] been clearly determined, that if by the contract it clearly appears to be the intention of the parties that time should be of the essence of the contract,—if, for instance, the parties stipulate that the agreement shall be void unless the purchase be completed on a certain day, it will be considered essential in equity. See *Hudson v. Bartram*, 3 Madd. 440; *Boehm v. Wood*, 1 J. & W. 419; *Williams v. Edwards*, 2 Sim. 78; *Lloyd v. Rippingale*, cited 1 Y. & C. Exch. Ca. 410; *Hipwell v. Knight*, 1 Y. & C. Exch. Ca. 401, 416; *Nokes v. Lord Kilmorey*, 1 De G. & S. 444; *Parkin v. Thorold*, 16 Beav. 59; *Gedge v. The Duke of Montrose*, 26 Beav. 45; *Hudson v. Temple*, 29 Beav. 536; *Oakden v. Pike*, 34 L. J. (Ch.) N. S. 620.

A mere statement in the conditions of sale that the abstract will be delivered on or before a particular day, will not, it appears, be sufficient to render the time of its delivery of the essence of the contract: *Roberts v. Berry*, 16 Beav. 31, 3 De G. Mac. & G. 284, 292.

The benefit of the objection in respect of time may be waived by the conduct of the parties, even although it was originally made essential: *Boehm v. Wood*, 1 J. & W. 420; *Levy v. Lindo*, 3 Mer. 81; *Hunter v. Daniel*, 4 Hare, 420; *Parkin v. Thorold*, 16 Beav. 59, 69, 71; *Wells v. Maxwell*, 32 Beav. 408; *Webb v. Hughes*, 10 L. R. Eq. 281.

Though time be not of the essence of a contract, where there has been great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed. That time will then be considered by a Court of equity as having become of the essence of the contract; and in case the party makes default in doing what is right and proper on his part, within the time so fixed, it will be a reason why the Court will not afterwards interfere in his favour to compel the execution of the contract: *King v. Wilson*, 6 Beav. 126; *Heaphy v. Hill*, 2 S. & S. 29; *Watson v. Reid*, 1 Russ. & My. 226; *Walker v. Jeffreys*, 1 Hare, 341; *Benson v. Lamb*, 9 Beav. 502; *Pegg v. Wisden*, 16 Beav. 239; *Parkin v. Thorold*, 16 Beav. 59;

Macbryde v. Weeks, 22 Beav. 533; *Gordon v. Mahoney*, 13 Ir. Eq. Rep. 404; *Morgan v. Gurley*, 1 Ir. Ch. Rep. 482, 495; *Eads v. Williams*, 4 De G. Mac. & G. 674; *Nott v. Riccard*, 22 Beav. 307. See *Taylor v. Brown*, 2 Beav. 183.

! The notice to complete must be reasonable, otherwise it will be altogether ineffectual. Thus in a recent case it was held that the purchaser was not justified, while negotiations were going on for the removal of his objections to the title, in giving *the vendor [*539] notice to complete within a month, or that the contract would be rescinded: *Wells v. Maxwell*, 32 Beav. 408, affirmed on appeal, 11 W. R. (L. J.), 842; *Parkin v. Thorold*, 16 Beav. 59; *M'Murray v. Spicer*, 5 L. R. Eq. 527; *Webb v. Hughes*, 10 L. R. Eq. 281.

Assuming that time has been made of the essence of the contract by a reasonable notice during the progress of negotiations, that may be waived by the conduct of the purchaser, and if the time is once allowed to pass, and the parties go on negotiating for the completion of the purchase, then time is no longer of the essence of the contract, per Sir R. Malins, V. C., in *Webb v. Hughes*, 10 L. R. Eq. 286.

A purchaser, however, is not bound to wait an indefinite time, and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may, in a reasonable manner, give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, unless the negotiations were without prejudice (*Tilley v. Thomas*, 3 L. R. Ch. 61), he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown, per Malins, V. C., in *Webb v. Hughes*, 10 L. R. Eq. 286.

Time will be considered more peculiarly of the essence of the contract, if the thing sold be of greater or less value, according to the effluxion of time; and the ordinary stipulation as to time must be complied with in equity as well as at law; for instance, in the case of a contract for the sale of reversionary interests; "for no man," says Lord Rosslyn, "sells a reversion who is not distressed for money, and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay:" *Newman v. Rogers*, 4 Bro. C. C. 393. See also *Spurrier v. Hancock*, 4 Ves. 667.

Time also will be considered of the essence of the contract in contracts with ecclesiastical corporations; as, for instance, in the case of a contract for a concurrent lease, in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the sum to be paid (*Carter v. Dean of Ely*, 7 Sim. 211); also, where the property is of a fluctuating value (*Doloret v. Rothschild*, 1 S. & S. 590); or the estate is wanted for commercial purposes (*Parker v. Frith*, 1 S. & S. 199, n.; *Wright*

v. *Howard*, 1 S. & S. 190; *Costake v. Tilt*, 1 Russ. 376; *Seaton v. Mapp*, 2 Coll. 556; *Walker v. Jeffreys*, 1 Hare, 348; *Macbryde v. Weeks*, 22 Beav. 533), or with a view to immediate residence *(*Tilley v. Thomas*, 3 L. C. Ch. App. 61, 67; but see *Webb v. Hughes*, 10 L. R. Eq. 281); or, if the estate is sold for the purpose of paying off the debts of the vendor, bearing a higher rate of interest than he would get for the unpaid purchase-money (*Popham v. Eyre*, Loft. 786; see, also, cases cited in *Crofton v. Ormsby*, 2 S. & L. 603); but not where the land has been purchased for the purpose of building a house for a residence: *Wells v. Maxwell*, 32 Beav. 408.

Upon the sale of a public-house, as a going concern, time is of the essence of the contract, and in the absence of express stipulation to the contrary, the licence of the house must be transferred under sect. 11 of the General Licensing Act (9 Geo. 4, c. 61), and not under sect. 14. See *Day v. Luhke*, 5 L. R. Eq. 336; there, upon the day fixed for the completion of a sale of a public-house, as a going concern, the vendors were not in a position to procure a transfer of the licence under sect. 11, it was held by Lord Romilly, M. R., that the purchaser was entitled to repudiate the contract. See also *Claydon v. Green*, 3 L. R. C. P. 511; *Cowles v. Gale*, 7 L. R. Ch. App. 12.

When time is of the essence of the contract, and the purchaser obtains a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been giving to him according to the contract. See *Gedye v. The Duke of Montrose*, 26 Beav. 45. In that case there was an agreement for the sale of a lease "with possession on the 1st of December, the rent to commence at Christmas." Possession was not given until the 31st of January, through the default of the vendor. It was held, by Sir John Romilly, M. R., that the purchaser was entitled to compensation, and an inquiry was directed.

2. *Where the vendor has not the same interest in, or there is some deficiency in the quantity or quality of the estate he has contracted to sell.*]

In examining these cases, it will be more convenient to consider, 1st, Where the vendor seeks specific performance; 2nd, Where the purchaser seeks specific performance.

1st. *Where the Vendor seeks Specific Performance.*—At law, where a person contracts to sell an interest, for instance, a term of years, and it appears that the term of years is of less duration than what the vendor represented it to be, the vendee may recover any deposit which he may have paid, even although the vendor may offer compensation (*Farrer v. Nightingale*, 2 Esp. Ca. 639; *Hibbert v. Shee*, 1 Camp. Ca. 113; *Duffell v. Wilson*, 1 Camp. Ca. 401; see, *however *Belworth v. Hassell*, 4 Camp. 140, where the strict [*541] rule of law seems to have been relaxed).

In *equity*, however, if the purchaser can get substantially what he contracted for, specific performance will be decreed against him at the suit of the vendor, but he will be allowed *compensation* for the difference in value between what he will get and what he contracted for. "Equity," says Lord Erskine, "does not permit the forms of law to be made instruments of injustice; and will interpose against parties attempting to avail themselves of the rigid rule of law for unconscionable purposes. Where, therefore, advantage is taken of a circumstance, that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years, he must be nonsuited in an action: but equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation, now so well established—a principle which I have no disposition to shake:" *Halsey v. Grant*, 13 Ves. 77; see also *Guest v. Homfray*, 5 Ves. 818; *Mortlock v. Buller*, 10 Ves. 306; and see *Vignolles v. Bowen*, 12 Ir. Eq. Rep. 194.

But if the failure to perform the contract is substantial, and such as does not admit of compensation, as where the vendor contracts to sell a term of sixteen years, whereas he had only a term of six years, not only will equity refuse to interfere in favor of the vendor, but will even assist the purchaser in recovering his deposit. See *Long v. Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4; and *Spunner v. Walsh*, 11 Ir. Eq. Rep. 597.

A purchaser cannot be compelled to take an underlease instead of an original lease. See *Madeley v. Booth*, 2 De G. & Sm. 718. There messuages described in a particular of sale as held for the residue of a term of ninety-nine years, from the 24th of June, 1833, but not as being held by an original lease, were sold subject to conditions that the purchaser should not be entitled to call for the lessor's title, and that any error or misstatement of the term of years should not vitiate the sale, but should be the subject of compensation, under a provision for arbitration, authorising the arbitrator of either party to proceed in certain events *ex parte*. The title proved to be an *underlease*, for a term less by three days than the term of ninety-nine years granted by the original lease. The vendor filed a bill to enforce specific performance, with compensation to an amount which had been *as-
[*542] assessed, in conformity with the conditions, by one arbitrator, nominated by the vendor, the purchaser having taken no part in the arbitration. Sir J. L. Knight Bruce, V. C., dismissed the bill with costs. "I cannot," observed his Honor, "consider a title under this underlease to be substantially the same thing as an assignment of the original term in the property: among the inconveniences incident to

an underlease, as distinguished from an assignment of the original term, it is sufficient to mention, that if the under-tenant were to tender the rent to the head landlord, he would not be bound to accept that tender. There is no privity of contract, in fact or in law, between the head landlord and the under-tenant."

It has, however, never been decided that if a person having a clear title as lessee for eighty years, makes another lease for sixty years, and then the under-lessee sells by auction the under-lease for sixty years, *simply describing it as a lease*, and subject to a condition of sale, that the lessor's title is not to be inquired into, and the lessor's title is perfectly good, but is not freehold, but only a term of years, this alone would be a reason for resisting specific performance: per Wood, V. C., in *Darlington v. Hamilton*, Kay, 558.

A purchaser, however, will not be bound to accept land of a different tenure from that which he contracted for (as, leasehold instead of freehold), although the leaseholds may be held for so long a term as to make them nearly equal in value to freeholds; for although, when a party gets substantially that for which he contracts, any small difference may be remedied by compensation, that will not be the case where it extends to the whole estate. See *Drewe v. Corp*, 9 Ves. 368; 1 S. & S. 201, n; *Wright v. Howard*, 1 S. & S. 190; *Barton v. Lord Downes*, 1 Flan & K. 505.

Nor will a purchaser, unless forced to do so by the conditions (*Price v. Macaulay*, 2 De G. Mac. & G. 339), be compelled to take copyhold instead of freehold, because the party buying might particularly wish for a freehold estate: *Twining v. Morrice*, 2 Bro. C. C. 33; *Hicks v. Phillips*, Prec. Ch. 575.

Where a person contracts to purchase an estate as copyhold, he will not be compelled to take it if it turns out to be partly freehold: *Ayles v. Cox*, 16 Beav. 23.

It seems, however, that specific performance could not be successfully resisted if an estate, represented as copyhold, equal in value to freehold, should turn out to be freehold (*Twining v. Morrice*, 2 Bro. C. C. 326); unless there be an express stipulation that the contract should be void if it should appear that any part of the estate [543] was freehold: *Daniels v. Davison*, 16 Ves. 249.

In *Prendergast v. Eyre*, 2 Hogan, 81, a person having contracted for the purchase of an estate in fee simple, subject to a perpetual rent-charge, it was held, that he could not be compelled to take a perpetual rent-charge upon the estate, which, as it turned out, was the only interest which the vendor had.

Objections to tenure may be waived by the conduct of the purchaser; as by his proceeding with the treaty for the purchase, after becoming acquainted with the nature of the tenure: *Fordyce v. Ford*, 4 Bro. C. C. 494; *Burnell v. Brown*, 1 J. & W. 168; *Martin v. Cotter*, 3 J. &

L. 496. But if he object to the tenure, although he be compelled to fulfil his contract, he will be entitled to compensation: *Calcraft v. Roebuck* 1 Ves. jun. 221.

A purchaser of the entirety will not be compelled to take an undivided share of an estate (*Attorney-General v. Day*, 1 Ves. 218; *Ruffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strode*, 2 My. & K. 726); nor will a purchaser be compelled to take a remainder expectant upon the determination of a previous life interest, instead of an estate in possession (*Collier v. Jenkins*, You. 295; *Nelthorpe v. Holgate*, 1 Coll. 203); nor an estate which is subject to a right of sporting, not mentioned in the particulars of sale; but he may waive the objection, as by taking possession after notice of it (*Burnell v. Brown*, 1 J. & W. 168); nor will a purchaser be compelled to take an estate if it be subject to an undisclosed right of digging for mines (*Barton v. Lord Downes*, 1 Flan. & Kel. 505; *Seaman v. Vaudrey*, 16 Ves. 390, or an undisclosed reservation of minerals to the lord of the manor on enfranchisement; *Upperton v. Nicholson*, 6 L. R. Ch. App. 436); nor if it be a mere sheep-walk and not a freehold (*Vancouver v. Bliss*, 11 Ves. 458); nor if it be liable to the repairs of a chancel (*Horniblow v. Shirley*, 13 Ves. 81, cited as *Forteblow v. Shirley*, 2 Swanst. 223).

Where redeemed land-tax was sold, described as being charged on three houses, whereas it turned out that it consisted of three separate sums charged on three houses separately, it was held that specific performance could not be enforced against the purchaser, as the misdescription was not susceptible of compensation (*Cox v. Coventon*, 31 Beav. 378); but it seems, that if there are undisclosed quit-rents and rent-charges,—at any rate, if they are of small amount,—specific performance with compensation will be decreed (*Esdaile v. Stephenson*, 1 S. & S. 122; *Bowles v. Waller*, 1 Hayes, 441; *Prendergast v. Eyre*, 2 Hog. 94; *Portman v. Mill*, *1 Russ. & My. 696). So also, [*544] if lands sold as tithe-free, turn out to be liable to a rent-charge in lieu of tithes, it will be a subject for compensation: *Howland v. Norris*, 1 Cox, 59. If quit-rents be sold, a mistake in their amounts is immaterial, and compensation will be allowed (*Cuthbert v. Baker*, cited Sugd. V. & P. 354, 11th edit.; Reg. Lib. A. 1790, fol. 442); although the objection would be fatal at law: *Johnson v. Johnson*, 3 B. & P. 162. And see *Hughes v. Jones*, 3 De G. F. & Jo. 307, where it was held, that a purchaser who entered into a contract without knowing of the existence of leases for lives at a low rent, could not be compelled to take the title without compensation.

Although the vendor cannot make a good title to a small portion of the estate, if compensation can be made for the deficiency, in consequence of such portion not being material to the possession and enjoyment of the estate, specific performance will be decreed: *M Queen*

v. Farquhar, 11 Ves. 467; *Knatchbull v. Grueber*, 1 Madd. 153, *Bowyer v. Bright*, 13 Price, 698; *Carver v. Richards*, 6 Jur. (N. S.) 667. This doctrine was carried to a great extent in former times. Sir Thomas Sewell, M. R., in *Shirley v. Davis*, cited in the principal case, went so far as to compel a man who had contracted for a house and wharf to take the house alone, although it appeared that he wanted the wharf for the purpose of carrying on his business. This case has, however, been strongly disapproved of. See 1 Cox, 61, 62; 6 Ves. 679; 13 Ves. 78, 228, 427; *Stewart v. Allison*, 1 Mer. 26. And it may be considered as settled that where a good title cannot be made to a portion of the estate contracted to be sold, if it be material to the possession and enjoyment of the rest, specific performance will be refused. Thus, in *Peers v. Lambert*, 7 Beav. 546, A. contracted to sell a wharf on the banks of the river Thames, with a jetty. The jetty turned out to be liable to be removed by the Corporation of London, if they thought fit. Lord Langdale, M. R., held, that the jetty was essential to the beneficial occupation and enjoyment of the premises contracted to be sold, and that a specific performance could not be decreed. And see *Shackleton v. Sulliffe*, 1 De G. & S. 609; *Perkins v. Ede*, 16 Beav. 193.

In the case of *Stewart v. The Marquis of Conyngham*, 1 Ir. Ch. Rep. 534, the particulars of sale stated that the timber on the estate would be included in the purchase. The title was not made out to the timber in a small portion of the lands. There being no misrepresentation, the Court directed an inquiry as to whether the timber on that portion of the estate was material to its possession and enjoyment. See also **Magennis v. Fallon*, 2 Moll. 590. [*545]

Upon the same principle, if a purchaser in the same contract agrees to purchase an estate for a fixed price, and also something else which is not essential to the enjoyment of the estate, and is but a small adjunct to it, if a good title cannot be made to the adjunct, the Court will compel specific performance of the contract to purchase the estate alone. Thus in *Richardson v. Smith*, 5 L. R. Ch. App. 648, by the contract for the sale of an estate, it was agreed that the purchase should be 24,000*l.*; and it was further agreed, amongst other things, that certain furniture and other articles on the estate, the value of which were about 2000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser should take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete. It was held by the Court of Appeal in Chancery, affirming with a variation the decree of Sir John Stuart, V. C., that the purchaser was entitled to specific performance of the contract, except so far as related to the furniture and articles.

Where, however, the adjunct is essential to the enjoyment of the property, as in the case of fixtures in a public house, specific perform-

ance of the contract to purchase the property without the adjunct, though with compensation, will not be enforced: *Darbey v. Whittaker*, 4 Drew. 134; *Jackson v. Jackson*, 1 Sm. & G. 184. And see *Milnes v. Gery*, 14 Ves. 400.

Where, however, vendors who by the contract bound themselves to make out a good title to *all* the lands included in the contract, but were unable to show a title to one three hundred and thirtieth part not necessary to the enjoyment of the other parts included in the contract, which provided for compensation for errors in dimensions in the land, the bill averring that they could make title to *all*, it was held that it was not competent to the vendors at the hearing to seek specific performance with compensation: *Ashton v. Wood*, 3 Sm. & G. 436.

There is no case of the sale of two distinct estates for one entire sum, in which the Court has undertaken, upon a failure of the title as to one estate, to decompose the sum, and fix a standard for adjusting the relative value of the two estates; which would bind the purchaser without regard to his views or estimate of relative value: *Prindergast v. Eyre*, 2 Hogan, 89; but it seems, that if an estate is sold by auction, and a good title cannot be made to some of the lots, a specific performance will be decreed as to the lots to which a good title can be made, if [*546] they are not complicated with the others. Thus in *Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; a good title could not be made to two of the lots. Lord Kenyon, M. R., said that he must take it for granted, that the two lots were not so complicated with the other lots as to entitle the purchaser to resist the whole. But his Lordship added:—"If a purchase was made of a mansion-house in one lot, and farms, &c., in others, and no title could be made, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract." See also *Lewin v. Guest*, 1 Russ. 325; *Harwood v. Bland*, 1 Flan. & Kel. 540; *Casamajor v. Strobe*, 2 My. & K. 724. The same rule seems to prevail at law: *Gibson v. Spurrier*, Peake's Add. Cas. 49; *Dykes v. Blake*, 4 Bing. N. C. 463; but see *Chambers v. Griffiths*, 1 Esp. Ca. 149.

Where the vendor, having a title to an estate, misrepresents the acreage, whether the estate be sold at so much the acre (*Sir Cloudesley Shovel v. Bogan*, 2 Eq. Ca. Ab. 688, pl. 4) or not (*Hill v. Buckley*, 17 Ves. 394), the purchaser will be entitled to compensation for a deficiency. See also *In re Gore's Estate*, 3 I. R. Eq. 260.

Where lands are described as "of or about" a certain acreage, or a certain acreage, "be the same more or less," it seems, that if the lands have been actually conveyed, the purchaser will not be entitled to an abatement, though they should turn out to be considerably less (*Twyford v. Wareup*, Rep. t. Finch, 310; *Anon.*, 2 Freem. Ch. Rep. 106; *Lord Townshend v. Stangroom*, 6 Ves. 328); but that, where an agreement in which the acreage has been so described, has not been

carried out by a conveyance, the purchaser will be entitled to an abatement for a deficiency, unless it be trifling (*Hill v. Buckley*, 17 Ves. 394; *Portman v. Mill*, 2 Russ. 570; *Day v. Finn*, Owen, 133; *In re Egan's Estate*, 6 Ir. Jur. N. S. 90; *In re Browne's Estate*, 5 Ir. Jur. N. S. 185); but see *Winch v. Winchester*, 1 V. & B. 375, where lands were described as containing by *estimation* forty-one acres, be the same more or less, and it turned out that they were five acres and a fraction less than that quantity. Sir W. Grant, M. R., held the purchaser not entitled to an abatement out of the purchase-money.

If, however, the vendor knew the true quantity, he would not, by the use of such phrases, be protected from the obligation of making a deficiency good: *Winch v. Winchester*, 1 V. & B. 377; *The Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337.

It seems the Court will not infer, from the intimate acquaintance of the purchaser with the estate (*Winch v. Winchester*, 1 V. & B. 975), or even from the fact of his being the occupier of it, that he was acquainted with its exact admeasurement, so as to *disentitle him to an [547] abatement. Thus, in *King v. Wilson*, 6 Beav. 124, a tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only: it was held by Lord Langdale, M. R., that he was entitled to an abatement.

If lands are purchased with the usual condition for compensation for misdescription, although the purchaser could enforce the contract on payment of compensation, if the lands turned out to be of much greater extent than they were described as being, the vendor, who was in fault by the misdescription, could not compel the purchaser to complete, on payment of a proportionately larger sum: *Price v. North*, 2 Y. & C. Exch. Ca. 620.

Where a decree is made for specific performance of a contract for sale, and an inquiry is directed in general terms, whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract; and if the vendor wishes to prevent objections, which have been waived before the suit, from being renewed under the inquiry, that point should be considered at the hearing, and noticed in the decree: *Uperton v. Nickolson*, 6 L. R. Ch. App. 436, explaining *Curling v. Austin*, 2 Dr. & Sm. 129.

2nd. *Where the Purchaser seeks Specific Performance.*—It may be laid down as a general rule subject, however, to some few exceptions, that a purchaser may, if he choose, compel a vendor who has contracted to sell a larger interest in an estate than he has, to convey to him such interest as he is entitled to, with compensation. "If," observes Lord Eldon, "a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have

the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole :” *Mortlock v. Buller*, 10 Ves. 315 ; see also *Lord Bolingbroke’s case*, 1 S. & L. 19, n. (a) ; *Nelthorpe v. Holgate*, 1 Coll. 203 ; *Barrett v. King*, 2 Sm. & G. 43 ; *Wilson v. Williams*, 3 Jur. N. S. 810 ; *Barnes v. Wood*, 8 L. R. Eq. 424. Thus, although as before observed, a person purchasing the entirety cannot, upon a failure to make a title to the whole, be compelled to take a part only of the estate, a [*548] *purchaser may, in general, if he wishes it, elect to take what he can get, with compensation (*Attorney-General v. Day*, 1 Ves. 218 ; and see 1 V. & B. 353 ; *Western v. Russell*, 3 V. & B. 187) ; unless it be expressly stipulated that the agreement should, in such event, be void (*Williams v. Edwards*, 2 Sim. 78) ; but in *Whateley v. Slade*, 4 Sim. 126, where a person being entitled to nine-sixteenths of an estate, agreed, by mistake, to sell the entirety, Sir L. Shadwell, V. C., was of opinion that a specific performance could not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially as another person had a lien on the estate for a debt, which would nearly exhaust the whole purchase-money. And see *Maw v. Topham*, 19 Beav. 576.

In *Dale v. Lister*, cited 16 Ves. 7, a bill was filed against the vendor for the specific performance of an agreement for the sale of leaseholds held under the Dean and Chapter of Norwich, to which the defendant represented himself to be absolutely entitled. As to twenty-four acres, part of the leaseholds, he was not absolutely entitled ; the same were in effect limited to him for life, with remainder to his sons and daughters in tail. To this part the vendor could not make a good title beyond his own life ; he admitted that the plaintiff might put and end to the contract, but insisted that he, the vendor, ought not to be compelled to take less than the stipulated price. However, specific performance, with a reduction of the purchase-money, was decreed. But see Lord Eldon’s remarks in *Milligan v. Cooke*, 16 Ves. 1, on this decision. See also *Hanbury v. Lichfield*, 2 My. & K. 629 ; *Neale v. M’Kenzie*, 1 Kee. 474 ; *Graham v. Oliver*, 3 Beav. 124.

Where it turns out that land is subject to a right to dig for mines, although that would effectually bar the vendor from insisting upon his contract, the purchaser might demand specific performance, with compensation : *Seaman v. Vaudrey*, 16 Ves. 390 ; see also *Peacock v. Penon*, 11 Beav. 355 ; *Painter v. Newby*, 11 Hare, 26.

If a landlord, from the limited extent of his estate or power, is unable to give, in point of duration, a lease for the whole of the interest which he agreed to give, then if the intended lessee is willing to

take—for it cannot be forced upon him—the interest which the landlord can give, the latter must grant a lease to the full extent which his estate or power authorises, and compensation will be made by the Court to the lessee for any loss that he may have sustained by reason of the agreement not being carried out to the full extent: *Leslie v. Crommelin*, 2 I. R. Eq. 134, 140.

Where the purchaser, at the time of the contract, knows of the *limited interest of the vendor, he will not be able to insist upon a conveyance of such interest, with compensation: *Lawrenson v. Butler*, 1 S. & L. 13; and see *Mortlock v. Buller*, 10 Ves. 292; *Colyer v. Clay*, 7 Beav. 189. In *Harnett v. Yielding*, 2 S. & L. 549, a tenant for life, with power to make leases for twenty-one years, at the best improved rent, contracted to execute a lease for twenty-one years, and a further lease for twenty-one years, during his life; consequently, to execute a further lease for twenty-one years, whatever might be the increased value of the property at the time such further lease was granted. Lord Redesdale held the contract a fraud upon the power, and that the lessee was not entitled to specific performance. To obviate this difficulty, the lessee offered to take a lease for twenty-one years, &c., if the defendant should so long live; but Lord Redesdale dismissed the bill, observing, that nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that is objected to, to say, “I will take the best you can give me.” A Court of equity ought to say to persons coming before it in such a way, “Make the best of your case before a jury.”

In *Castle v. Wilkinson*, 5 L. R. Ch. App. 534¹, a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being *aware that the estate belonged* to the wife, and the wife afterwards refused to convey. It was held by the Court of Appeal in Chancery, that the purchaser could not compel the husband to convey his interest, and accept an abated price. “On the face of the agreement,” observed Lord Chancellor Hatherly, “the husband and wife intended to sell, and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole. The latest authority, *Barnes v. Wood*, (8 L. R. Eq. 424,) before Vice-Chancellor James, is in strict conformity with the other authorities . . . namely, that where a man proposes to convey the whole of an estate, as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the

Court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the [*550] *consideration to be paid for that which he improperly alleged he was capable of selling. Since the case of *Emery v. Wase* (5 Ves. 846), the whole matter has been settled, and as the purchaser has chosen to file his bill with a *full knowledge of the law and facts*, his bill must be dismissed."

And it appears to be immaterial that the purchaser has constructive notice only of the limited interest of the vendor. Thus, in *James v. Lichfield*, 9 L. R. Eq. 51, a vendor contracted to sell certain property which the purchaser knew to be in the occupation of a tenant, and it was afterwards discovered by the purchaser that the tenant had a lease, it was held by Lord Romilly, M. R., that the purchaser was affected with notice of the lease, and was not entitled to specific performance with compensation. "If," said his Lordship, "the purchaser, knowing of the tenancy, is bound to inquire, as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think, also, that no distinction can properly be drawn in a Court of equity, on the ground that the matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from, and were incidental to, that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy, whatever it was. The bill must be dismissed with costs, unless the plaintiff elects to take the property without compensation." See also *In re Ryan's Estate*, 3 I. R. Eq. 255.

Although, as a general rule, where there is a deficiency in the quantity of land comprised in a contract for sale, the purchaser can demand specific performance, with compensation, there are nevertheless certain limits to the rule. Thus, in *The Earl of Durham v. Legard*, 34 L. J. (Ch.) N. S. 589, where A. agreed to sell B. an estate, which was supposed by both parties, and was stated in the agreement, to contain 21,750 acres, but in fact contained only 11,814 acres, it was held by Sir John Romilly, M. R., upon a bill filed by the purchaser, that he [*551] *was not entitled to specific performance of the contract, with compensation. "In the case," said his Honor, of

Hill v. Buckley, 17 Ves. 394, which is usually cited upon these occasions, Sir William Grant laid it down, that where there is less land than was agreed to be sold, the ordinary mode of settling it is to ascertain the quantity and take it rateably: if that were done here, the plaintiff would get an estate, which he had intended to buy for 66,000*l.*, for about 33,000*l.* If that principle were to be followed in the present case . . . it is clear I should be doing great injustice. I am of opinion that this is a case simply of mistake, and that the purchaser is not entitled to any compensation. The plaintiff must elect whether he will perform the contract without compensation, or have the bill dismissed. In either case he must pay the costs of the suit."

The neglect of a purchaser to make inquiries, may disentitle him from claiming compensation, for some defect which with ordinary care he might have discovered. Thus, in a recent case, an agreement for the sale of an advowson for a certain sum was made, nothing *being said by either vendor or purchaser as to the income of the living*. The title was accepted, but before completion the purchaser discovered that the income of the living was charged with the repayment of a sum of money, borrowed from Queen Anne's Bounty for rebuilding the parsonage, of which charge the vendor was aware. It was held by Vice-Chancellor Stuart, that the purchaser, who obtained a decree for specific performance, was not entitled to compensation: *Edwards-Wood v. Marjoribanks*, 1 Giff. 384. This decision was affirmed by the Lords Justices (3 De G. & Jo. 329), and by the House of Lords (7 Ho. L. Ca. 806).

But the right to compensation may be excluded by express contract. Thus, where one of the conditions of sale was, "that the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way," upon a bill being filed by the purchaser seeking specific performance, with compensation, the Court decreed specific performance, without compensation, and ordered the plaintiff to pay the costs of the suit: *Cordingley v. Cheeseborough*, 3 Giff. 496; 31 L. J. Ch. 617. And see *Nicoll v. Chambers*, 11 C. B. 996.

But such a condition excluding compensation for errors may be construed so as to extend to small unintentional inaccuracies only. Thus in *Whittemore v. Whittemore*, 8 L. C. Eq. 603, at a sale by auction under a decree, the property sold was stated in the particulars to contain 753 square yards or thereabouts, and *one of the conditions of sale provided, that if any error, misstatement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only. It was held by Sir R. Malins, V. C., that the condition only applied to small errors, and did not cover a large deficiency, and that the purchaser was entitled to compensation. [552]

The purchaser's right to compensation may also be excluded, by the vendor rescinding the contract under a condition empowering him to do so, if unwilling or unable to make a title, or if the title do not prove satisfactory (*Mawson v. Fletcher*, 6 L. R. Ch. App. 91; 10 L. R. Eq. 213; *Duddell v. Simpson*, 2 L. R. Ch. App. 102), and the vendor may, under such condition, rescind the contract, although the title may be good, if the purchaser persists in an objection to it (*Greaves v. Wilson*, 25 Beav. 290; *Page v. Adams*, 4 Beav. 269). And this appears to be reasonable, because a good title might only be shown after a long and expensive inquiry, whereas the vendor might find another purchaser, who would be satisfied with the title as then shown. See *Mawson v. Fletcher*, 6 L. R. Ch. App. 93.

It seems, however, that the vendor will not be allowed to rescind the contract if he has sold the property, knowing that his title to a part of it is defective (*Nelthorpe v. Holgate*, 1 Coll. 203; but see *Thomas v. Dering*, 1 Keen, 729), or he has been guilty of wilful misrepresentation (*Price v. Macaulay*, 2 De G. Mac. & G. 347), or if the purchaser is willing to waive all objections to the title, and to take the property without compensation: *Page v. Adams*, 4 Beav. 269; *Williams v. Edwards*, 2 Sim. 78. The right to rescind may, moreover, be lost by replying to the purchaser's objections or requisitions (*Tanner v. Smith*, 10 Sim. 410; *McCulloch v. Gregory*, 1 K. & J. 294; Dart, 147, 4th ed.), and by acquiescence in, or confirmation of, the contract (*Cole v. Gibbons*, 3 P. Wm. 290; *Attwood v. Small*, 6 C. & F. 424, 432; *Flint v. Woodin*, 9 Haro, 618), unless the replies to requisitions or objections have been made without prejudice: *Morley v. Cook*, 2 Hare, 111; Dart, 147, 4th ed.

As to the right of a purchaser under conditions to rescind the sale, upon being "unwilling or unable" to make a title, see *Duddell v. Simpson*, 2 L. R. Ch. App. 102, varying *S. C.*, 1 L. R. Eq. 578.

Courts of equity will not, on behalf of a purchaser, compel a partial performance of a contract, which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract. Thus, in **Thomas v. Dering*, 1 Kee. 729, a person who [*553] was tenant for life *without impeachment of waste*, with remainder to his sons in tail, contracted to sell the fee, which it turned out he had no power to do, and the purchaser thereupon required him to convey his life estate and his reversion in fee, subject to the estate tail; but Lord Langdale, M. R., refused specific performance, upon the ground, principally, that it would be unreasonable and prejudicial to persons interested in the property, but not parties to the contract. See also *Graham v. Oliver*, 3 Beav. 124; *Beeston v. Stutely*, 27 L. J. (Ch.) 156; 6 W. R. (V. C. W.) 206.

Nor will partial performance be decreed if there has been misrepresentation on the part of the purchaser, even although he is satisfied

with a performance of the contract subject to any outstanding interests, without compensation: *Olermont v. Tasbury*, 1 J. & W. 112.

Nor will the Court decree specific performance, where the purchasers were at the time of the contract aware of important facts with reference to the subject matter of the contract which ought to have been disclosed to the vendors. See *Phillips v. Homfrey*, 6 L. R. Ch. App. 770. There the owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it. It was held by Lord Hatherley, L. C., affirming the decision of Sir J. Stuart, V. C., that the Court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an under value. "If," said his Lordship, "a man knows that he has committed a trespass of a very serious character upon his neighbour's property, and, finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, and to say to him, 'I regret that from mistake' (if it be mistake, and I will assume it to be so for the present purpose) 'I have taken some two thousand tons of your coal. I do not know what your view of the case may be. I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal I have taken.' The proposal which he makes is not in reality a simple proposal for the purchase of the property; it involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware. He is, therefore, bound *to inform the owner of the circumstances of the case, and is not at liberty to [*554] enter into a contract without his disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be informed, in order to know what course he is to adopt I apprehend it would be an error to say generally, that you cannot enforce a contract in this Court, where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good The case is not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it, in order to test its value, and did not communicate to the vendors the result. . . . The case would, I think, be something analogous to this: Suppose a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a

mark which will tell him who is the artist, and thus finds a mark, showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established in my mind that the price was inadequate. The ground of my decision is, that the purchasers suppressed the fact of their having wrongfully got a large quantity of the vendor's coal, and so given the vendor a heavy pecuniary claim against them."

Where any deficiency in certain events arises as to the extent or duration of an interest in an estate contracted to be sold, not admitting of compensation, Lord Eldon has laid it down as a general rule, that equity can neither compel a purchaser to take, nor or a vendor to give an indemnity: *Balmano v. Lumley*, 1 V. & B. 225; *Paton v. Brebner*, 1 Bligh, 66; *Aylett v. Ashton*, 1 My. & Cr. 105; *Powell v. South Wales Railway Company*, 1 Jur. N. S. 773; *Bainbridge v. Kinnaird*, 32 Beav. 346; and see *Ridgway v. Gray*, 1 Hall & T. 195: 1 Mac. & G. 109; where the particulars of sale described the property purchased, as "let on lease for twenty-one years, to and in the occupation of B. & Son;" the fact being, that the property had been demised for twenty-one years to T., and had been assigned by him, for the residue of the term, to B. alone, one of the firm of B. & Son, who were

*joint occupants thereof. Lord Cottenham said, that he could [*555] not see how the purchaser could compel the vendor to give compensation in respect of the misdescription, and that he had no power to compel the purchaser to be satisfied with an indemnity. See however *Milligan v. Cooke*, 16 Ves. 1; *Campbell v. Hay*, 2 Moll. 102.

Upon the same principle in a case in Ireland, lands were sold in the Landed Estates Court, but the exception of mines, minerals, and royalties (which had been excepted upon the conveyance of the property to the persons under whose title the lands were sold) was not mentioned on the rental under which he purchased. It was held by Lynch, J., that the purchaser, if dissatisfied with his purchase, was entitled to have back his purchase-money and all costs, but that the Court could not entertain his claim for compensation, as no means were afforded by which the Court could fix or ascertain the amount: *In re Bunbury's Estate*, 1 I. R. Eq. 458.

Where it turns out that the vendor cannot make out a title, the purchaser's bill for specific performance will be dismissed, without costs, and he will be left to his remedy at law; *Thomas v. Dering*, 1 Kee, 729; *Malden v. Fyson*, 9 Beav. 347. But where the vendor has filed a bill in such a case, he will be ordered to return his deposit with interest: *Lord Anson v. Hodges*, 5 Sim. 227.

Although, as a general rule, a purchaser will not be allowed to pay

his purchase-money into Court, and to enter into the possession of the purchased land, until after the acceptance of the title, where he only asks that his claim to compensation may be reserved, an order to pay the purchase-money into Court will be made: *Man v. Ricketts*, 5 De G. & Sm. 116.

Two questions arose in the principal case; one, may a contract which is not mutual be specifically enforced? the other, is time of the essence of a contract for the sale of land?

It is laid down in *Fry on Specific Performance*, Am. ed., chap. 8, sec. 5, 286, that "a contract to be specifically enforced must be mutual, that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other of them."

This paragraph was cited and approved in *The Marble Co. v. Ripley*, 10 Wallace, 359; and the doctrine has been advanced in numerous instances, see *Bodine v. Glading*, 9 Harris; *Duval v. Myers*, 2 Maryland Ch. 401; *Geiger v. Green*, 4 Gill, 472, 476; *Tyson v. Watts*, 7 Id. 124; *Moore v. Fitz Randolph*, 6 Leigh, 135; *German v. Machin*, 6 Paige, 292; *Meason v. Kaine*, 13 P. F. Smith, 335, 340.

In *Duval v. Myers*, the Chancellor said, "the right to a specific execution of a contract, so far as the question of mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties, so that upon the application of either, against the other, the court would coerce a specific performance. A party not bound by the agreement itself has

no right to call upon this court to enforce performance against the other contracting party, by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its originally obligatory character."

This language may lead to an erroneous inference. If such a rule exists it is subject to exceptions, which tend to nullify the rule; *Richards v. Green*, 8 C. E. Green, 32, 35; *Justice v. Lang*, 42 New York, 493. It may be true that a party who from infancy or any other cause, is under a disability when he enters into an agreement, cannot entitle himself to a specific performance by ratifying the contract after he becomes sui juris. In like manner where the contract is intended to bind both the parties, and the obligation fails as to either of them, the other will not be compelled to execute the contract; *Bateman v. Porter*, 9 Allen, 234; and hence when an ante-nuptial agreement is invalid as it regards the property of the wife, in consequence of not having been placed on record, it will not be enforced on her behalf against the husband. So a chancellor may, in the exercise of a sound discretion, refuse to enforce an agree-

ment which is one-sided and unequal in its operation; *Geiger v. Green*, 4 Gill, 472; *Tyson v. Watts*, 1 Maryland Ch. 13, 77; *Smith v. McVeigh*, 3 Stockton Ch. 239. Under these circumstances the object of the contract which is that both parties should stand on an equal footing, is not attained, and the breach can best be weighed and compensated by a jury. In this sense mutuality is essential to a decree of specific performance; but the assumption, that the obligation must be reciprocal from the outset, goes farther than the authorities will bear. A covenant to stand seized in consideration of blood or marriage, was one of the earliest heads of equitable jurisdiction. Here chancery raised a use which the statute subsequently converted into an estate. In like manner equity may enforce a covenant to convey on the payment of a sum certain; *Ewing v. Gordon*, 49 New Hampshire, 444; *Jones v. Robbins*, 29 Maine, 351. Such an agreement becomes obligatory on the assent of the covenantee, although he does not engage to pay the stipulated price; *Barnard v. Lee*, 97 Mass. 92; *Calvert v. Gordon*, 1 Manning & Ryland, 437; 3 Id. 424. Here the contract is sustained by the seal; but it is well settled that a promise, in consideration of a promise to be made on the other side, may be valid, although the promisee does not respond at once nor until after a considerable lapse of time. The case of *Cook v. Oxley*, 3 Term, 653, has sometimes been regarded as laying down a different rule, but the question arose on a demur-

rer to the declaration, and all that it establishes is that a promise to give another time to consider whether he will accept an offer is not obligatory, and will not support an action of assumpsit. The authorities concur that where an offer to sell is accepted before it is withdrawn, it is too late for the vendor to say that he has changed his mind; *Corson v. Mulvany*, 13 Wright, 88, 99; *The Boston & Maine R. R. v. Bartlett*, 3 Cushing, 234; *Mactier v. Frith*, 6 Wend. 104. There is no difference as it regards principle between such a case, and that where the vendor names a price and promises to execute a deed if it is paid; *Corson v. Mulvany*, *ante*. In either instance the promise becomes absolute when the condition is fulfilled, although liable to be recalled during the interval; *Perkins v. Hadsell*, 50 Illinois, 216.

UNILATERAL CONTRACTS.

Mutual promises are not essential to the validity of a contract at common law, *Justice v. Lang*, 42 New York, 593. The obligation depends on the consideration, or in other words, on the fulfilment of some express or implied request which is the condition of the promise. The promisee need not manifest his assent except by complying with the terms prescribed. It is only where the vendor requires promise for promise, that the purchaser must signify his acceptance of the offer. A promise in consideration of performance is obligatory when the act is done, although the promisee did not communicate his intention to accept

and act under the promise ; *Wilson v. McClure*, 50 Illinois, 366 ; *Powers v. Bumcratz*, 12 Ohio, N. S. 279, 290 ; *Powers v. Fowler*, 4 Ellis & Bl. 98 ; *Oldershaw v. King*, 2 Hurlstone & Norman, 399, 517 ; *Weaver v. Wood*, 9 Barr, 221 ; 2 Am. L. C. 96, 107, 112, 5 ed.

In *Weaver v. Wood*, Gibson, Ch., said : " This consideration belongs to the class called executory in the text-books, as distinguished from a concurrent consideration, which is promise for promise, by which both parties are bound, or neither is. By a conditional promise, resting on an executory consideration, neither is bound till the consideration has been executed. It is noticed in Chitty on Contracts, 16 ; and the nature of it was said in *Clark v. Russell*, 3 Watts, 217, to be such, that if a party promise another a definite or a reasonable reward, if he will do a particular thing, the party promised is not bound to do it ; yet if he does it without more, he entitles himself to the reward. On the other hand, the promisor may retract before performance ; strictly speaking, there is no contract before that, for the offer is accepted only by the performance of the condition of it ; but when that is done, there is the concurrent assent of two minds, and the contract is mutual as well as complete."

This language shows that a contract may be mutual, although the parties were not bound in the first instance, and although the act or promise which completes the obligation is separated by weeks or month from the promise in which

it originated ; *Corson v. Mulvany* ; *The Fishmonger's Co. v. Robertson*, 1 M. & G. 131, 177 ; *Train v. Gold*, 5 Pick, 380 ; *Mactier v. Frith*, 6 Wend. 103 ; *The Boston & Maine R. R. v. Bartlett*, 3 Cushing, 224 ; *Parker v. Sergeant*, Finch, 146. " If, said Wilde, J., in *Train v. Gold*, A. promise B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended, for until the performance of the condition of the promise, there is no consideration, and the promise is nudum pactum, but on the performance of the condition by the promisee it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory."

If the act be done within the time prescribed by the promisor, he cannot allege that performance has been too long deferred ; *Foster v. Boston*, 22 Pick. 33, although where no time is fixed, performance must take place within a reasonable time ; *Beckwith v. Cheever*, 1 Foster, 41. So a man who gives another time to consider whether he will buy, is bound by an acceptance of the offer, before the delay accorded has expired ; *Boston & Maine R. R. Co. v. Bartlett*, 3 Cushing, 224 ; *Mactier v. Firth*, 6 Wend. 103. Under these circumstances the whole is one transaction, and the minds of the parties meet as effectually as if the

contract had. been begun and concluded on the same day.

It is a necessary consequence, that if the owner of land writes to say that he will convey on receiving a stipulated sum, the person to whom the letter is addressed, may maintain a suit or obtain a decree of specific performance, on proof that he tendered the money in due season and that it was refused. It is now generally conceded that an offer made through the post-office to sell, if another will agree to buy, cannot be recalled after the acceptance has been mailed; *Adams v. Lindsell*, 1 B. & Ald. 681; *Mactier v. Frith*, 6 Wend. 103; *Hamilton v. The Lycoming Ins. Co.* 5 Barr, 339; *McCullough v. The Eagle Ins. Co.* 1 Pick. 278, and the case is the same, if not stronger, for a specific performance, where the vendor promises to execute a deed for a price which is paid or tendered at the appointed time. Accordingly, where the respondent, by a writing dated Sept. 7th, 1860, gave the complainant the option of taking any one of several tracts of land within six months, at a stipulated price, and the complainant entered on the premises, made valuable improvements, and afterwards, on the 26th of June, 1867, tendered the purchase-money with interest; the court held that although there was no consideration in the first instance, this ceased to be true when the complainant expended time and money on the premises, and would have paid the price if it had not been refused; *Perkins v. Hasdell*, 50

Illinois, 216. Lawrence, J., said, that "the mutuality and the consideration consisted in the complainants having done what the other party to the contract had required, and that it was immaterial that he did it without having entered into an agreement to that effect."

In like manner, where the allegation was that the defendants had signed a certain writing, whereby they agreed to convey a lot of ground to the complainant for \$20,000, if the complainant would take the same within thirty days, and that the complainant subsequently, and before the time was out, tendered the purchase-money, and notified the defendants that they were ready to accept a deed; it was held that the bill presented a sufficient ground for a decree of specific performance; *The Boston & Maine R. R. v. Bartlett*, 3 Cushing, 224.

In *The Boston & Maine R. R. v. Bartlett* the bill alleged that the defendants, on the first of April, 1844, in consideration that the plaintiffs would take into consideration the expediency of buying certain land, signed a writing, dated April 1st, 1844, whereby they agreed to convey to the plaintiffs "the said land for the sum of twenty thousand dollars, if the said plaintiffs would take the same within thirty days from that date;" that afterward, and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration of their agreeing to keep in consideration the expediency of taking said land," etc.,

extended the said term of thirty days; and that on the 29th of May, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price, but that the defendants refused to accept the same and execute such conveyance. The court held that a written proposal to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time, but if it is accepted within the time, and before it has been withdrawn, such offer and acceptance constitute a valid contract, which may be specifically enforced. Fletcher, J., said, "the only ground assumed and insisted on by the defendants in support of the demurrer, in this case is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the court, no importance is attached to the consideration set out in the bill, namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine, in the case of *Bean v. Burbank*, 4 Shepley, 458, which was referred to for the defendants, seems to

rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and during the whole of that time, it was an offer, every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not, therefore, form a contract. It was then but an offer to contract; and the parties making the offer, most undoubtedly, might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties which constitutes, and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once. * * * * * A different doctrine prevails in France, and Scotland, and Holland. It is there held, that whenever

an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon consideration, or a paper with a seal attached. As, therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled."

This decision shows that a contract is not necessarily less obligatory, because it was unilateral in the first instance. Whether the promise be to sell if another will agree to buy, or is merely conditioned for payment, without requiring a reciprocal engagement, it becomes absolute and mutual when the condition is fulfilled. Or to state the rule in the language of the common law, where a promise operates as a continuing request, compliance with the request at any time before the promise is withdrawn, is a sufficient consideration

for the promise; see *Hamilton v. The Lycoming Ins. Co.*, 5 Barr. 339.

All that the principle requires is that an act should be done at the instance of the promisor, by which the promisee will lose if the engagement be not fulfilled. See the *Old Colony Railroad v. Evans*, 6 Gray, 26. It is therefore broad enough to embrace the case of one who marries on the faith of a promise to make a settlement, bequeath a legacy, or provide for himself and his family in some other way. The promisee need not engage to take a wife; it is enough that the promise is held out as an inducement to a marriage which is solemnized in reliance on the good faith of the promisor; *Parker v. Sergeant*, Finch, 146; *Shadwell v. Shadwell*, 9 C. B., N. S. 159. See *Cookes v. Mascall*, 2 Vernon, 34, 200; *Saunders v. Cramer*, 3 Drury & Warren, 87; *Luders v. Ansty*, 4 Vesey, 501; 5 Id. 213; *Law v. Henry*, 39 Indiana, 414. The case of *Neale v. Neale*, 9 Wallace, may be referred to in this connection, although the contract there was one of mutual promises.

In like manner a promise to afford the means of payment if another will buy a house, or to give a deed if he will enter and build on the land, becomes mutual and obligatory when the act for which it is conditioned is performed; *Perkins v. Hadsell*, 50 Illinois, 216, 219; *Crosby v. McDoual*, 13 Vesey, 148, 152.

The existence of a debt is a sufficient consideration for the transfer of real or personal property as

security or payment; and hence where one who is indebted promises to execute a mortgage or assign a chose in action to the creditor, the contract may be specifically enforced, although unilateral, and nothing is done or promised on the other side. The assent of the promisee will be presumed to an act intended for his benefit, and need not be expressed in terms; *ante*, vol. i., 954; *Palmer v. Scott*, 1 Russell & Mylne, 391, 394. In *Palmer v. Scott*, the Master of the Rolls said, "Were this a proposal merely, it must, to constitute an agreement, be accepted by writing; but here it is not a proposal, but an express undertaking, which this court will compel the party signing it to perform specifically, although the other party has not bound himself by writing."

It has been ingeniously contended that if the vendor refuses to accept the price, the purchaser may retract, and as the minds of the parties do not meet at any time in a common purpose, there can be no obligation. The fallacy of this argument lies in not remembering that the refusal of the vendor does not prevent the obligation from arising, and is an expression of his purpose not to comply with an engagement which has been rendered absolute by the fulfilment of the condition. Like every effort to rescind a mutual obligation, it depends for its effect on the assent of the opposite party, and leaves him free to say whether the contract shall stand or be set aside. It is therefore entirely consistent with the mutuality which

is essential to a decree of specific performance.

A mutual contract may exist, although the promisor is ignorant of the promisee's assent, and although he writes to say that he has changed his mind before the promise is accepted or acted on, as where the acceptance of an offer is mailed while a letter recalling it is on the way, or where an advance is made on a letter of credit or guarantee which has been revoked, but before the notification reaches its address.

The objection and the answer to it were clearly stated by Agnew, J., in *Corson v. Mulvaney*, 13 Wright, 88, 99, Here "a new and ingenious turn is given to the argument. It is said, but if the seller refuse to accept the tender, the purchaser may retract; he is not bound, and of course the remedy is not mutual. But the fallacy lies in this: he is not bound, not because no obligation to perform arose on his election, but because he sets up the seller's breach of contract by the refusal, as a discharge of the obligation. The obligation was there, but because the seller chose not to recognize it, the purchaser now chooses to be discharged from it. Take a better test. The purchaser writes to the seller, I have concluded to take your property according to our contract. I will have a deed prepared for your execution, and a mortgage according to the terms, and will meet you to perform our bargain. Will it be said, that after this explicit notice of his election, the purchaser can fly from his contract without a

refusal of the seller to accept performance? Then, how can the seller avail himself of his own refusal, as a ground of non-performance, so long as the purchaser declines to avail himself of the discharge which the refusal affords?"

The principle was carried to its furthest limit in *Kerr v. Day*, 2 Harris, 112. There one Alexander gave a written lease to Cuddy for three years, from the 1st of April, 1845, with the right "to improve" the land, and it was agreed that the lessee should have the privilege of buying at any time during the term for 1200 dollars. Cuddy went into possession, made "improvements," and assigned the lease to Kerr. In March, 1847, Alexander conveyed the premises to Day, who brought ejectment against Kerr. It was held by the court below that if the agreement was obligatory on the original parties, it could not be set up against the plaintiff, who had obtained the title before the lessee, or the plaintiff who claimed under him, elected to take advantage of the option accorded in the lease. This judgment was reversed by the Supreme Court. Bell, Justice, said, "The ground upon which a chancellor executes an executory contract for the sale of lands, is, that equity looks upon things agreed to be done as actually performed; consequently when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser, of the estate sold, and the purchaser as a trustee of the purchase-money for the

vendor; *Green v. Smith*, 1 Atk. 572; *Craig v. Leslie*, 3 Wheat 578. The vendee is, in contemplation of equity, actually seized of the estate, and is therefore, subject to any loss which may happen to it between the agreement and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance executed; *Seton v. Slade*, 7 Ves. Jr. 205; 1 Ves. 220; 6 Ves. Jr. 352; and the death of either vendor or vendee even before the time of completing the contract, is held to be entirely immaterial; *Winged v. Lofebury*, 2 Eq. Ca. Abr. 32, pl. 43; *Paul v. Wilkins*, Tothill, 106; *Baker v. Hill*, 2 Ch. R. 113. As a result of this principle, which seems to be of general application, it is settled that an estate under contract of sale is regarded as converted into personality from the time of the contract, notwithstanding the election to complete the purchase rests entirely with the purchaser; and if the seller die before the election be exercised, the purchase-money when paid, will go to his executors as assets; *Sikes v. Lister*, 5 Vin. Abr. 561; *Baden v. Pembroke*, 2 Vernon, 213 (see vol. 1, 1140, 1162.)

* * * * * In *Laws v. Bennett*, cited and approved by Lord Eldon, in *Ripley v. Waterworth*, 7 Vesey, 436: "Whitmore devised to Douglass, for seven years, with a covenant that if the tenant, after the twenty-ninth of September, 1761, and before the twenty-ninth

of September, 1765, should chose to purchase the inheritance for £3,000, Whitmore would convey to him. In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal to Bennett and his sister equally, as tenants in common. In 1765, before the time mentioned, Walter who purchased the lease and benefit of the agreement from Douglass, called on Bennett to convey for £3,000, which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the £3,000 and interest, and it was decreed accordingly, "and," added the chancellor, "though the testator could never have compelled the lessee to purchase, yet, when the assignee made the election, it was held the personal estate of the testator, and not to belong to the devisee of the real estate. * * * * In *Daniels v. Davidson*, 16 Ves. 253, *Laws v. Bennett* is again approvingly noticed, under the name of *Douglass v. Whiting*, and is said to have turned upon the doctrine that, when the lessee made his option to purchase, he was to be considered as the owner *ab initio*. Indeed the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election."

It is no doubt true that a

covenant to convey if the covenantee elects to take the land, may operate as an equitable conversion from the execution of the deed. When his determination is announced, it relates back, and the whole becomes one transaction. An irrevocable undertaking to turn land into money is an immediate conversion, although depending on a contingency. But it does not follow that the covenantee has the right of property while it is yet uncertain whether he will buy. He has an interest which may pass by an equitable transfer, or be enforced at the instance of his creditors, but it is rather *ad rem* than *in re*, and does not amount to an estate in the land.

If, as some of the decisions indicate, an equitable estate passes immediately on the execution of the covenant, it is because the seal precludes the power of revocation. As the covenantor cannot retract, it is immaterial that the covenantee is free. This argument does not apply to a parol promise that another shall have the privilege of buying. Such an offer is not valid until the act is done, or engagement made which the promisor requires. Until then it is a *nudum pactum* which may be recalled at pleasure, and cannot be a source of title. If the agreement in *Kerr v. Day* had been merely unilateral, the authorities relied on by the court could hardly be regarded as in point. It was however so far mutual, that the relation of landlord and tenant arose forthwith. But for this the promise might have been recalled as soon as it

was made. The entry of the lessee followed by the expenditure of money on the premises, was a part performance entitling him to insist that the contract should be fulfilled, and when the price was tendered before the time expired, this right became complete against the lessor and every one who claimed under him with notice.

It is obvious that where one promises, that another shall have the privilege of buying on certain terms, the contract is not mutual until the promisee does the act, or enters into the engagement which the promisor requires. If the promisor is bound in the first instance it must be because the instrument is under seal, and not by virtue of the principles which regulate parol agreements. But there is an intermediate class of cases where an agreement which speaks only for one party, imports that some act is to be done or obligation incurred by the other party. If the latter accepts or acts under the deed, he is as much bound to do what it requires, as if the obligation were assumed in terms; *Corson v. Mulvany*, 13 Wright, 88, 98.

A tenant obviously cannot refuse to pay the rent because the lease does not contain an express covenant to that effect. The case is virtually the same where one goes into possession of land under an agreement that he shall sink a shaft, explore the land for ore, or expend money on the premises in any other process. Such a contract though purporting to be unilateral and to speak only for one

party, is in effect the agreement of both. Both the parties are bound from the outset, or there is no obligation on either side. In like manner a promise to renew a lease at the option of the lessee, or that he shall have the privilege of buying, which would be unilateral if it stood alone, may constitute a mutual obligation when taken in connection with the rest of the instrument. *In re Hunter*, 1 Edwards Ch. 5. In *Corson v. Mulvany*, 13 Wright, 818, the controversy originated in the following instrument:

"Dr. Hiram Corson hereby agrees that D. H. Mulvany shall dig five shafts for iron ore on the lot of said Corson fronting on the Spring Mill and Marble Hall road, and bounded by lands of Joseph Freas and others, in Whitemarsh township, containing seven and three-quarters acres, at any time prior to the 1st day of April next, 1864, and if said Mulvany shall desire to purchase said tract of land at that time, at the price or sum of \$1,000, he shall have the right and privilege of so doing, the purchase money in that case to be paid as follows: \$200 cash on the execution of the deed on the said 1st of April, and the balance of \$800 in two years thereafter, with lawful interest payable annually, to be secured by mortgage on the premises. In witness whereof the said parties have hereunto set their hands and seals this 12th day of December, A. D. 1863."

Corson entered and sunk the shafts, and on the 28th of March, 1864, notified Mulvany that hav-

ing been successful in the search for ore, he would pay the first instalment, and give a mortgage for the residue in conformity with the terms of the agreement. Such a tender was accordingly made, but Mulvany refused to accept the money, alleging as an excuse that his wife was unwilling to release her dower or execute the deed. Corson therefore brought an ejectment in the nature of a bill for specific performance which resulted in his favor. The judgment was delivered by Agnew, J., who said *inter alia*: "It is alleged that the contract is not mutual, because an option was given to Mulvany only to convert the privilege into a purchase. If this be true, it will prevent specific performance, for it is settled, equity will not enforce specific performance where the remedy is not mutual. Both parties have signed and sealed this agreement, and the language of the instrument clearly imports a covenant on the part of Mulvany to pay the purchase-money, if he elects to purchase. The language of a writing may be wholly that of a vendor, yet the vendee's sealing or accepting it will bind him, and whether the action against him should be case or covenant is not material; *Dubbs v. Finley*, 2 Barr, 397; *McFarson's Appeal*, 1 Jones, 504-10; *Campbell v. Shaw*, 3 Watts, 60; *Colt v. Selden*, 5 Id. 525; *Mead v. Weaver*, 7 Barr, 330, 331. In the last named case the effort of Chief Justice Gibson was to show that covenant would not lie when the party had not sealed the writing, however, debt or as-

sumpsit might. The English authorities cited in that case conclusively show that the entry of the grantee, or his acceptance of a deed poll, are equivalent to sealing, and covenant will lie.

The naked question is, whether, in a mutual contract to give an option, the party who gives notice of his election is bound to performance.

To assert the negative is simply to deny the power of making a conditional contract, and of declaring the performance shall take place when the contingency happens. If one contracts to purchase a vessel at sea, upon her safe arrival in port, no one will dispute that an obligation to deliver on one side, and to pay on the other, arises upon her safe arrival. The vessel may never arrive, and the contract is not absolute to performance on either side till the contemplated contingency occurs; but the contract is binding, and only awaits the event to become binding also to performance. Now, as a contingency or condition on which performance is suspended, what difference is there between a contingency depending on the action of third persons or the controlling power of Providence, and one depending on the act of one of the parties? The uncertainty which attends the contingency exists in either case. The vessel may not arrive, or the party may not elect, but if either event takes place the contingency has occurred. A choice or an election is but a fact, and wherein does it differ from any other fact made the con-

dition of performance? The agreement is mutual. One says, I will sell if you conclude to purchase; the other says, I will pay if I do conclude to purchase. He then resolves and say, I have concluded. The contingency upon which performance was rested has happened. Why are not both bound? One would think it a plain case of mutual obligation to perform on the happening of the event which was fixed as the condition of performance.

The buyer tenders his money, and, clearly, the seller is bound to receive it. By the very offer to pay, the purchaser not only recognizes the obligation of his previous assent to the contract, but the happening also of the fact on which his obligation to perform rested. The offer or tender is not itself the election, it is but the consequence of it. Election and notice of it precede the tender."

There is no doubt that where a writing, though signed only by one party, imports that another is under a reciprocal obligation, the latter may be as much bound by the acceptance of the instrument as if he had subscribed his name, *Colt v. Selden*, 5 Watts, 525, *ante*. This applies *a fortiori* when the instrument, though speaking only for one party is signed by both. The obligation flows from the terms employed, and will not arise when the intention plainly is that one party shall be bound and the other free. An election to proceed under such a covenant, does not necessarily impose an obligation. The effect

depends on whether the covenant is conditioned for performance, or for a promise to perform.

If A. covenants to pay for such goods as B. may sell to a third person, B.'s promise to sell the goods will neither confer a right, nor operate as a cause of action. The guaranty cannot be enforced without an actual sale. So a promise to pay, has no force or significance where the covenant is to convey on payment. But the covenant may be so worded as to imply that the covenantee is to receive a deed on declaring his election to take the land, although the time has not arrived for the payment of the purchase-money. Such a declaration is irrevocable, and imposes an obligation which the law interprets as a covenant. When the vendee announces his intention to accept the contract, he becomes answerable for the price. The contract in *Corson v. Mulvaney* did not stand in need of this principle, because it was not incumbent on the covenantor to execute a deed until the first instalment was paid, and a mortgage tendered for the residue. When this was done the obligation was complete, and could not be rescinded by the refusal of the vendor, or without the consent of both parties.

A parol agreement to sell, if another shall elect to purchase, is not obligatory on either party in the first instance until the election is declared. The promisor may retract, and although he must accept the price if tendered in due season, and while the promise is

still unrevoked, the contract, properly so called, dates from the tender and not from the original undertaking.

The condition is precedent, and there is no obligation until it is fulfilled. This marks the distinction between such a contract and a covenant, which becomes binding as soon as it is delivered, although it may be defeated by the failure of the covenantee to comply with the terms prescribed. A promise to pay if the promisor shall on due consideration make up his mind to buy, is not an equivalent for a promise to sell. Mutual promises do not constitute an agreement, unless both the parties are bound. A promise to give another time to consider whether he will accept the promise, may be obligatory in morals, but has no legal obligation; *Cooke v. Oxley*, 3 Term, 652; *Roullidge v. Grant*, 4 Bing. 653. It is essentially revocable, and may be withdrawn at any time before acceptance. The obligation in *Corson v. Mulvany* arose first from the execution and delivery of the instrument, next from the acts done under it, by digging shafts in search of ore, and finally from the assent of Mulvany while the privilege was still in force. It might have been valid on the two last grounds, though not under seal; see *The Old Colony R. R. v. Evans*, 6 Gray, 25.

The doctrine, that a promise to convey for a stipulated price, may be specifically enforced, although the purchaser does not engage to take the land, is not contrary to the equality which is essential to

equity. Both parties are free until the money is tendered, and then it cannot be refused, consistently with the promise. The case is substantially the same where the obligation is put in the form of a bond or covenant. Although one party is irrevocably bound, while the other may refuse, this results from the deliberate act of the former, in affixing a seal, and is not a reason for withholding a remedy to which the latter would be entitled if the contract were parol; *Corson v. Mulvany*, 13 Wright, 98; *Barnard v. Lee*, 97 Mass. 92; *Ewing v. Gordon*, 49 New Hampshire, 444; *Jones v. Robbins*, 29 Maine, 351; see *Calvert v. Gordon*, 1 Manning & Ryland, 437; 3 Id. 424; *Gordon v. Calvert*, 2 Simons, 253; 4 Russell, 531; *Offord v. Davies*, 12 C. B., N. S. 748. The difference which exists in this regard between a sealed and unsealed agreement, appears from the cases of *Offord v. Davies* and *Calvert v. Gordon*, and although the question arose in these instances on a guaranty, the principle is not less applicable to a contract for the sale of land, on proof that the price was tendered at the appointed time.

In *Barnard v. Lee*, the bill was filed to enforce a bond, conditioned that if the complainant should, on or before the first day of April, A. D. 1866, pay or cause to be paid the full sum of six hundred dollars, and the interest accruing upon the same, and "upon request" the respondent should "make and deliver a good and valid deed in fee" of the land, then the obligation

should be void. The bill further alleged that the complainant entered with the knowledge and consent of the respondent, and cultivated and improved the land; that on May 25th, 1866, the complainant tendered the six hundred dollars with interest thereon, according to the tenor of the bond, and demanded a conveyance which the obligor refused; and that the complainant then was, and had since then been, ready and willing to pay the price.

It was alleged on the part of the defence, that as the obligation was not mutual it should not be specifically enforced, and that if the complainant ever had a right, it had been lost by the failure to tender the money at the time prescribed; but the objections were overruled and the prayer of the bill granted.

In *Willard v. Tayloe*, 8 Howard, 557, the respondent executed a lease for ten years, with a proviso that the lessee should have the right or option of purchasing the premises at any time before the expiration of the term, for the price or sum of \$22,000, payable in instalments. The first instalment of \$2,000 was tendered in due season and refused. The lessee having filed a bill for specific performance; Field, J., said that the covenant was in the nature of a continuing offer to sell, and being under seal, the respondent was not at liberty to recede. When the tender was made, the obligation became complete, and might be enforced by a chancellor.

COVENANT TO SELL OR RENEW.

—It is established under these authorities that a stipulation in a lease to sell or renew if thereto required, may be specifically enforced, notwithstanding the apparent want of mutuality, and although it is left to the choice of the lessee whether he will accept a new lease or become a purchaser; *Souffrain v. McDonald*, 27 Indiana, 269; *Kerr v. Day*, 2 Harris, 112, *Kerr v. Purdy*, 50 Barb. 24; *Willard v. Tayloe*, 8 Howard, 537; *Maughlin v. Perry*, 25 Maryland, 352; *Hall v. Center*, 40 California, 61; *DeRutte v. Muldrone*, 16 Id. 505; *D'Arras v. Keyser*, 2 Casey, 249; *Napier v. Darlington*, 20 P. F. Smith, 64; *Perkins v. Hadsell*, 50 Illinois, 216, 221; see *Moss v. Barton*, 1 L. R. Eq. 474; *Hersey v. Giblett*, 18 Beavan, 174. The lessee takes the premises on the faith of the covenant, and might refuse if it were not introduced; *In re Hunter*, 1 Edwards Ch. 5; *Haurally v. Warren*, 3 C. E. Green, 124; The agreement, as a whole, is therefore mutual, although the covenant in question is unilateral and only binds the landlord. The law seems to have been held differently in *Boucher v. Van Buskirk*, 2 A.K. Marshall, 345, but the decision can hardly be sustained.

In *Napier v. Darlington*, 20 P. F. Smith, 64, the parties entered into an agreement which seems to have been under seal, by which the premises were demised for five years with the privilege of purchasing at the end of the term. The lessee assigned his interest to the defendant, who tendered the purchase-money before the lease ex-

pired, and demanded a conveyance and the court held in accordance with *Kerr v. Day*, that he had an equitable estate, which was a good defence under the jurisprudence of Pennsylvania to an action of ejectment by the lessor.

It has been held that readiness and willingness to pay the price, or accept a renewal at the time prescribed, are not essential to the right to have such a covenant specifically executed; *D'Arras v. Keyser*. This view is notwithstanding questionable, and the better opinion seems to be that relief should not be granted under these circumstances, unless the conduct or language of the parties operates as a waiver of the forfeiture, nor unless the party who seeks to enforce the agreement has been prompt and ready; see *Masterman v. Mann*, 9 Hare, 206; *Hopkins v. Gilman*, 26 Wisconsin, 476; *Kerr v. Purdy*, 50 Barb. 24; 51 New York, 629; Certainty is moreover essential, *Buckmaster v. Thompson*, 36 New York, 558, and an agreement to renew a lease, at the option of the tenant, on such terms as any one else will give, is too indefinite in this regard to be specifically enforced; *Gelston v. Sigmond*, 27 Maryland, 334; and so is an agreement to sell or let at a price or rent to be fixed by a third person, as being in effect a contract to submit to an arbitration; *Hopkins v. Gilman*; *Milner v. Gray*, 14 Vesey, 400. In *Buckmaster v. Thompson*, a covenant that "in case the parties of the second part shall then be tenants

of the herein demised premises, to first offer the premises for sale or be purchased by them, for the sum of \$20,000," was in like manner held too vague and indefinite to admit of a decree of specific performance.

When the covenant to renew is general, the lessee may exercise the privilege at any time during his occupancy of the premises, unless the lessor calls upon him to decide at once; *Hersey v. Giblett*, 18 Beavan, 174; *Moss v. Barton*, 1 L. R. Eq. 474.

SIGNATURE OF PARTY TO BE CHARGED SUFFICIENT.

We may now turn to the case where the complainant has not signed the instrument which he seeks to enforce. The fourth section of the English Statute of Frauds, as re-enacted in most of the States of this country, declares that no action shall be brought to charge any person on any contract or sale of land, tenements, or hereditaments, unless in writing, and signed by the party to be charged, or some agent thereto lawfully authorized. This language implies that one who signs may be charged, although the other party to the contract does not affix his signature.

It has been contended that such a contract is wanting in mutuality, and does not afford a ground for a decree of specific performance; see *Benedict v. Lynch*, 1 Johnson Ch. 570; *Geiger v. Green*, 4 Gill, 476; *Wilson v. Clark*, 1 M. & S. 554; *Parrish v. Koons*, 1 Parsons Eq. 79. This objection may be valid where the intention is that

the writing shall be executed by both parties, and one omits to sign through mistake or fraud. But it does not apply in favor of one who puts his name to an instrument knowing that it is obligatory on him, and will not bind the other party. The statute of frauds does not avoid the contract, it merely requires that the contract shall be established by a writing, signed by the party whom it is sought to charge. Every one is presumed to be cognizant of the legal consequences of his acts, and a vendor who signs the contract without requiring the signature of the vendee, must be supposed to know that it rests with the latter to say whether the sale shall be carried into effect. When, therefore, the vendee files a bill for specific performance and tenders the price, the vendor has all that he is entitled to expect; *Ives v. Hazard*, 4 Rhode Island, 15; *Perkins v. Hadsell*, 50 Illinois, 217; *Estes v. Furlong*, 59 Id. 302. The agreement is thenceforth mutual, and the objection that it was not such in the first instance, comes with an ill grace from one who is endeavoring to evade a moral and legal obligation. The defence rests exclusively on the statute, and the intention of the legislature plainly is that a defendant who has signed, shall not allege that the plaintiff did not. In the language of Chief Justice Tindal, if there is a want of mutuality, the fault lies at the door of the defendant, who might have required the plaintiff's signature before affixing his own; *Laythorp v. Bryant*, 2 Bing. N. C.

735. The preponderance of authority is in accordance with these principles, that as there is nothing in the language of the act to impair the obligation of the contract as it regards a party who signs, so it may be specifically enforced against him, although he would not have had a corresponding remedy if the complainant had not filed the bill. This interpretation was contemporaneous with the statute; *Hatton v. Grey*, 5 Viner Abr. 525, pl. 4; 2 Cases in Ch. 164; *Coleman v. Upcott*, 5 Viner, 527, 528, pl. 17; 2 Eq. Cases, 45; *Buckhouse v. Crosby*, 2 Eq. Cases, Abr. 32; and although criticized with much logical acumen by Lord Redesdale and Sir Thomas Plummer; see *Lawrence v. Butler*; 1 Schoale v. Lefroy, 13; has maintained its ground in England, and is now established in the United States; 3 Sugden on Vendors, 129, ch. 4, sect. 3; *Shirley v. Shirley*, 7 Blackford, 452; *Wright v. King*, Harrington Ch. 12; *Ives v. Hazard*, 4 Rhode Island, 45; *Penneman v. Hartshorn*, 13 Mass. 91; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Douglass v. Spears*, 2 Nott & McCord, 207; *McCrea v. Purmont*, 16 Wend. 460; *Davis v. Shields*, 26 Wend. 362.

In *Copeland v. Upcott*, "The Lord Keeper decreed the defendant to perform the agreement, for that it was directly within the statute of frauds as being an agreement signed by the party to be charged with the same, and there was no need of its being signed by both parties, and the plaintiff by his bill hath submitted to perform

what was required of his part to be performed. If one (being in company) offers a bargain and writes it down, and another takes it up and prefers his bill, there is a sufficient agreement."

Such a contract is analogous to a covenant that another shall have the privilege of buying, or for the good behavior of a servant whom he is about to employ. The party who executes the instrument cannot allege that the other is not bound, as a reason for not fulfilling the obligation which he has voluntarily incurred; *ante*; see *Calvert v. Gordon*, 7 B. & C. 809; 3 M. & R. 124; *Gordon v. Calvert*, 2 Simons, 253; 3 Russell, 531. The duty arises in the one case from the sealing and delivery, and in the other from the manifest intention of the statute that the party who signs shall not be discharged. A contract of sale is not less obligatory at common law because the vendee promises orally and the vendor in writing. It is therefore entirely competent for the legislature to set the former free while leaving the other bound. Such an enactment is not contrary to natural equity, because the vendee cannot enforce the agreement without making the stipulated compensation, and because the vendor contracts in subordination to the enactment and in accordance with the terms which it prescribes. For the same reasons such an enactment does not impair the obligation of a subsequent contract, in the sense of the Constitution of the United States, although it can-

not operate retroactively under that instrument.

It is well settled in like manner that a contract for the sale of merchandise, is obligatory on the vendor under the seventeenth section of the statute, although the vendee does not affix his signature, and could not be compelled to pay the price; *Sanborn v. Flagler*, 9 Allen, 474; *Egerton v. Matthews*, 6 East, 307; *Laythorp v. Bryant*; *Russell v. Nicol*, 3 Wend. 112; *Justice v. Lang*, 42 New York, 493. So the vendee cannot defend an action for the purchase-money, on the ground that the vendor did not sign the note or memorandum, and might have withheld the goods; *Emerson v. Hills*, 2 Taunton, 38; *Allen v. Bryant*, 3 Id. 169; *Barstow v. Gray*, 3 Greenleaf, 409, 415.

The main current of authority is in accordance with these decisions, that it is not an answer to a bill for a specific performance, that the complainant did not sign the contract, and might have violated it with impunity; *Justice v. Lang*, 42 New York, 493; *Clason v. Bailey*, 14 Johnson, 487, 490; *Tripp v. Bishop*, 5 P. F. Smith, 428; *Morrison v. Wentz*, 13 Minnesota, 191; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Douglass v. Spears*, 2 Nott & McCord; *Sams v. Tripp*, 10 Richardson Eq. 447; *Boston v. Gray*, 3 Greenleaf, 405; *Getchell v. Jewett*, 4 Greenleaf, 350; *Rogers v. Saunders*, 16 Maine, 92; *Laning v. Cole*, 3 Green Ch. 229; *Esmay v. Gordon*, 18 Illinois, 483; *McConnell v.*

Brillhart, 17 Id. 354; *Ives v. Hazard*, 4 Rhode Island, 15; *In re Hunter*, 1 Edwards Ch. 5; *Woodward v. Aspinwall*, 3 Sandford S. C. 272; *Young v. Paul*, 2 Stockton Ch. 401; *Barnard v. Lee*, 97 Mass. 92.

The opposite doctrine that the writing must be signed by both parties, was notwithstanding advanced in *Boucher v. Van Buskirk*, 2 A. K. Marshall, 345, and seems to prevail in Kentucky; *Jones v. Noble*, 3 Bush, 694. So in *Geiger v. Green*, 4 Gill, 476; and *Duval v. Myers*, 2 Maryland Ch. 401, the court adopted the argument of Lord Redesdale, that a specific performance should not be decreed unless both parties are bound, although the objection was to the terms of the contract, and not that the complainant did not sign.

In the instances hitherto considered, the contract disclosed by the instrument was mutual, and purported to have been concluded by both the parties though signed only by one, but it is equally well settled that an oral acceptance of a written offer, may constitute an agreement which equity will enforce; *Esmay v. Gordon*, 18 Illinois, 483; *Farwell v. Lowther*, Ib. 252; *Warner v. Wellington*, 3 Drewry, 523; *Smith v. Neale*, 2 C. B., N. S. 67; *Reuss v. Pickseley*, 1 Law R. Exchequer, 342.

The principle was clearly stated by the Vice-Chancellor in *Warner v. Wellington*. "The other ground of demurrer is this:—that the memorandum was not a memorandum of agreement,

but only an offer or proposal, which the defendant retracted before it was accepted by the plaintiff. Now there is a clear distinction between a memorandum of offer, and a memorandum of agreement. In the case of an offer, no doubt the party signing it, may at any time before acceptance, retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement.

A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties.

Taking this as a memorandum, not of an agreement, but of an offer not then finally accepted, the question is, whether there has been a sufficient acceptance by the plaintiff before the defendant retracted. What is alleged by the plaintiff as an acceptance, was his sending the draft lease. This raises another question, can acceptance be by parol without writing? and it is singular that I cannot find any case in which it is determined that a parol acceptance of a written proposal is sufficient. But I think upon principle that parol acceptance would be sufficient, because when one party has signed a written proposal, and the other ex-

pressly accepts it by parol,—as if he says in express terms “I accept the proposal,” that reduces it to a case of parol agreement come to between the parties, and a memorandum of the agreement signed by one, in which case it is clear that the signature of one party is sufficient to bind him, although the other has not signed.”

In *Sanborn v. Flagler*, 9 Allen, 474, the question arose under the 17th sect. of the statute on the following memorandum: “Will deliver to S. R. & Co., best refined iron, 50 tons within 90 days at 5 cts. per lb., 4 of cash. Plates to be 10 to 16 inches wide, and 9 feet to 11 long. This offer good till 2 o'clock, September 11th, 1862, J. H. F., J. B. R.”

The plaintiff testified that the instrument was written by him, and that he and the defendant signed their initials, the defendant writing the initials “J. H. F., and he the initials “J. B. R.” and that before two o'clock on the day named, and before the defendant left the plaintiff's office, he accepted the proposition, and so stated to the plaintiff verbally.

It was contended for the defence that inasmuch as the acceptance was not in writing, it was not obligatory on the defendant. This objection was overruled by the Court. Bigelow, C. J., said “The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. Is not denied by the defendant that a verbal acceptance

of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement, is supplied by the signature of the party sought to be charged to the offer to sell. Indeed the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell, and an express agreement to sell stand on the same footing inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it, may always be proved by evidence *aliunde*.”

In the *Old Colony Railroad v. Evans*, 6 Gray, 25, the principle was applied to a contract for the sale of land. The defendant proposed in writing that if the complainants would “purchase or hire the ‘Taylor farm’ and lay a turn-out to the main line of the railroad,” and suffer him to dig gravel on the farm, and to use the railroad as a means of transportation at a certain rate, he would purchase another tract of land known as

Mount Hope, which the complainants had bought under a previous oral agreement to the same effect. The complainants accepted this proposal orally, and rented the Taylor farm for seven years, and the defendant entered on it and dug the gravel in accordance with the agreement. They subsequently tendered a deed for Mount Hope which was refused. A bill was then filed to compel the defendant to take the land and pay the price. The court held that when the complainants acted on the defendant's offer by renting the Taylor farm, and laying the turn-out, the contract became obligatory on him and might be specifically enforced, although he could not have had a corresponding remedy against the complainants.

The explanation of this course of decision seems to be, that it belongs to him who makes an offer to say on what terms he will be bound. He may insist that the other party shall signify his acceptance in a way to be legally answerable. If, for instance, an offer of sale were addressed to a corporation which could not, agreeably to the *lex loci*, contract by parol, the vendor might refuse to receive an acceptance which was not authenticated by the corporate seal. So it is not incumbent on one who writes offering his house for sale, to rest satisfied with an oral acceptance. He may insist that the answer like the letter shall be in writing, and constitute a mutual obligation. But as this is the right of the party who makes the offer, so it may be

waived by him. If he is content with an oral response the offer stands. There is not a contract in the strict sense of the term, but there is a continuing request, and if this is complied with while unrevoked, it is immaterial that the party did not bind himself to do what he actually performs; *Perkins v. Hadsell*, 50 Illinois, 216.

In the *Fishmonger's Company v. Robertson*, 5 M. & G. 131, suit was brought on an agreement that the plaintiffs should withdraw their opposition to a bill then before Parliament for the drainage of certain lands, and should use all reasonable means to facilitate its passage, and that the defendants would in consideration thereof secure to the plaintiffs a certain portion of the land so drained, and pay the plaintiffs 1000*l.* on the passage of the bill. The plaintiffs were a body corporate, and it was contended that as they had not affixed their seal the contract did not bind them, and therefore could not bind the defendants. Their promise was the consideration for the defendants' promise, and the invalidity of the one involved that of the other. The court held that it might be that until the corporation performed the agreement on their part, there was a want of mutuality which would have entitled the defendants to retract on the ground, that the contract was a *nudum pactum*. But that when such performance took place it was an adoption of the contract, which rendered it mutual; and the objection which had been made

could no longer avail. And it was strongly intimated that the institution of the suit was a ratification which would have rendered the contract obligatory on the plaintiffs, and therefore on the defendants, although it had not been performed by the plaintiffs. The cases under the statute of frauds go further, and to the point that one who takes an oral in exchange for a written promise, is bound although there be no obligation on the other side. But it would notwithstanding appear that he may call on the other party to declare in writing whether he means to abide by the contract, and that the refusal of such a request will be a defence to a bill for specific performance or an action for damages; Sugden on Vendors, 129, ch. 4, sect. 3.

The case of the *Fishmonger's Company v. Robertson*, affords an answer to the doctrine that a contract which is not obligatory on both parties when first entered into, should not be specifically enforced. If the institution of a suit by one who is not bound may relate back and supply the want of mutuality, this effect may for a stronger reason result from the filing of a bill in equity, because a chancellor can control the costs and may throw them on the complainant, if it appears that his right was not complete when the subpoena issued.

The doctrine that a contract may be obligatory on a party who signs, although the other party does not affix his signature, is now too well settled to be a sub-

ject of dispute, but it was at one time doubtful whether the party who has signed is entitled to the aid of a chancellor, or should be left to find such remedy as he can at law. In *Benedict v. Lynch*,¹ Johnson Ch., Chancellor Kent inclined to the opinion of Lord Redesdale, that the want of mutuality is an insuperable barrier to a decree of specific performance, but when the question arose in *Clason v. Bailey*,¹⁴ Johnson, he confessed that the main current of authority did not support this proposition. "I have thought," said he, "and have often intimated, that the weight of argument was in favor of the construction that an agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party should not be at liberty to enforce at his pleasure, an agreement which the other party was not entitled to claim. It appears to be settled in *Hawkins v. Holmes* (1 P. Wms. 770), that though the plaintiff has signed the agreement, he never can enforce it against the party who has not. The remedy, therefore, in such cases is not mutual. But notwithstanding the objection, it appears from the review of the cases, that the point is too well settled to be now questioned."

The law has ever since been established on this basis in New York, *McCrea v. Purmont*, 16 Wend. 468; *Davis v. Shields*, 26 Id. 362; *Woodward v. Aspinwall*, 3 Sandford Ch. 272; *McCrea v. Hunter*, 1 Edwards, 5.

In *Lowry v. Mehaffy*, 10 Watts,

387, Kennedy J., said, that it was settled in England that an agreement signed by one of the parties only, would bind him, and the point was even freer from difficulty in Pennsylvania, where the statute was limited to a declaration that all leases, estates, interests of freehold for a term of years, etc., made and created by delivery only, or seizin on parol and not put in writing and signed by the parties so making the same, or their agents lawfully authorized by writing, should only have the force and effect of leases or estates at will.

In *Wilson v. Clark*, 1 W. & S. 354, Chief Justice Gibson assailed this doctrine with his accustomed force. The fourth section of the statute implied that the agreement should be obligatory on him who signed, although the other party did not. It had not been enacted in Pennsylvania, and the question arose under the first three sections. There was, consequently no ground for an exception to the general rule, that both the parties must be bound or neither would be. A contract signed only by one party ought not to be specifically enforced against the other party, because he could not have a like remedy. Where a contract, which was intended to be mutual, failed on one side, neither could be sustained. Unless the vendor was under an obligation to convey, the purchaser ought not to be made liable for the price; nor could a purchaser, who had not bound himself to pay, justly require the vendor to execute a deed. A chan-

cellor should, therefore, refuse to intervene and leave the complainant to seek a remedy at law.

In *Parrish v. Koons*, 1 Parsons, Eq. 79, 81, Judge King inclined to this view of the question; but in *McFarson's Appeal*, 1 Jones, 503; and *Simpson v. Breckinridge*, 8 Casey, 287, the Supreme Court recurred to the ground taken in *Lowry v. Mehaffy*, that a writing signed by one party and accepted by the other, may take the case out of the statute and be specifically enforced.

The controversy is now set at rest by the case of *Tripp v. Bishop*, 5 P. F. Smith, 428, where Strong, J., delivered the opinion of the court in the following terms: "Neither the British statute nor ours requires that the written agreement or memorandum of the sale should be signed by both parties; a receipt for the purchase-money, if it describes the lands, has been held sufficient; 9 Ves. 234, 121, 466; and even a note or a letter has more than once been held to be a sufficient agreement to take the case out of the statute: Sugden on Vend. 45. This is even more certain under our statute than under that of 29 Charles II. The words of the latter are, 'unless the agreement, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith.' * * Our act declares that all leases, estates, interests of freehold, &c., shall have the force and effect of leases or estates at will only, unless put in writing, and signed by the parties so making or creating the same, that is, the

parties making the leases or creating the estate. It is then only the lessor or grantor who is required to sign the agreement. His contract must be in writing and signed by him; but the statute requires no written evidence of the engagement of a lessee or grantee. The statute of frauds was passed for the protection of land-owners. It was intended to guard them against perjuries in the proof of parol contract. To secure this protection is prescribed a rule of evidence, by which alone their estates can be diverted. This is intimated in *Lowry v. Mehaffy*, 10 Watts, 387. There it was ruled that an agreement for the sale of land reduced to writing, and signed by the vendor alone, and delivered to the vendee, is all that the statute requires. It is true, that in that case, it appeared the contract had been partially executed, but not sufficiently to give effect to a parol sale. After all, it was the signature of the agreement by the vendor alone, which made the sale effective. The same thing was ruled in *McFarson's Appeal*, 1 Jones, 503. The case of *Wilson v. Clarke*, 1 W. & S. 554, is not in conflict with these decisions. There the contract rested entirely in parol. The vendor had signed no agreement, he could not, therefore have been compelled to make a conveyance, and for this reason he was not allowed to enforce the contract specifically against the other party."

This interpretation is sustained by the letter of the statute, which does not require the signature of

both parties, but that the writing shall be signed by the party to be charged. And such is also the spirit of the enactment, which was designed to afford a safeguard against fraud and perjury. There can be no danger of false swearing, when the contract is adopted by one party and established against the other with the certainty of written evidence. Under these circumstances all that the legislature designed to accomplish is secured, and there is no room for the application of the statute.

The authorities on the difficult and controverted question of mutuality, when taken as a whole, would seem to show that if the obligation is mutual when the decree is made, it need not have been mutual in the first instance. Where the want of mutuality impairs the legal obligation of the contract, it necessarily precludes the right of specific performance; where it does not, the question is one for the sound discretion of a chancellor. A promise to convey, if a married woman will do a certain thing, becomes obligatory when the thing is done; and although a promise to a married woman in consideration of a promise by her is not valid as a contract, it operates as a continuing request, and cannot be retracted after her part of the agreement has been fulfilled; *Walker v. Coover*, 15 P. F. Smith, 430; *Vance v. Nogle*, 20 Id. 176. See *The Fishmongers' Co. v. Robertson*, 5 M. & G. 131. So a contract, which was not obligatory when made, may be specifically enforced

at the suit of one who has changed his position for the worse on the faith of the contract; *Laning v. Cole*, 3 Green Ch. 229; *France v. France*, 4 Halstead, 650; *Young v. Paul*, 2 Stockton Ch. 402; *Very v. Levy*, 13 Howard, 345.

Here the equity results from what is done under or in pursuance of the contract, but the party who is not bound may adopt the contract by filing a bill, or in some other mode of equal efficacy, and will then be as much entitled to a specific execution of the contract, as if it had been obligatory from the first; *Ives v. Hazard*, 4 Rhode Island, 13; *Farwell v. Lowther*, 18 Illinois, 252; *Johns v. Dodge*, 19 Id. 433; see *The Fishmongers' Company v. Robertson*; *Telfair v. Telfair*, 2 Dessausure, 271. This principle does not apply, unless the complainant is *sui juris*, and competent to enter into an agreement. It has accordingly been held that an agreement will not be specifically enforced, where either party was under a disability to contract, which subsists when the decree is made. Under these circumstances, the contract is invalid, and cannot be ratified; *Flight v. Bolland*, 4 Russell, 298; *Green v. Richards*, 8 C. E. Green, 32, 536. *Flight v. Bolland*, was a suit for specific performance by an infant, and the bill was dismissed, because the complainant was not originally bound, nor by the filing of the bill. The principle applies for a still stronger reason, where a bill is filed by a married woman

to enforce a contract made during coverture; *Watts v. Kinney*, 3 Leigh, 272. In *Green v. Richards*, the question arose on the following instrument, signed by the defendant:

"This is to show that I agree to sell to Mrs. Captain Green, house and lot, No. 71 Ferry street, for the sum of two thousand five hundred dollars, and that when there is five hundred dollars paid, and the back rent, I will give her a deed, and take a mortgage for two thousand."

The Chief Justice said: "If this contract is to be regarded as made with a married woman having no separate estate, and therefore under the usual disability of coverture, both at law and in equity, it appears to me that this objection would be clearly tenable. It is true that there are exceptions to the rule, that a court of equity will not perform unilateral contracts, as for instance, in those cases where an agreement which the Statute of Frauds requires to be in writing, has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which it does not confer upon the other, an example of which is exhibited in the instance of a lease for years, which gives an option to the lessee to purchase during the term. But it will be observed that when such contracts come to be enforced in equity, they cease to be unilateral, for upon filing the bill, the party who was before unbound, puts himself under all the obligations of the



contract. By his own act he makes the contract mutual, and the other party is enabled to enforce it. The consequence is, that in every case that I can find, where specific performance has been ordered, a mutual remedy existed upon it at the time of the rendering of the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of an agreement by the one party, when, at the time of such order, the other party is at liberty to reject the obligation of such agreement."

It would seem that the objection that the complainant could not bind herself, might have been obviated by requiring her to deposit so much of the purchase-money as was due, together with a mortgage for the residue, in the hands of an officer of the court to be delivered to the respondent on the execution of the deed.

A contract by a husband for the sale of the wife's land, to which she is not a party, cannot be adopted and enforced by her after his death, and may on the contrary be rescinded at the instance of the purchaser; *Hoover v. Calhoun*, 16 Grattan, 109.

The doctrine that a contract which could not be enforced against a *feme covert*, cannot be enforced by her, does not apply, when the contract has so far been executed on her part, that it would be a fraud in the vendor to retract. In *Vance v. Nogle*, 20 P. F. Smith, 176, the vendee, a *feme covert*, went into possession, paid

part of the purchase-money, and was ready and willing to give a bond and mortgage for the residue in accordance with the terms of the agreement, and it was held that the heirs of the vendor could not dispossess her, under the equitable jurisprudence of Pennsylvania.

The language held in *Green v. Richards*, implies that a specific performance may be decreed at the instance of a complainant, who is *sui juris*, although she was under the disability of coverture at the time of entering into the agreement, because the institution of the suit supplies the mutuality which was wanting in the first instance. A like principle was applied in *Clayton v. Ashdown*, 9 Viner abr. 393; in favor of an infant who became of age before the filing of the bill. This conclusion may bear variance with the doctrine held in other instances, that a contract will not be specifically enforced unless it was binding on both parties when made, *ante*, 1099, *Hoover v. Calhoun*, 16 Grattan, 109; but it is sustained by the weight of authority and by principle; see *The Fishmongers Company v. Robinson*, 5 M. & G. 131.

It has been held that where an agreement by a married woman for the sale of her real estate is authenticated by her separate acknowledgment, and would be valid if it were a deed, it may be specifically enforced by the purchaser. *Dankel v. Hunter*, 11 P. F. Smith, 382; *Schofroth v. Amba*, 46 Missouri, 114, see vol. 1, 765.

All that the statute requires is that

the name of the party to be charged should be written by himself or by some one whom he requests or authorizes, in a way to authenticate the contract as his, and if this appears with sufficient clearness, it is immaterial whether the signature is in the beginning, in the middle, or at the end of the document, and whether it is written in the third person or in the first; *Yersley v. Gregsby*, 9 Leigh, 387; *Johnson v. Dodge*, 17 Illinois, 433; *Worral v. Dunn*, 1 Selden, 229; *Ogilvie v. Foljambe*, 3 Merrivale, 53; *Propent v. Parker*, 3 Russell & Mylne, 625. It follows that where one party prepares the instrument and inserts his name as covenantor or promisee, and it is executed and delivered by the other, both are answerable under the provisions of the statute; *Higdon v. Thomas*, 1 Harris & Gill, 139; *Berry v. Combe*, 1 Peters, 640, 630; *McConnell v. Brillhart*, 17 Illinois, 354. It is equally well settled that if the writing is signed by an agent who is duly authorized in other respects, his authority need not be in writing; *Yersly v. Gregsby*; *Johnson v. Dodge*; *Worrell v. Dunn*. A stamped or printed signature may authenticate the contract, within the meaning of the statute; *Schneider v. Morris*, 2 M. & S. 286; see *Boardman v. Spooner*, 13 Allen, 353; and so may a telegraphic message, signed by the defendant, if sufficiently full and explicit to leave no doubt of that to which he agrees; *Trevor v. Wood*, 36 New York, 407; see *Howard v. Day*, 14 Allen, 487, 2 Smith's Lea. Ca. 249, 7 Am ed.

The revised statutes of New York require the contract to be in writing, and subscribed by the party by whom the lease or sale is to be made; 2 R. S. 135, § 8; and that every instrument required to be subscribed by any party, under that provision, may be subscribed by the agent of such party, lawfully authorized; *Idem*. § 9. To render the instrument binding on either party, it must consequently be signed at the foot or end by him who is to make the lease or execute the deed: *Coles v. Bowne*, 10 Paige, 426; *Champlin v. Parrish*, 11 Id. 410; *Viele v. Osgood*, 8 Barb. 130.

In *Champlin v. Parrish*, the Chancellor said, "The court for the correction of errors has decided that a contract for the sale of lands is not binding upon either party, unless the agreement is in writing, and is subscribed by the party by whom such sale is to be made, or by his agent duly authorized. And that it is not sufficient to charge the vendee, upon such a contract, that the agreement is duly subscribed by him or by his agent; *Townsend v. Hubbard*, 4 Hill, 351. It is also necessary, in order to make such an agreement valid and binding upon either of the parties, that the agreement should be actually subscribed by the vendor, or by his authorized agent. And a mere memorandum of the agreement, in the handwriting of the vendor, or by his agent, containing the names of the parties and conditions of the sale, &c, but without being subscribed with the

name of such vendor, or his agent, is not sufficient, under the provisions of the revised statutes;" see *Davis v. Shields*, 26 Wend. 43.

Where from the nature of the subject matter, a contract cannot be specifically enforced against one party, it will not be enforced at his instance against the other, because performance is a condition precedent to the right of compensation, and the court should not enforce payment where it has no sufficient means of ascertaining whether the stipulated benefit has been conferred. It were obviously unjust to compel any one to accept the services of another, unless it can be known with certainty whether they are faithfully performed; *Pickering v. The Bishop of Ely*, 2 Young & Collier, C. C. 249; *Johnson v. The Railway Co.*, 3 De Gex, M. & G. 914; *Buck v. Smith*, 29 Michigan, 166; *The Marble Co v. Ripley*, 10 Wallace, 359. This is sometimes put on the ground of want of mutuality; see Fry on Specific Performance, chap. 8, sec. 286; but really depends on a different principle.

It is equally well settled that equity will not enforce a contract, where the effect would be to deprive the vendor of the land without affording him an equivalent. Although the consideration need not be adequate, it must not be illusory, nor such as to indicate that the complainant took advantage of the defendant's negligence or want of foresight. A promise to convey, in consideration of a promise to search for coal or minerals, and

pay so much for each ton that shall be mined or dug, is not a fit subject for a decree of specific performance; *Cooper v. Pena*, 21 California, 403; *Geiger v. Geiger*, 4 Gill, 472; *Tyson v. Watts*, 1 Maryland Ch. 124; 7 Gill; *Reeder v. Trotter*, 10 Maryland, 282. The principle was applied in *Reeder v. Trotter*, although the vendor had received \$10,000 in hand; but it was at the same time determined that he could not keep the money and the land, and must refund the one if he elected not to convey the other. For a still stronger reason a specific performance will not be decreed where the covenants which constitute the consideration are void; *Bateman v. Porter*, 9 Allen, 234; and the rule was applied in *Bateman v. Allen*, although the defect arose from a failure to record the deed, which might have been obviated by due care on the part of the defendant.

The doctrine that an unequal contract will not be specifically enforced, was applied in *The Marble Co. v. Ripley*, 10 Wallace, 359; Strong, J., said: "Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that, when from personal incapacity, the nature of the contract, or any other cause, a contract is

incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from the difficulty attending its execution in the former." *Richmond v. The Dubuque Railroad*, 33 Iowa, 422.

It was declared in like manner in *Buck v. Smith*, 29 Mich. 166, that courts of equity cannot assume to specifically enforce an agreement to enter a copartnership, and as a member of the firm to exercise and apply personal skill and judgment according to the shifting needs of property and business, in the control and management of the partnership assets, and will not, therefore, enforce the other side of a contract, of which such an agreement is the counterpart. A chancellor will not, therefore, compel the execution of an agreement to convey land, in consideration of the vendee's entering into partnership with the vendor; *Buck v. Smith*.

In *Bodine v. Glading*, 9 Harris, 50, a proviso that the vendor might resell if the price was not paid at the day, and charge the purchaser with the difference, was held to preclude a decree for a specific performance. Lewis, J., said that "if such a decree could be made at the instance of a complainant who was not compellable to perform the agreement, the defendant might be obliged to fulfil a disadvantageous contract, which he could not have enforced if it had turned out to his advantage. It did not appear that the parties contemplated

any other remedy for a violation of the contract than a re-sale and the payment of the difference. If the contract was mutual, both parties were entitled to insist upon a re-sale. If the vendor alone had that right, the want of mutuality was an answer to the bill. Where the contract itself assessed the damages which the party was to pay upon his doing or omitting to do a particular act which he covenanted to abstain from or perform, equity would not interfere to prevent or to enforce the act in question, or to restrain the recovery of the damages; 2 Vern. 119; Foulb. Treat. Eq. 142, note; 2 Bro. P. C. 436; Newlin on Contr. 313; see *post*, notes to *Slooman v. Walters*. There was no substantial difference between an agreement assessing the damages, and one providing the means of assessing them. The foundation of the chancery jurisdiction in decreeing specific performance was the supposed impossibility of doing justice by an award of damages. But where the parties themselves agreed upon the compensation for the breach, or, what was the same thing in principle, pointed out the method by which it was to be ascertained, the necessity for the intervention of a chancellor ceased, and with it his jurisdiction.

Two reasons were assigned in this instance: one that the contract was not mutual, the other that the parties had fixed the compensation for the breach. We may doubt whether either was a sufficient ground for the judgment. The stipulation that the vendor

might re-sell was in the nature of a condition of defeasance, introduced for his benefit, and which he might waive at pleasure. By filing a bill for a specific performance, he affirmed the contract, and the purchaser's want of punctuality was not a reason why he should be exonerated from payment. The argument from the want of mutuality seems equally invalid. It is irreconcilable with the decisions which establish that a contract that another shall have the privilege of buying may be specifically enforced, although the obligation is not mutual, and although he does not sign the contract.

Whatever the rule may be where the contract liquidates the damages, the object of a penalty is *prima facie* to secure the fulfilment of the contract, and not to exclude the right to a specific performance; *Howard v. Hopkins*, 2 Atkyns, 371; *Kennedy v. Lee*, 3 Merrivale, 441, 450; *Ewing v. Gordon*, 49 New Hampshire, 457; *Gillis v. Hall*, 7 Philadelphia R. 422; *post*, notes to *Slooman v. Walters*. In *Hobson v. Trevor*, 2 Peere Williams, 191, Lord Chancellor Macclesfield observed: "It can be no argument to say that the defendant ought only to pay the penalty of £5000, because the agreement is recited in the bond; and such agreement was not to be the weaker, but the stronger for the penalty." And Shaw, C. J., in *Dooley v. Watson*, 1 Gray, 414, said: "Courts of equity have long since overruled the doctrine that a bond for the payment

of money conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out. And see *Hilliard on Vendors*, 435; *Ensign v. Kellogg*, 4 Pick. 1; *Hall v. Sturdivant*, 46 Maine, 34; *Ewing v. Gordon*."

TIME IS NOT ORDINARILY OF THE ESSENCE OF A CONTRACT FOR THE SALE OF LAND.—It is well settled that an executory contract of sale, will not be enforced at the instance of one who is not ready and willing to tender or convey that which the purchaser agreed to buy, at the time and in the way prescribed, and that a default in this regard cannot be excused by showing that it was due to causes beyond the vendor's control, or that it was not injurious to the purchaser; *McCullough v. Dawson*, 1 Indiana, 413; *O'Kane v. Kiser*, 25 Id. 168; *Garth v. Lees*, 3 Hurlstone & Coltman, 558; *Russell v. Nicoll*, 3 Wend. 212; *Codrington v. Paleologo*, 2 Exchequer, 193; *Hoare v. Rennie*, 5 Hurlstone & Norman, 19. The principle applies whether the subject matter of the contract is goods or land; *The Bank of Columbia v. Hagner*, 1 Peters, 455; and is recognized in chancery as well as by the courts of common law; see *Tilly v. Thomas*, Law R. 3 Ch. App. 61, 67, 69; *Palmer v. Temple*, 9 A. & E. 508, 517; *Hill v. Fisher*, 34 Maine, 143; *Sansom v. Rhodes*, 6 Bing. N. C. 261; *Mar-*

shall v. Powel, 9 Q. B. 779, 792; *Sugden on Vendors*, Ch. 4 sect. 1; *Shaw v. Wilkins*, 8 Humphreys, 647, 652.

In *Hill v. Fisher*, the suit was brought on a contract to convey a tract of land in consideration of \$455, one-half to be received at the time, and the residue at the end of the year. The first instalment was paid punctually, but the vendor refused to accept the second, which was not tendered until some months after it became due, and it was held that the purchaser was not entitled to damages for the vendor's refusal to give a deed. In an action at law, when the question is whether a party has performed his part of a contract which requires performance within a certain time, the court cannot declare that immaterial, which the parties by their contract have made material; *Hill v. The School District No. 2*, 17 Maine, 316; *Allen v. The Inhabitants of Cooper*, 22 Id. 123; see *Phillips v. Rose*, 8 Johnson, 392.

In like manner where the vendor failed to execute a conveyance at the appointed time, it was held that he could not recover the price except on equitable principles, although the deed was delivered a few days later and accepted by the purchaser; *Jordan v. Cooper*, 3 S. & R. 564, 576; see *Haverstick v. The Erie Gas Co.*, 5 Casey, 254.

On the other hand when the right of property or title passes under the contract, it will not fail because the vendor does not deliver or convey at the day, or because the purchaser omits to pay

the price when due; *Martindale v. Smith*, 1 Q. B. 389; see *Welsh v. Moffit*, 1 Thompson & Cook, 575. It is a general rule that although one who seeks to enforce a contract must show that he has performed, or is ready and willing to perform every stipulation which is precedent or concurrent, a recovery may be had, notwithstanding his failure to comply with a stipulation, which is not to be performed until after the period fixed for the fulfilment of that on which he sues, unless it was intended to operate as a condition, and avoid the contract if not fulfilled. See *Morton v. Lamb*, 7 Term, 125; *Edgar v. Boies*, 11 S. & R. 445, 450; *Wilkes v. Smith*, 10 M. & W. 360; *Roach v. Dickinson*, 9 Grattan, 156; 2 Smith's Lead. Cases, 23, 7 Am. ed. Thus in the common case of a sale on credit, the failure of the purchaser to pay the price, does not entitle the vendor to have back the goods, unless the contract contains an express provision to that effect. In like manner where specific chattels are sold to-day, to be paid for next week, and delivered at the end of a month, the purchaser may, notwithstanding a failure to pay at the appointed time, tender the money subsequently, and maintain trover or replevin for the goods; *Martindale v. Smith*.

The principle is clearly stated in Addison on Contracts, Am. ed. 235. "When the sale is of quantity, of things of a certain kind, and may be fulfilled by the delivery of any goods answering to the terms prescribed, the right of

property does not pass from the vendor to the purchaser, and time will, in general, be of the essence of the contract so long as the contract remains executory, and the purchaser will not be bound to accept and pay for the goods if they are not tendered on the day specified. But if the sale is of specific ascertained chattels, and the ownership and right of property in the thing sold have been transferred by the bargain to the purchaser, time is not of the essence of the contract, and the vendor cannot repudiate the sale and revest the right of property and the ownership in himself, and refuse to deliver the goods at a subsequent period, on a tender of the price, on the ground of the non-payment thereof at the time appointed; *Martindale v. Smith*, 1 Q. B. 235; *Wilmshurst v. Bowker*, 7 M. & Gr. 882; unless the sale has been made conditional on payment at the time named, and it appears to have been the intention of the parties that the sale should be at an end and the vendor entitled to sue for damages, in case of the non-payment of the purchase-money at the appointed period." Addison on Contracts, 235, Am. ed.

From what is here said two conclusions follow: one, that where the right of property passes under the contract, it will not fail because the purchaser does not pay the price, or the vendor withholds the goods; the other, that an executory contract cannot be enforced unless its requirements are fulfilled as it regards time, quantity, kind, and every other

particular for which it provides, although seemingly trivial or minute; *Howe v. Remena*, 5 H. & N. 19; *Coddington v. Paleologo*, 2 L. R. Exchequer, 193; *Garth v. Lees*, 1 H. & C. 558; *Russell v. Nicols*, 3 Wend. 212; *Cross v. Eglin*, 2 B. & Ad. 106; *Ryland v. Kreitman*, 19 C. B., N. S. 351; *Levi v. Levi*, 1 Ellis & Ellis, 969. A sale of a specific chattel will stand good, notwithstanding the entire failure of the consideration through the inability or neglect of the purchaser; *Martindale v. Smith*, 1 Q. B. 389; but punctuality is essential under an agreement to sell and deliver goods of a particular kind, or answering to the description given in the contract, at a certain time; and if the day named be the 31st of August, a tender on the 1st of September is too late. This principle prevails alike in equity and at law; see *Tilly v. Thomas*, L. R. 3 Ch. Appeals, 61; and a chancellor will neither enforce an executory contract at the suit of one who is in default, nor rescind an executed contract because the goods are not delivered or paid for at the appointed time. The difference is that while an agreement for the sale or conveyance of land is regarded as executory in one jurisdiction, it confers an equitable estate in the other, attended with many if not all the incidents of ownership. Hence a delay in making title or payment will not operate as a forfeiture, unless it results in an injury which is insusceptible of compensation. Such is the legal rule where the sale is

of a specific chattel, or of goods which are set apart for the purchaser, though still remaining in the custody of the vendor, and there is good sense and justice in applying it to sales of land; *Martindale v. Smith*; *Siter's Appeal*, 2 Casey, 178; *Sutter's Heirs v. Ling*, 1 Id. 466; *Richter v. Selin*, 8 S. & R. 425, 440; *Robb v. Mann*, 1 Jones, 300; *Russell's Appeal*, 3 Harris, 319; *Bowie v. Berry*, 3 Maryland, 359; *Papin v. Massey*, 27 Missouri, 445, 452; *Wright v. Thompson*, 14 Texas, 588; *Kerr v. Day*, 2 Harris, 112, 114; *Hunter v. Bates*, 25 Indiana, 299. The rule which governs the sale of chattels is here applied to real estate. It is well settled, that when the parties agree on the thing, and the price, the right of property passes, although the goods are not delivered nor the purchase-money paid. They may make payment or delivery a condition precedent, or provide that a default in either respect shall avoid the contract, but such an intention will not be implied. And such is the interpretation given by a chancellor to a contract for the purchase of land. See *Haugwout v. Pomeroy*, 7 C. E. Green, 119; 8 Id. 531.

The principle is accurately given in *Haugwout v. Pomeroy*. "In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase-money. After the contract the vendor is the trustee of the legal estate for the vendee;

Crawford v. Bertholf, Saxton, 460; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Huffman v. Hummer*, 2 C. E. Green, 264; *King v. Ruckman*, 6 C. E. Green, 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase-money; 1 Story's Equity, § 789; 2 Ibid., § 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract he became trustee, and therefore liable to account; 2 Spence's Eq. Jur. 310; or the second purchaser, if he have notice at the time of the purchase, of the previous contract, will be compelled to convey the property to the first purchaser; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Downing v. Risley*, 2 McCarter, 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was; 1 Eq. Cases Abr. 384; *Story v. Lord Windsor*, 2 Atkins, 631. The *cestui qui trust* may follow the trust property in the hands of the purchaser, or may resort to the purchase-money as a substituted fund; *Murray v. Ballou*, 1 Johns. Ch. 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doc-

trine of the specific performance of contracts for the sale and conveyance of land mainly depends."

It was declared in like manner by Duncan, J., in *Richter v. Selin*, that "equity looks upon things agreed to be done, as actually performed. Consequently, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase-money. So much is the vendee considered in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate, between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interval; because by the contract, he is the owner of the premises, to every intent and purpose, in equity."

It is accordingly well settled that if the premises are consumed by fire subsequently to the sale, or are swept away by a flood, or if they are injured by a tort-feasor, the loss will fall on the purchaser, who can neither make the deterioration a ground for refusing to accept a conveyance, nor rely on it as a defence to an action brought for the purchase-money; *Robb v. Mann*, 1 Jones, 300. The rule was applied in *Robb v. Mann*, although the machinery and fixtures of a distillery which had been sold by an administrator under an order of court, were removed by a trespasser before the purchaser was entitled to possession under the contract, and while he was conse-

quently powerless to prevent the wrong. Rogers, J., said, "the question is to whom the property belonged in the intermediate time between the sale and its confirmation by the court, or in other words, was it the property of the administrator and heirs, or the property of the purchaser. The loss of whatever kind and by whomsoever caused, must be borne by the owner. Had there been a private sale it could hardly have been considered an open question, for if there be any point settled, it is that when a contract is made for a sale of land, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee for the vendor of the purchase-money. So much is the vendee considered in contemplation of equity as actually seized of the estate, that he must bear any loss that may happen to the estate between the agreement and conveyance, and he will be entitled to any benefit that may accrue to it in the interval, and the reason assigned is, that by the contract he is the owner of the premises to every intent and purpose in equity; *Richter v. Selin*, 8 S. & R. 440; Sugden on Vendors, ch. 4. This principle, which is indisputable, would seem decisive of the question unless a distinction can be taken between a private and a judicial sale, which is not sanctioned by the authorities; see *Stoever v. Rice*, 3 Wharton, 25; *Bashore v. Whisler*, 3 Watts, 494; *Morrison v. Wurtz*, 7 Id. 437." * * "It can scarcely admit of a doubt that had the buildings, including the

machinery, been destroyed by fire, whether caused by accident or design, the loss would fall on the purchaser, on the reasonable principle on the contemplation of equity, he is the owner of the premises from the time of the sale." The court went on to observe, that if the purchaser cannot maintain trespass for an injury done to the premises before he is entitled to possession, he may have an effectual remedy through an action on the case.

It has been held in like manner that the contract may be specifically enforced, notwithstanding the destruction of the premises by fire subsequently to the sale, and although the vendor fails to renew the insurance, or notify the purchaser that it is about to terminate; *Brewer v. Hibberd*, 30 Maryland, 301. Such a conclusion is the more reasonable, because the right of the vendor to insure for protection of the vendee, or for a greater amount than the unpaid purchase-money, is questionable, and authorities may be found looking either way. See *Shotwell v. The Jefferson Ins. Co.*, 5 Bosworth, 247; *Updegraff v. The Ins. Co.*, 9 Harris, 513; 2 American Lead. Cases, 850; 5 ed.

It follows conclusively from the same rule, that if the premises are sold after the sale under a judgment against the vendor for a sum exceeding the amount of the purchase-money, the vendee will be entitled to the surplus, although he has not paid any part of the price; *Siler's Appeal*, 2 Casey, 178.

It results from the principle above stated, that as the immediate effect of the contract is to vest the ownership of the land in the vendee, and that of the purchase-money in the vendor, so the right thus acquired, will not be forfeited by a failure to execute a conveyance or pay the price at the appointed time, unless the circumstances, or the terms employed, are such as to take the case out of the general rule. In other words, the contract, although executory in form, is regarded by a chancellor as executed in fact, and consequently within the rule which would be applied at law if the vendor had given a deed.

The doctrine has sometimes been put on a different ground, that where the vendor is ready and willing to fulfil the contract in every particular, although not until after the appointed time, and the only defence is that he did not execute a conveyance or pay the price at the day, a chancellor does not regard the delay as material, unless it appears that some injury ensued which does not admit of compensation; *DeCamp v. Feay*, 5 S. & R. 323.

In this instance *DeCamp* covenanted to convey to *Feay*, in consideration of receiving \$4,000 in instalments, which were all paid at maturity, except the last; when that became due the purchaser tendered part, which the vendor accepted, on condition that if the purchaser did not pay the residue within six days, the contract should be void. The residue was not tendered until five months after-

wards, and the vendor then declined to receive the money or execute a conveyance. The court held that the refusal was not justifiable, and that the contract should be specifically enforced.

Gibson, J., said, "where time admits of compensation, as it perhaps always does where the lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement. Neither do I consider that the subsequent agreement, by which the parties stipulated that if the whole sum should not be paid at a certain day, the payment then made should be forfeited, and the original bargain be at an end, gave the defendant any additional right to rescind.

Vernon v. Stephens, 2 P. Wms. 66, comes fully up to the case before us; and there the subsequent agreement was not only positive, that in default of payment by a particular day, the articles should be delivered up, but the parties solemnly entered into an order of court to enforce performance of it, yet the chancellor, on the ground that the agreement and order were in the nature of a penalty, and intended only as a security for payment of the money, relieved against them on payment of principal, interest and costs, saying that where the defendant has received that, he has no right to complain of having suffered. It is precisely on the same principle, that in other cases chancery relieves against the exercise of a legal right expressly arising out of a contract, as in the case of a

mortgage; or a right of entry for a forfeiture incurred by the non-performance of a covenant in a lease to pay the rent at a particular day; or against the forfeiture of the deposit by reason of non-payment of the purchase-money, or against payment of a higher rate of interest, if the principal be not paid by a particular day."

The doctrine that lapse of time is not essential in equity, unless it is material, and that it will not be regarded as material where no injury results from the delay, or none that does not admit of compensation, was also advanced in *Falls v. Carpenter*, 1 Dev. & Batt. Eq. 272, where Ruffin, C. J., said that if a bond is conditioned for the conveyance of land at a certain time, and the deed is not delivered until the ensuing day, the obligee may enforce the penalty at law, but will be enjoined by a chancellor, from recovering more than an equivalent for any loss that has been occasioned by the breach.

There can be little doubt that it is on the ground taken in *Houghwout v. Pomeroy*, and not on that assigned in these instances, that a court of equity ordinarily proceeds in decreeing a specific performance, notwithstanding a default in point of time. As the right vests on the signing of the agreement, and not from what is done under it on either side, a default in payment or performance will not avoid the right, although it may give rise to a failure of consideration, and thus operate as a defence. The parties may how-

ever make the payment of the purchase-money, or the delivery of a deed, conditions which must be punctually fulfilled, and it may then be requisite to consider whether the breach is fatal or admits of relief, which will depend in general on whether the parties intended that an exact performance of the agreement should be a condition precedent to the vesting of the right. When such is manifestly the design, it is not less obligatory on a chancellor than in a court of common law; *Phelps v. The Illinois Central R. R. Co.*, 63 Illinois, 468; *Fallon v. Kennerly*, 45 Missouri, 124; *Reid v. Burden*, 11 P. F. Smith, 460. The breach of a condition subsequent will not avoid the agreement under the rule laid down in *Feay v. DeCamp*, if it is not perverse, admits of compensation, and is not manifestly perverse or wilful.

To whatever ground we may refer the rule, that time is not ordinarily of the essence of a contract for the sale of land, it is established under a train of decisions which have come down from the earliest recorded history of equitable jurisprudence to the present time, and is a legitimate deduction from the doctrine which lies at the foundation of the present system of conveyancing, that one to whom land is bargained and sold, is as much the owner as if he had received a deed; *Walton v. Wilson*, 30 Mississippi, 576; *Edgerton v. Peckham*, 11 Paige, 352; *Pinckney v. Hagerdon*, 1 Duer, 90; *Remington v. Irwin*, 2 Harris, 143; *Viele v. The Troy*

and Boston Rail Road, 21 Barbour, 381; *Ewing v. Crouse*, 6 Indiana, 312; *Keller v. Fisher*, 7 Id. 718; *Huffman v. Hanna*, 2 C. E. Green, 263; *Crittenden v. Drury*, 4 Wisconsin, 205; *Brock v. Heddy*, 13 Ohio, N. S. 305; *Snyder v. Spaulding*, 57 Illinois, 486; *Smoot v. Rea*, 19 Maryland, 406; *Hull v. Sturdivant*, 46 Maine, 34; *Jones v. Robbins*, 29 Maine, 351; *Sharp v. Trimmer*, 9 C. E. Green, 422; *Hubbell v. Von Schœning*, 49 New York, 326; *Van Campen v. Knight*, 63 Barb. 205; *Dresel v. Jordan*, 104 Mass. 407; *Quinn v. Roath*, 37 Conn. 16; *Spalding v. Alexander*, 6 Bush. 160. *Linton v. Potts*, 5 Blackford, 396; *Shafer v. Niver*, 9 Michigan, 253; *Bomier v. Caldwell*, 8 Id. 463. Agreeably to some of the decisions, the rule applies not only to mutual agreements, but where the vendor covenants to convey, or that the vendee shall have the privilege of buying, and although the latter does not bind himself to accept a deed or give the price; *Townley v. Bidwell*, 14 Vesey, 691; *Ely v. Beaumont*, 5 S. & R. 124; *Kerr v. Day*, 2 Harris, 112; *D'Arras v. Keyser*, 2 Casey, 249, *post*. The question is not what is the time prescribed for payment on one side, or for performance on the other, but whether there has been a wilful or injurious delay, rendering it inequitable to enforce the contract.

The rule is peculiarly applicable where the default consists in the failure of the purchaser to pay at the appointed time, because interest may then be given as a compensation for the postponement of

the principal; see *Decamp v. Feay*, 3 S. & R. 325, 327; *Sharp v. Trimmer*, 9 C. E. Green, 422; *Shortall v. Mitchell*, 57 Illinois, 161; *Pritchard v. Todd*, 38 Conn. 413; *Converse v. Blumrich*, 14 Michigan, 109, 114; *Young v. Daniels*, 2 Clarke, Iowa, 126; *Longworth v. Taylor*, 1 McLean, 375; 14 Peters, 172. In the case last cited, Longworth entered into a sealed agreement in the year 1814, for the purchase of a lot of land from Taylor, for a stipulated sum, payable one-third immediately, one-third six months afterwards, and the residue at the expiration of a year; and it was also provided, that a conveyance should be executed within three months from the signing of the contract. The first instalment was paid by the purchaser, who took possession of the land, but the deed was not executed, and when the second instalment matured, it was postponed on Longworth's agreeing to pay interest at the rate of nine per cent. The interest was paid punctually until the close of the year 1819, and in the meantime Longworth erected buildings, which enhanced the value of the premises. During that year, or in the beginning of the next, he was notified that one Chambers was about to institute proceedings in equity for the recovery of the land. Such a suit was accordingly commenced in November, 1823, and prosecuted until 1830, when it ended in a decree for the defendants. During the interval Taylor brought an ejectment against Longworth for

the lot, and recovered judgment and possession under it, in August, 1824.

In the year 1825, Longworth filed a bill in equity against Taylor, for a specific performance of the agreement, which was not brought to a hearing till some ten years afterwards, when the Circuit Court rendered a decree for the complainant, which was affirmed by the Supreme Court of the United States. Story, J., said in delivering the opinion of the court above.

"The substantial question in the cause is, whether, under all the circumstances, the plaintiff, Longworth, is entitled to a specific performance of the contract for the purchase: and upon the fullest consideration we are of opinion that he is, and that the decree is therefore right. We shall now proceed to state, in a brief manner, the grounds upon which we hold this opinion.

"In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of

circumstances, affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.

"But except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract: and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases, the court expects the party to make out a case free from all doubt; and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay, and apparent omission of his duty.

"It does not seem necessary to cite particular authorities in support of these doctrines, although they are very numerous. It will be sufficient to refer to the cases of *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Law*, 9 Id. 456, 493, 494, and *Brashier v. Gratz*, 6 Wheat. 528, in this court; and to *Seton v. Slade*, 7 Vesey, 265; *Valsey v. Grant*, 13 Id. 73; *Alley v. Deschamps*, Ib. 225; *Hearn v. Tenant*, Ib. 289; and *Hepwill v. Knight*, 1 Younge & Coll. 415, in England, as affording illustrations in point.

"In applying the doctrines above stated to the facts and circumstances of the present case, the first remark that occurs is, that the

first default was on the part of Taylor. By his contract he undertook to make a deed of general warranty of the premises in the course of three months after the date of the contract; the second instalment not being payable until a long time afterwards. He never made any such deed, or offered to make it; and if he had, it is obvious, that instead of his being placed in the situation of a defendant in equity, as he now is, he would have been compelled to be a plaintiff either to enforce a specific performance, or to rescind the contract. Now, the plain import of the words of his contract is, that he will make the deed. The excuse for the omission is, that it was the duty of the other side to prepare and tender a formal deed to him for execution. And authorities are relied on, principally from the English courts, to show, that in all cases of this sort, the established rule is, that the vendee shall prepare and tender the conveyance. This is certainly the rule in England, founded, doubtless, upon the general understanding and practice among conveyancers, as well as upon the peculiar circumstances attendant upon conveyances in that country. The same rule does not seem to have been adopted generally in America, although it may be adopted in some States. In Ohio, the rule is stated by the learned judge who decided the present case, not to prevail; and the local practice, in a case of this sort, ought certainly to constitute the proper guide in the interpretation

of the terms of the contract. But waiving this consideration, let us proceed to others presented by the case.

"Up to the close of the year 1819, there is no pretence to say, that there had been any violation of the contract on the part of Longworth; and no step whatever was taken by Taylor, until he brought the ejectment in 1822, to enforce the contract. That ejectment he asserts in his answer to have been brought in order to compel Longworth to complete the contract, or to put an end to it.

"In the meantime, Longworth had been left in the possession of the premises, under the contract, had made improvements upon them, and had received the rents and profits with the acquiescence of Taylor. Under such circumstances, where there had been a part performance, and large expenditures on one side, under the contract, and acquiescence on the other side, it would be incompatible with established doctrine, to hold that one party could, at his own election, by a suit at law, put an end to the contract. It could be rescinded by Taylor only, by the decree of the court of equity; which decree would, of course, require full equity to be done to the other party, under all the circumstances. Pending the ejectment, Longworth made several propositions for payment, varying from the original conditions, all of which were declined by Taylor; although it seems that Longworth supposed that some of them would have been satisfactory. The re-

covery in the ejectment was of course successful, as the legal title was in Taylor, and the equities of Longworth could not be matters of defence to that suit.

"The present bill was brought in the succeeding year; and the question is, whether, under all the circumstances of the case, Longworth is now entitled to a specific performance of the contract, upon his paying all the arrears of the purchase-money. Undoubtedly if there were no grounds of excuse shown accounting for the delay on his part to fulfil the contract, between September, 1822, when the ejectment was brought, and June, 1825, when the present bill was filed there might be strong reason to contend that he was not entitled to a specific performance of the contract, even if some other relief on account of his improvements might be deemed equitable. But in point of fact, the adverse claim of Chambers and wife to the property, was made known as early as the year 1820, and was asserted by counsel, who were consulted on that occasion, to be valid. The claim was prosecuted (as has been already stated) by a suit in equity, brought in 1823, against Taylor, Longworth, and others, and remained undecided until the close of the year 1829. There is no pretence to say that this claim was not *bona fide* asserted, or that Longworth brought it forward to cover his own default. While it was known and pending, there is as little pretence to say, that Longworth could be compelled to complete the contract on his side

or that he had not a right to lie by, and await the decision of the title, which thus hung, as a cloud, upon that of Taylor. It is one thing to say, that he might waive the objection, and require a conveyance on the part of Taylor; and quite another thing to say, that he was compellable at once to elect at his peril, either to proceed on the contract, or to surrender it. There is no ground to assert that from the commencement of the present suit, Longworth has not always been ready and willing to pay up the arrears of the purchase-money, and to complete the contract. The proofs in the case are entirely satisfactory on this head. In our opinion the lapse of time is fairly accounted for by the state of the title; and therefore Longworth has not been guilty of any delay which is unreasonable or inexcusable."

It is well settled, in accordance with these principles, that one who does not pay the price, or make a good title at the time prescribed, or until many years afterwards, may be entitled to a decree of specific performance, if the circumstances are such as to excuse the delay; *Bennet v. Welch*, 25 Indiana, 140; *Brumfield v. Palmer*, 7 Blackford, 227; *Morgan v. Scott*, 2 Casey, 51; *McLaughlin v. Shields*, 2 Jones, 283; *Mason v. Wallace*, 3 McLean, 148; *Sarter v. Gordon*, 2 Hill Ch. 121; *The Barbadoes Toll Bridge v. Vreeland*, 3 Green Ch. 157; *Hepburn v. Auld*, 5 Cranch, 262; *King v. Hamilton*, 4 Peters, 311; *Wightman v. Reside*, 2 Dessausure, 578; *Craig v. Martin*, 3 J.

J. Marshall, 50; *Gibbs v. Champion*, 3 Ohio, 334; *Jackson v. Legion*, 3 Leigh, 161; *Getchell v. Jewett*, 4 Maine, 350; *Waters v. Travis*, 9 Johnson, 450; *Keller v. Fisher*, 7 Indiana, 718; *White v. Delaplaine*, 5 Wisconsin, 206, 214. Thus, in *The Barbadoes Toll Co. v. Vreeland*, 3 Green's Ch. 137, the contract was specifically enforced after the lapse of twenty-three years, and in *Waters v. Travis*, 9 Johnson, 450, notwithstanding an interval of like duration, between the making of the contract and the institution of the suit. In both instances, however, the vendee was actually in possession, which rebutted the presumption of abandonment that might otherwise have arisen from the lapse of time; see *Eppinger v. McGreal*, 31 Texas, 147; *Delavan v. Duncan*, 49 New York, 485; *Ballard v. Walker*, 3 Johnson's Cases, 60; *Tate v. Conner*, 2 Dev. Eq. 224; *Baum v. Dubois*, 603 Wright, 587.

In *Longworth v. Taylor*, the contract was enforced at the instance of the purchaser; but it is equally well settled that the vendor may obtain a decree of specific performance, notwithstanding his failure to complete the title, or give a deed at the time designated in the agreement. The equitable estate passes on the execution of the contract, and the purchaser is not necessarily prejudiced because the legal title is not conveyed until a subsequent period; *Musselman's Appeal*, 15 P. F. Smith, 480; *Bell's Appeal*, 21 Id. 465; see *Morgan v. Scott*, 2 Casey, 51; *Ley v. Huber*, 3 Watts, 367; *Tiernan v. Roland*,

3 Harris, 429; *Levison v. Burt*, 4 W. & S. 27; *Townsend v. Lewis*, 11 Casey, 125; *Mayo v. Swope*, 8 Grattan, 46; *Daniel v. Leitch*, 13 Id. 195, 213. This is peculiarly true when he goes into possession and exercise the rights and privileges of an owner; *Campbell v. Shrum*, 3 Watts, 60; *Musselman's Appeal*; *Bell's Appeal*. It is not an answer under these circumstances, that the vendor was unable to make title at the period named in the contract, or when the bill was filed, if he can cure the defect before the master reports adversely, or the case is presented for a final hearing; see *Beebee v. Dowd*, 22 Barb. 255; *The Dutch Church v. West*, 7 Paige, 37; *Brown v. Haff*, 5 Id. 235; *Winne v. Raymond*, 6 Id. 407; *Wilson v. Tappan*, 6 Hammond, 172; *Seymour v. Delancy*, 3 Cowen, 445; *Allerton v. Johnson*, 3 Sandford Ch. 73; *Hepburn v. Dunlap*, 1 Wheaton, 179; *Cotton v. Ward*, 3 Monroe, 313; *Jones v. Robbins*, 29 Maine, 351; *Ley v. Huber*, 3 Watts, 363; *Tiernan v. Roland*, 3 Harris, 429, 436; *Luckett v. Williamson*, 37 Missouri, 383. So a purchaser cannot complain of a want of punctuality in which he has acquiesced, or arising from his neglect or inability to pay the price; *Campbell v. Shrum*. He must be ready, prompt and willing, if he means to insist on punctuality; *Tiernan v. Roland*, 3 Harris, 429, 440. If the purchaser obtains all that he stipulated for, did not insist on exact performance, and has not been prejudiced by the delay, he is liable for the price,

although the costs may be thrown on the complainant. When, however, the vendor can neither make title nor give possession at the appointed time, a chancellor will not enforce the contract, especially if possession was material to the purchaser, and he was ready and willing to pay the price; *McKay v. Carington*, 1 McLean, 51; *Cooper v. Brown*, 2 Id. 495; *Taylor v. Porter*, 1 Dana, 422; *Tiernan v. Roland*, 3 Harris, 429; *Watts v. Waddle*, 6 Peters, 389.

It is moreover established that a chancellor will not lend his aid to a complainant, who did not do all that lay in his power to complete the title within a reasonable time; see *Grundy v. Ward's Ex'rs*, *Littell's Select Cases*, 129; *Rider v. Gray*, 10 Maryland, 282, 286; *King v. Hamilton*, 4 Peters, 311; *Tiernan v. Roland*, 3 Harris, 429; nor to one who fraudulently concealed the defect which occasions the delay; *Christman v. Campbell*, 22 Grattan, 82.

In general equity will not compel the execution of the contract, at the suit of one who did not own what he agreed to sell; *Hurley v. Brown*, 98 Mass. 545; *Pipkin v. James*, 1 Humphreys, 325, 328. Such a contract may be a ground for a recovery in damages, but not for a decree of specific performance; *Tiernan v. Roland*, 3 Harris, 429, 436. It is necessarily uncertain whether the vendor can fulfil the agreement, and he cannot justly require the purchaser to accept that which he might have been unable to convey; *Lay v. Huber*, 3 Watts, 367. The objec-

tion to enforce such a contract is, that while purporting to be absolute, it is really subject to a contingency of which the purchaser may have been ignorant. It does not therefore apply where it appears from the instrument, that the vendor is to acquire the land, and reconvey it at the same or at a higher price; and a specific execution of the contract may, under these circumstances, be essential to the ends of justice; see *Dresel v. Jordan*, 104 Mass. 107; *The Old Colony Railroad v. Evans*, 6 Grey.

It was declared in *Dresel v. Jordan*, 104 Mass. 107, that if the seller is able to "make good the title which he has contracted to convey" in time to comply with the requirements of the contract, "it is not requisite that he should have such title and capacity to convey, or such means at the time of agreement." "It is sufficient upon a contract made in good faith, if he is able to make the stipulated title at the time when by the terms of his agreement, or by the equities of the particular case, he is required to execute the conveyance in order to entitle himself to the consideration; *Richmond v. Grey*, 3 Allen, 25."

Whatever the rule may be in this regard, there is little doubt that an agreement to purchase a title which is known to be defective, or to purchase such right as the vendor has, and take the risk of the title, is obligatory, and may be specifically enforced, if free from the vice of maintenance. See *Brashier v. Gratz*, 6 Wheaton, 528.

The mere circumstance that the

legal title is outstanding, does not preclude the right to sell; and hence one who has an equitable estate arising under articles of agreement, may offer the premises for sale, without waiting until he has obtained a deed; *Tiernan v. Roland*, 3 Harris, 429; *Lay v. Huber*. In *Tiernan v. Roland*, the court held that a purchaser of an estate in fee will not be compelled to take a life estate, nor any estate in which the vendor had no right of property at the time of the pretended sale, although a vendor who has an equitable right at the time of entering into the agreement, may entitle himself to a specific performance, by acquiring the legal title subsequently and before the hearing.

It is the manifest right of a purchaser to have a clear marketable title, and a specific performance will not be decreed unless this requirement is fulfilled, nor when the title, as finally tendered, is subject to a reasonable doubt; *Bumberger v. Clippinger*, 5 W. & S. 366; *Speakman v. Forepaugh*, 8 Wright, 363; *Swayne v. Lyon*, 17 P. F. Smith, 436; *Morgan v. Morgan*, 2 Wheaton, 290; *Buller v. O'Hear*, 1 Dessausure, 382; *Griffin v. Cunningham*, 19 Grattan, 571; *Soheir v. Williams*, 1 Curtis C. C. R. 479; *Richards v. Gray*, 3 Allen, 285; *Sturtevant v. Jaques*, 14 Id. 523, although a mere possibility or suspicion of defect is not a defence; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

The existence of an incumbrance, is not ordinarily a reason for a refusal to execute the

contract, because the purchase-money may be applied under the order of the court to the discharge of the debt, and consequently of the lien; *Thompson v. Carpenter*, 4 Barr, 132; *Guynet v. Maitland*, 4 Duer, 86; *Marsh v. Wykoff*, 10 Bosworth, 202; *Wallace v. McLaughlin*, 57 Illinois, 53. It was held in *Tiernan v. Roland*, 3 Harris, 429, in conformity with this principle, that the execution of a mortgage by the vendor after the contract of sale, will not preclude his right to a specific performance, if the mortgage is satisfied at or before the filing of the bill. But the court will not compel the purchaser to take the land subject to an incumbrance, which cannot be removed because the amount is in dispute, or because it exceeds the sum which he is to pay in cash; *Garnet v. Mason*, 6 Call, 309; *Christman v. Cabell*, 22 Grattan, 82; see *Huntly v. Smith*, 51 New York, 21; *Snyder v. Spaulding*, 57 Illinois, 480; *Wallace v. McLaughlin*, *Id.* 53.

TIME MAY BE ESSENTIAL.—It is established under the more recent course of decision, that although time is not ordinarily, or *prima facie*, of the essence of a contract for the sale of real estate, the parties may, if they think proper, fix the period within which the contract must be fulfilled, and provide that if it be not, all right under it, it shall cease. Whether such a stipulation is regarded as a condition precedent or subsequent, it does not contravene any rule or principle of jurisprudence, and is

not less obligatory on a chancellor than in a court of common law; *Wells v. Smith*, 2 Edwards Ch. 78; 7 Paige, 82; *Benedict v. Lynch*, 1 Johnson Ch. 370; *Willis v. Forney*, 1 Busbee Eq. 256; *Stow v. Russell*, 36 Illinois, 18; *Steele v. Biggs*, 22 *Id.* 643; *Kemp v. Humphreys*, 13 *Id.* 573; *Smith v. Brower*, 5 Gilman, 309; *Baldwin v. Van Vorst*, 2 Stockton Ch. 577; *Kirby v. Harrison*, 2 Ohio, N. S. 326, 332. See *Goldsmith v. Guild*, 10 Allen, 239; *Jackson v. Ligon*, 3 Leigh, 161, 187; *Scott v. Fields*, 7 Ohio, 424; *Brewer v. Connecticut*, 9 *Id.* 189; *Notson v. Barrett*, 1 Green, Iowa, 302; *O'Fallon v. Kennerly*, 45 Missouri, 124; *Heckard v. Sayre*, 34 Illinois, 142; *Reid v. Burdon*, 11 P. F. Smith, 460.

In *Benedict v. Lynch*, the defendant in March, 1810, agreed to sell a tract of woodland to the complainant at a certain price per acre, payable in four annual instalments; it being also agreed that if the payments, or any of them, were not punctually made, the contract should be void. The complainant took immediate possession of the land, and cleared eight acres; but in consequence of unforeseen events, found himself unable to make the stipulated payments. The defendant waited till the close of the second year, when he brought an ejectment and obtained judgment. The complainant subsequently, in the beginning of the year 1814, tendered the whole of the purchase-money, and filed a bill for specific performance. The court held that punctuality was by

the terms of the agreement, essential to the obligation which the complainant sought to enforce. Aside from this, his negligence in not tendering the price until three years after the period fixed for the payment of the first instalment, was an answer to the bill, in the absence of proof that the defendant had acquiesced in the delay. This decision is the more noteworthy, because the entry of the complainant into possession, and his building a house, indicated that he was acting in good faith, and did not mean to waive his right under the contract.

The following language was held by the chancellor in dismissing the bill: "There was an express stipulation in this contract, that if the plaintiff failed in either of his payments, the agreement was to be void. The first question that naturally presents itself, is whether time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment in 1811. Lord Thurlow is said to have intimated, in *Gregson v. Riddle* (cited in 7 Ves. 268), that time could not be made of the essence of the contract, even by a positive stipulation of the parties, but there was no decision on that point; and in other and later cases (*Lloyd v. Collett*, 4 Bro. 569; 4 Ves. 589, n.; *Seton v. Slade*, 7 Ves. 265); it has been admitted, that the parties may make the time of the essence of the agreement, so that if there be

a default at the day without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. The case is not analogous to that of a mortgage, where the only object of the security is the payment of the money, and not the transfer of the estate; and it seems to be conducive to the preservation of good faith, and the rights of parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the courts should not interfere, as of course, to annul such a provision. The opinion of Lord Loughborough, in *Lloyd v. Collett*, contains a strong and decisive argument upon this point. 'There is nothing,' he observes, 'of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound, and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is so essential, that, in no case in which the day has been by any means suffered to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, &c., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that, if the

agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken.' 'I want a case,' he says, 'to prove that where nothing has been done by the parties, this court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no steps had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity.' It would be impossible for me to add to the perspicuity and energy of this reasoning; and the lord chancellor, in that case, held, that as the vendor had omitted to complete a purchase for six months, being all that time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed.

"It may, then, be laid down as an acknowledged rule in courts of equity (and so the rule is considered in the elementary treatises on this subject); (Newland on Contracts, 242; Sug. Law of Vend. 3d London ed. 268), that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that pur-

pose, without being able to assign any sufficient justification or excuse for his delay; and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail (and of which the facts in the present case furnish an example), that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity, to help those who show no equitable title to relief."

In *Wells v. Smith*, a contract for the sale of a city lot contained a provision that the purchaser should on or before a particular day build a house upon the front of the lot, or that in lieu thereof he should on that day pay to the vendor \$1,000, as the first instalment of the purchase-money; the contract further provided that if the vendee neglected or failed to perform any of the covenants therein contained, at the times limited for that purpose, all his right or interest in the premises, whether at law or in equity, should cease. The court

was of opinion, that the parties had made payment at the day an essential part of the contract, and that as the vendee had neither built the house nor paid the \$1,000 at the times prescribed, he was not entitled to a decree of specific performance. The chancellor said: "As to the power of the vendor, or of the purchaser, to make the performance of a condition precedent, essential to the vesting of a legal or equitable right in the adverse party, to a specific performance, I have no doubt; though this court may perhaps relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance. Thus, if a vendor, after he had received the greater portion of the purchase-money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received, and the premises also, if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment, and convey the premises, or to restore the purchase-money already paid, after deducting a reasonable allowance for the use of the premises in the meantime.

In this case, however, the interest of the money till the 1st of August, and the shop which the complainant agreed to leave on the premises, if he did not perform his part of the contract at the day, "are not probably more than the value of the use of the premises in the meantime, and of

the chance of gain to the purchaser by the probable increase in the value of the property. They may, therefore, very properly be considered as reasonable stipulated damages for the non-performance of the contract by the vendee at the time fixed upon by the parties, and are not properly a forfeiture. Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due, frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title, and the delivery of the possession of the premises at the time contemplated by the purchaser, are of essential benefit to him, which cannot be compensated by damages, which are ascertainable by the ordinary rules of computing damages. It would, therefore, not only be unreasonable, but entirely unjust, for any court to hold that parties in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day."

In *Davis v. Stevens*, 3 Iowa, 158, the defendant agreed to sell and convey the premises to the complainant, Davis, "on condition

that he would pay promptly, time being of the essence of the contract;" and the court held that Davis had lost the right to enforce the contract by a want of the punctuality which it exacted.

It was also held that if the vendee wished to claim a specific performance, it was incumbent on him to tender the purchase-money on the day prescribed, without waiting for a demand from the vendor, and that the latter might enforce the forfeiture, although he had not tendered a deed or called on the purchaser to pay the price.

In *Scott v. Fields*, 7 Ohio, 425, the defendant sold the land in controversy to the complainant for the sum of \$831, payable as follows: \$100 in hand; \$200 on the 13th of March, 1835; \$200 on the 13th of June, 1835, and \$331 on the 13th of January, 1836. The agreement also stipulated that in case of the complainant failing to make the payments, he was to forfeit the first instalment, and the agreement was to be considered null and void. The complainant paid the first instalment and went into possession, and the second was also paid at maturity. When the time arrived for the payment of the third instalment, the complainant made default, and the defendant soon afterwards sold and conveyed the premises to a purchaser with notice, who was joined in the bill. The complainant then informed the defendant, that he was ready to pay the third instalment, to which the defendant replied that he had parted with the premises, and was prepared to re-

fund the second instalment. When the last instalment became due, the vendee tendered the whole amount of the purchase-money, with interest, which was refused. The court held that "the parties had made time of the essence of the contract, and that the complainant had violated the agreement by failing to pay the third instalment." The bill was accordingly dismissed, but with a decree for the repayment of the second instalment.

In *Bullock v. Adams*, 5 C. E. Green, 371, the chancellor said, "courts of equity do not in general consider the time of performance as of the essence of a contract for the sale of lands, but hold that it may become of the essence, by being expressly made so by the contract itself; Fry on Specific Performance, §§ 610 and 712; 1 Story's Eq. Jurisprudence, § 776; Sugden on Vendors, ch. viii., p. 305; *Mackreath v. Marlar*, 1 Cox, 259; *Hudson v. Bartram*, 3 Maddock, 440; *Baynham v. Guy's Hospital*, 3 Vesey, Jr., 295; *Seton v. Slade*, 7 Vesey, 270; *Lloyd v. Rippingale*, 1 Young & Collier Ex. 410; *Hipwell v. Knight*, Ibid. 401; *Honeyman v. Marryatt*, 21 Beavan, 14; *Benedict v. Lynch*, 1 John Ch. Rep. 370; *Wills v. Smith*, 7 Paige, 22; 4 Edw. Ch. Rep. 697; or by notice from the other party insisting upon performance at a time fixed; Fry, § 722; or from the subject matter of the contract and its surroundings; Fry, §§ 713, 715; *M'Cay v. Carrington*, 1 M'Lean, 50; *Holt v. Rogers*, 8 Peters, 420; *Levi v. Linds*, 3 Mer. 81; *Coslake*

v. Till, 1 Russ. 376; *Wright v. Howard*, 1 Simon & Stuart, 190; *Young's Administrator v. Rathbone*, 1 C. E. Green, 224 " The same doctrine may be found in *Barnard v. Lee*, 97 Mass. 92, although the circumstances did not admit of its application.

A similar view was taken in *Fallon v. Kennerly*, 45 Missouri, 127, where the court held that "relief may be given against a forfeiture arising from the breach of a stipulation, that the contract shall be void if the money be not paid at the time prescribed; but that it will not be accorded except on some distinct and sufficient ground, as for instance, that the purchaser went into possession and made valuable improvements, or paid a considerable portion of the price, or that the default was occasioned by the act of the vendor, or that he waived it by receiving part of the purchase-money, or where other circumstances render it inequitable to enforce the forfeiture."

It results from the authorities above cited, that the vendor may make punctuality a condition on which the obligation depends. It is wise, and it is but just, that he should be permitted to impose any condition which pleases him, and the purchaser is willing to accept. When such a stipulation is agreed to, it should be fulfilled, and laches or want of means are not a ground for equitable relief. If a chancellor can extend the time of payment for a day, he may extend it for twelve months, or for twelve

years, or indefinitely. Where such a jurisdiction is claimed, it is hardly safe to enter into a contract of sale. The latitude which has been accorded in some instances, operates injuriously by keeping the vendor in doubt whether the buyer can or will comply with his part of the agreement. In this uncertainty the vendor has not the money nor the land, and can neither improve the one nor engage in any new enterprise for which the other is required; *Bullock v. Adams*, 5 C. E. Green, 371.

It has, nevertheless, been held that when the agreement is not that it shall be void in default of punctual payment, but that the vendor may avoid the contract, or that he "shall be at liberty to consider the contract forfeited and enter upon and take possession of the land," the failure of the purchaser to pay at the day, will not work a forfeiture, unless the vendor gives notice of his intention to take advantage of the breach, or does some act which clearly indicates that such is his design; *Armstrong v. Pearson*, 5 Iowa, 317; *Young v. Daniels*, 2 Id. 126. It was further held in these instances, that to render such a rescission valid, it must be attended with a repayment or tender, of any sum that may have been received under the contract, and of the securities given for the price; and the same point was determined in *Murphy v. Lockwood*, 21 Illinois, 611, 620; see *White v. Butcher*, 6 Jones Eq. 231.

In *Staley v. Murphy*, 47 Illinois, 244, Lawrence, J., said: "There are undoubtedly cases where the pur-

chaser has been guilty of gross laches, in which the vendor would be justified in re-selling to a third person, without first tendering to the first purchaser the money paid, either holding it subject to his order, or until the equities between them growing out of the contract and its violation by the purchaser, can be adjusted; *Thompson v. Bruen*, 46 Illinois, 125. But while the money paid need not be returned in every case, as a preliminary to the rescission of a contract for non-performance by the vendee, the unpaid negotiable notes must always be either returned or cancelled, so that they cannot be negotiated and their payment enforced. As was said by the court, in *Chrisman v. Miller*, 21 Illinois, 236, the vendor who rescinds must place himself in a position where he cannot enforce the contract as against the vendee. He cannot be permitted to retain the notes with the power of negotiating them to innocent purchasers, and, at the same time, insist that the contract is terminated, and the rights of the vendee extinguished." *Heckard v. Sayre*, 34 Illinois, 142; *Converse v. Blumrick*, 14 Michigan, 109, 115; *Morris v. Hoyt*, 11 Id. 9.

Where, however, the contract stipulated that "in case the party of the second part shall fail to make the aforesaid payment punctually, this contract shall become utterly null and void, and all right under it shall cease, and the premises shall revert to the party of the first part without any re-entry or declaration of forfeiture, it was

held in accordance with the opinion of Chancellor Walworth, in *Wells v. Smith*, ante, 1121, that the vendor might insist on the forfeiture, although he had not notified the vendee, or returned the notes which had been given for the purchase-money; *Phelps v. The Illinois Central R. R. Co.*, 63 Ill. 468.

Any act which shows unequivocally that the vendor considers the contract as at an end, may operate as an election to enforce the forfeiture; and it seems to be held in Illinois that this effect will follow from the sale of the premises to a third person, although not made known to the purchaser; *Chrisman v. Miller*, 21 Ill. 227, 236; *Fitch v. Boyd*, 55 Ill. 307, 309.

It has also been determined in that State, that the obligation of the vendor to return the securities given for the purchase-money, if he intends to avoid the sale, ceases when they reach maturity, and cannot be freed from the equities between the original parties by a transfer or negotiation; *Fitch v. Boyd*; *Phelps v. The Railroad Co.*, 63 Illinois, 468, 476.

In *Bodine v. Glading*, 9 Harris, 50, the terms of the sale were "cash to be paid within fifteen days, or the property may be resold at the risk and expense of the purchaser." The defendant, Glading, bought the premises, but declined to pay the price, on the score of an objection to the title, which seems to have been made in good faith, but proved to be unfounded. Some months afterwards the vendor filed a bill for specific performance.

Lewis, C. J., said that time was clearly of the essence of the sale, which ceased to be obligatory on the vendor, when the purchaser suffered the fifteen days to elapse without tendering the money. It followed that on the occurrence of the default, the contract lost the mutuality which was essential to a decree for specific performance, and the bill must consequently be dismissed. Two objections may be made to this judgment; one, that a party may in general waive a right introduced for his benefit; the other, that the provision for a resale, was not intended to avoid the contract, but simply to afford a means of assessing the damages occasioned by the default. Where goods remain unpaid for in the hands of the vendor, he may, on due notice, or under an express provision to that effect, dispose of them at public sale for the account of the purchaser and at his risk, without losing the right to maintain *indebitatus assumpsit* for the price; and there is no reason why a sale of land should obey a different rule.

Punctuality is likewise essential to the right to enforce the contract, where the value of the property is fluctuating, and will presumably vary with the lapse of time; because it will then be inferred that the parties had regard to the actual state of things in determining the price, and that it will not be a fair equivalent unless paid at once. See *Gould v. Smith*, 10 Allen, 239; *Kirby v. Harrison*, 2 Ohio, N. S. 326, 332; *Brashier v. Gratz*, 6 Wheaton, 528.

In *Brashier v. Gratz*, the vendor's title was doubtful, and a suit had been brought against him for the recovery of the land, but the vendee agreed to take the risk, and gave his notes for the purchase-money, payable in six, twelve, and eighteen months. The notes were not paid when due, and the vendee waited until the suit terminated in a judgment for the vendor. He then tendered the price of the land, and filed a bill for a specific performance, which the court dismissed, on the ground that what the complainant had agreed to purchase was the defendant's right title, and interest, and as this depended on a future and uncertain event, he could not be entitled to lie by until that was determined in his favor.

In *Jennisons v. Leonard*, 21 Wallace, 302, woodland, chiefly valuable for the timber, was sold for the sum of \$27,000, payable in monthly instalments in proportion to the amount of timber cut, the price to be paid in full within three years from the date of the agreement. The vendee entered and at first complied with the agreement, but soon felled more trees than he paid for, and the arrears accumulated until they amounted to \$5,000. The court held that time was of the essence of the contract, and that the vendor might, without giving notice or returning the collateral security, take possession of the land and dispose of the timber which had been felled, as a means of obtaining payment. It was further held that the exercise of this right was not inconsistent with the right to

recover the balance of the arrears by suit; Hunt, J., said "It is contended that the vendor had no right, under the contract of September 1st, 1866, to re-enter upon the premises, and take possession of the down timber. This contention is based upon the idea that time was not of the essence of the contract, and that although Cole was in arrears of payment to an amount exceeding \$5,000, this gave no right to the vendor to declare the contract forfeited. Conceding that the intention of the parties determines the question, the claim can scarcely be sustained in relation to a sale of timber lands, where the entire value of the estate consists in the timber standing upon them, and when it is provided that there shall be monthly payments, to be regulated by the quantity of timber cut, and when it is provided that a given quantity shall be cut during every month. That the parties should not have intended to require the payments to be kept up in the ratio of the cutting, and that the vendor should not have intended to reserve his only practical protection in this respect, viz., a right of entry in the case of a failure, cannot readily be believed. * * *

This was one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase, his equitable

interest increases, and when the contract price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs, or his assigns. The vendor is a trustee of the legal title for the vendee to the extent of his payment. The result of this state of thing is quite unlike that of a conveyance subject to a condition subsequent which is broken, and when re-entry or a claim of title for condition broken is necessary to enable the vendor to restore to himself the title to the estate. The legal title having, in that case, passed out of him, some measures are necessary to replace it. In the case of a contract like that we are considering no legal title passes. The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made."

The perishable or unstable nature of the consideration may also be a ground for holding that time is of the essence of the contract. In *Goldsmith v. Guild*, 10 Allen, 239, the defendant agreed to sell land in the year 1864, during the rebellion and while the value of legal tender notes, as estimated in gold, was undergoing a continual change. The contract, which was dated as of the 19th of March, but not signed and delivered until the 23d, contained a provision that the "papers should pass within ten days." The plaintiff conten-

ded that the time should be computed from the execution of the contract; the defendant, that the ten days ran from the date. The defendant was ready and willing to give a deed on the 29th of March, but the plaintiff declined to pay the price before the 2d of April. It was tendered on that day, and refused on the ground that it came too late. A bill having been filed for a specific performance, the court held with the defendant, that the plaintiff had forfeited his right under the contract. Chapman, J., said, "the strict rule of law, in respect to time as an essential part of a contract, does not prevail in equity, and the doctrine that 'time is not of the essence of the contract' has been applied to many cases. But this doctrine applies to sales of property only in cases where time is immaterial to the value, and is urged only by way of pretence and evasion, and does not apply to a sale of property, the value of which is subject to daily fluctuation. *Doloret v. Rothschild*, 1 Sim. & Stu. 590. In this country time is regarded as more important in respect to the sale of land than in England, because the value of land is more fluctuating here than there; *Hepburn v. Auld*, 5 Cranch, 262; *Richmond v. Gray*, 3 Allen, 25.

In the present case, the evidence tends to show that the property was subject to frequent fluctuations in value on account of the frequent and almost daily fluctuations in the gold market, and that there was an actual change in its

value; and we cannot doubt that time was not only an essential part of the contract in fact, but that it was so regarded by the parties when they made their contract."

The case of *Booten v. Schaffer*, 21 Gratten, 474, is substantially the same, although the purchase-money was payable in confederate notes, which were rapidly depreciating, and there was reason to suppose that the purchaser waited with a view to take advantage of the fall.

It has been said that the indulgence shown in England, to a want of punctuality in the fulfilment of a contract for the sale of land, should not be accorded here, where the market value of real estate land is fluctuating and uncertain, and may vary, in a week or even in a single day; *Hepburn v. Auld*, 5 Cranch, 262; *Goldsmith v. Guild*, 10 Allen, 139; *Richmond v. Gray*, 3 Id. 25. If the premise be conceded, it is an inevitable inference that an executory sale of land and of merchandise, should obey the same rule. It is a general principle, that where from the nature of that which is to be done or given on either side, delay must necessarily be injurious, time is of the essence of the contract, and a specific performance will not be decreed, unless the complainant was ready and willing at the day; *Gale v. Archer*, 42 Barb. 320. *Booten v. Schaffer*, 21 Gratten, 474.

The courts will not infer that the parties intend to make time of the essence of the contract

for the sale of land, from the mere appointment of a day for the delivery of a deed, or the payment of the price. The intention must be unequivocally declared, or must appear from the fluctuating, uncertain, or perishable nature of the commodity; *Barnard v. Lee*, 97 Mass. 92; *Jackson v. Ligon*, 3 Leigh, 161, 187; *Matthews v. Giles*. 1 Clark's Iowa, 242; *Brashier v. Gratz*, 6 Wheaton, 523, 533; *Morgan v. Herrick*, 21 Illinois, 481; *Duffey v. O'Donovan*, 46 New York, 223; *Hubbell v. Van Schaening*, 49 Id. 326; *Hall v. Delaplaine*, 5 Wisconsin, 206; *Quinn v. Roach*, 37 Conn. 17; *D'Arras v. Keyser*, 2 Casey, 249. *Viele v. The Railroad*, 21 Barb.; *Remington v. Irwin*, 2 Harris, 168. It is a general rule, that language which admits of a milder interpretation, shall not be so construed as to work a forfeiture; see 1 Smith's Lead. Cases, 115, 136, 7 Am. ed.; *Hoyt v. Kimball*, 49 New Hamp. 322. "I am unable," said, Coulter, J., in *Remington v. Irwin*, "to perceive that time is made essential by the terms of the contract. The first instalment was, it is true, to be paid by the vendee, on the first of October, 1848, when a title, free of encumbrances, was to be conveyed by the vendor. This, however, is nothing more than a naked covenant to pay money at a particular day, which I apprehend has never been held to make time of the essence of the contract, for the plain reason that it admits of adequate compensation ascertained by law in the shape of interest; *Decamp v. Feay*, 5 S. & R. 328."

Where the consideration consists of goods or services which are not tendered until after the time prescribed, the purchaser must not only show that the absolute or intrinsic value is unchanged, but that they are worth as much to the vendor as if the contract had been punctually fulfilled; see *Denniston v. Coquillard*, 5 McLean, 253; *Rider v. Gray*, 10 Maryland, 282, 286; *Andrews v. Bell*, 6 P. F. Smith, 343, 349.

WHERE THE CONTRACT IS UNILATERAL TIME IS PRESUMABLY ESSENTIAL.—It is universally conceded that what is commonly called an offer, or in other words, an undertaking to sell if another will agree to buy, is not obligatory unless the promisee signifies his assent at the time and in the way prescribed, *ante*, 1081; and the principle is the same where the vendor stipulates for payment, and not for a promise to pay. In either case the undertaking is revocable if not under seal, until the condition is fulfilled, and in both the fulfilment must take place before the time expires. Time is therefore necessarily of the essence of a unilateral contract to convey, if the price be paid on or before a certain day; see *Kerr v. Purdy*, 51 New York, 629; *Maughlin v. Perry*, 35 Maryland, 352, 360; *Jones v. Noble*, 3 Bush, 694; *Magoffin v. Holt*, 1 Duvall, 95; *Brooke v. Garrod*, 3 K. & Jones, 608, 2 De Gex & Jones, 62; *Austin v. Tawney*, 2 L. R. Ch. App. 143; *Fissler's Appeal*, 25 P. F. Smith, 483; see *Estes v. Furlong*, 59 Illinois, 298, 300.

A chancellor cannot substitute a different contract for that which the parties have made, nor would it be equitable to lay down a rule that might compel the vendor to wait indefinitely on the purchaser; see *Westerman v. Means*, 2 Jones Penna. 97, 100. If, said Lord Cranworth, in *Brooke v. Garrod*, "the contract be that on the payment of £1,000 at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day; or why I should be compelled to perform not my contract, but another contract into which I have not entered."

In *Jones v. Noble*, the agreement was as follows: "This instrument of writing is to certify that I have this day sold to J. R. Shivell, a certain tract of land described in a deed that has been duly acknowledged, which deed is now in my possession, and which is to be delivered to the said Shivell on the payment of \$2,000, on the 25th of December, 1863. Signed J. B. Jones." Shivell having died before the time for payment, the purchase-money was tendered soon after the 25th of December by his personal representatives, who brought a suit in the following March to enforce the contract. The court inclined to think that the contract failed for want of mutuality, but held that if it did not "the payment of the price being a condition precedent to the transfer of the land, time was of the essence of the

contract, and the plaintiffs were not entitled to specific performance."

When one agrees that another shall have the option of buying without limiting him as to time, what the contract requires is payment within a reasonable time, and the conduct of the vendor in suffering the vendee to take possession and improve the land, may debar him from contending that there has been an unreasonable delay, which precludes a specific performance. *Belmayer v. Ketts*, 6 Barb. 273.

In *Kerr v. Purdy*, 51 New York, 629, the bill alleged that the defendant leased certain premises to the complainant for the term of five years, with a clause giving the lessee the privilege of buying at any time within the first three years, by paying all arrears of rent and \$10,000. It appeared in evidence that the plaintiff was in arrears for rent, and did not tender the purchase-money before the time expired, although he had made arrangements to procure it. The court held that the right depended on payment within the three years, and ceased when they elapsed without the fulfilment of the condition. In *D'Arras v. Keyser*, 2 Casey, 249, the court decreed a specific performance under circumstances which were much the same, but the judgment can hardly be deemed satisfactory.

Where a unilateral contract is under seal, it confers an equitable right on the covenantee which the covenantor cannot recall, and that

may be specifically enforced. It follows that if such a covenant be conditioned for payment on or before a certain day, and the covenantor disposes of the land to a third person before the time expires, there is a breach on his part which dispenses with the necessity for a tender, and the coveantee will be entitled to a specific performance on filing a bill within the time appointed for payment, and having the purchase-money ready when required; *Maughlin v. Perry*, 35 Maryland, 352; *Smoot v. Rea*, 19 Maryland, 406; *Kerr v. Purdy*, 50 Barb. 424; *Karker v. Haverly*, Ib. 79; *White v. Dobson*, 17 Grattan, 262.

It has been held in some instances, that whether the contract be mutual or unilateral, it is equally within the rule that time is not essential, and that the vendee may be entitled to a specific performance notwithstanding a default in payment; *Jones v. Robbins*, 29 Maine, 351; *Barnard v. Lee*, 97 Mass. 92; *Perkins v. Hasdell*, 50 Illinois, 216; *Ewing v. Gordon*, 49 New Hampshire, 444; *D'Arras v. Keyser*, 2 Casey, 249. This view prevailed in *Jones v. Robbins*, 29 Maine, although the bond was conditioned to be void, unless a note was given for the price and paid when due. In some of these instances, the vendee went into possession with the vendor's assent, and expended money on the land. Under such circumstances a new contract may arise, or it may be inequitable to insist on that originally made; but it seems that a covenant that another shall have

the privilege of buying on or before a certain day, cannot be enforced unless the privilege is claimed or exercised before the stipulated period has elapsed, *ante*, 1089.

In *D'Arras v. Keyser*, a covenant in a lease for a year that the lessee should have "the privilege of buying the premises for the sum of \$2,575, at any time within twelve months from the date hereof," and that "upon the payment of the purchase-money" the lessor would execute a deed, was held to confer an equitable right on the lessee, although the price was not tendered for more than two years, and notwithstanding the objection that, as the lessee was not bound to accept or pay for the land, the lessor could not have intended that the contract should remain open indefinitely. The court seems to have been influenced by the idea that the lessor had waived the default, by suffering the lessee to remain in possession, and pay rent for another year, without calling on him for the purchase-money. Woodward, J., said: "Mere default in the payment of money at a stipulated time admits, in general, of compensation, and hence time of payment is seldom treated as of the essence of real contracts. Parties may make it so by express agreement, but there is nothing on the face of this contract, or in the attending circumstances, to indicate the intention of these parties to make time essential." So where the defendant covenanted to convey, if the complainant should "on or before the first of April, pay, or cause to be paid, &c.," the court

held that time was not of the essence of the contract, and that the complainant was entitled to a specific performance, although he did not tender the purchase-money until the 25th of May, and the delay was not accounted for or excused; *Barnard v. Lee*, 97 Mass. 92. In both these instances however, the complainant went into the actual possession of the premises, with the defendant's consent, and was suffered to remain notwithstanding the default.

The subject has been complicated by a supposed distinction between law and equity. It is well settled, in both jurisdictions, that where a right of property has accrued under a contract, it will not fail through a subsequent default; but that an executory contract cannot be enforced by one who does not comply punctually with its terms. The difference is that chancery may for the sake of the remedy, regard an executory agreement for the sale of land, as executed to the extent of passing the estate. Hence, a delay which admits of compensation is not fatal to the right of specific performance. But this principle does not apply until the agreement is concluded, and punctuality is essential as it regards all that goes to constitute the agreement. Unless an offer is accepted at the time, and in the way prescribed, there is no obligation on either side. Here equity follows the law, or rather the immutable principles of logic and good sense which lie at the foundation of jurisprudence. It has never been held, or even contended, that where A.

writes to say that he will convey, if B. will agree to the terms proposed before the month is out, a court of equity can relieve against B.'s failure to reply at the appointed time; and the principle is the same where A. stipulates for payment, as distinguished from an agreement to be answerable for the price. It is immaterial that B. declares his assent, and that he will send the money when the day arrives, because the acceptance varies from the offer. Notwithstanding any such declaration, the vendor may retract before the money is tendered, and as he is not bound, the purchaser is also free. Where the proposal is to sell for cash, a chancellor has neither the right nor the power to say that the purchaser shall have the estate on credit. To hold otherwise, is to make a contract for the parties by substituting a promise on one consideration, for a promise on an entirely different consideration.

WHEN EQUITY WILL RELIEVE AGAINST FORFEITURE.—A court of equity cannot relieve against the breach of a precedent condition, or what comes to the same thing, of a contract so worded as to indicate that no right is to vest under it, unless it is punctually fulfilled. Where, on the other hand, the condition is subsequent, that is to say, where the right vests on the execution of the contract, subject to a proviso, that it shall be avoided by a breach, the case comes within the principle under which relief is afforded against penalties and for-

feitures. A chancellor will not intervene where the violation of a contract is wilful, nor where it does not admit of compensation, but he may compel the defendant to accept performance after the day, if the circumstances are unchanged, and there is no better ground for his refusal than the lapse of time. This it is, which seems to have been intended by the dicta in the earlier cases, that time cannot be made of the essence of the contract; see *Clark v. Lyons*, 25 Illinois, 105; *Snyder v. Spaulding*, 57 Id. 480, 454; *Vernon v. Stephens*, 2 Peere Williams, 616; *De Camp v. Feay*, 5 S. & R. 323, 326; *Edgerton v. Peckham*, 11 Paige, 352, 359.

In *Edgerton v. Peckham* the owner of a lot of land agreed to sell it for \$300, one-third down, and the residue in one and two years, possession to be given immediately, and the agreement contained a stipulation that if the purchaser made default in either of the last mentioned payments, the vendor should be discharged from the agreement, and that the purchaser should forfeit the money already paid, and should surrender the premises. The purchaser took possession of the land, made valuable improvements, and paid the first instalments of the purchase-money. He did not pay the last instalment at the time prescribed, nor did the vendor demand the money or offer a conveyance, but when the amount was tendered a few days afterwards, the vendor declined to receive it, and insisted on the forfeiture. The chancellor

held that the case differed materially from that of *Wells v. Smith*. There the condition was precedent, and the exact fulfilment of it essential to the vendor. The deed was to be delivered on a particular day, and the purchase-money secured by a bond and mortgage, and that the security might be ample, the purchaser was to build a house of certain dimensions before that time, or pay \$1,000 of the purchase-money at his election. He did neither, and by the express terms of the agreement the vendor was not to give the deed in that event. Moreover, the purchaser had only paid for the use of the property, so that there was in fact no forfeiture, except the loss of a profitable speculation which the purchaser failed to obtain the benefit of, by his non-performance of the condition precedent to the vesting of the right in him.

If, in the case actually before the court, the parties meant, that if the purchaser was not ready with the last instalment at the precise moment when it became due, he should lose the benefit of what he had already paid, and the vendor might keep the money and the land, the court should not allow such an intention to prevail. The vice chancellor's decree for a specific performance must consequently be affirmed.

Agreeably to this view, a sale of land with a stipulation, that if the purchaser makes default, all right under the contract shall cease, stands nearly, if not quite on the same footing as a deed conditioned to be void if the pur-

chase-money is not paid at the day. Whether relief should be granted, is a question depending on the circumstances of the case. In general, a court of equity will set aside a forfeiture resulting from the non-payment of money, upon a theory which is not always consistent with the truth, that interest is compensation for the breach; *Wells v. Smith*, 7 Paige, 22, 24, 28; *Sanborn v. Woodman*, 5 Cushing, 36; *De Camp v. Feay*, 5 S. & R. 323, 326; *Remington v. Irwin*, 2 Harris, 143, 145; *Smith's Lead Cases*, 108, 7 Am. ed.; although the default must not be wilful, nor continue for an unreasonable length of time; *Jones v. Robbins*, 29 Maine, 351; *Hancock v. Carleton*, 6 Grey, 39; and the burden of proof is on him who asks for relief, to show that his failure to comply with the agreement was due to accident or mistake, and has not occasioned an irreparable injury.

In *Watson v. Delaplaine*, 5 Wisconsin, 206, a stipulation that if the notes which had been given for the price, were not paid at the time prescribed, "the vendor should have the option of declaring the contract forfeited," was held to be in the nature of a condition subsequent, against which equity would relieve on proof, that the purchaser had tendered the money on being notified of the vendor's intention to take advantage of the breach.

In *Jones v. Robbins*, 29 Maine, 351, the contract was specifically enforced, notwithstanding an entire want of the punctuality which

it imperatively required, on the ground that the complainant's failure to pay the first instalment of the purchase-money when due, was excused by his illness while away from home, and that he was not answerable for the subsequent defaults which grew out of the defendant's declaration that the right under the contract was gone.

A failure to perfect the title or execute a conveyance at the day, is not necessarily within this principle; *Wells v. Smith*, 7 Paige, 23, 26; and a chancellor will not intervene unless the act or omission through which the forfeiture is incurred, was the result of accident or mistake, and when compensation can be made to the injured party; see *Paschall v. Passmore*, 8 Harris, 295, 306; *Hill v. Barclay*, 16 Vesey, 402; 18 Id. 56; *Reynolds v. Pelt*, 19 Id. 134; *Jones v. Robbins*, 29 Maine, 351.

It may be inferred from the authorities which have been cited, that where the intention manifestly is that payment, or the conveyance of a good and sufficient title at or before a certain time, shall be a prerequisite without which no right shall vest under the contract, a chancellor cannot make a new agreement for the parties, by holding a subsequent tender equivalent to the punctual performance which they have prescribed. Under these circumstances, the case falls within the rule, that an executory agreement fails utterly, if it be not exactly fulfilled; *ante*. When on the other hand, the effect of the contract is to vest an immediate right in the purchaser, which

would descend to his heirs, or pass under a general or residuary devise, relief may be given against a subsequent default, which is not wilful or injurious.

Whatever the rule may be where the bill is founded exclusively on the contract, an equity may arise from an entry into possession, followed by a part payment of the purchase-money, or an expenditure on the land, which will be enforced independently of the contract, and that it may not be used to surprise and oppress a purchaser who has gone on in the belief that his right was secure; *Edgerton v. Peckham*; *Bellamie v. Ragsdale*, 14 B. Monroe, 364.

It is not less clear, that where the failure of the complainant to fulfil the contract at the appointed time, has been occasioned by the default or laches of the defendant, it will not be a ground for refusing a decree of specific performance, however clear the intention of the parties may have been that punctuality should be essential to the obligation. Prevention is equivalent to performance, and no one can rely on a breach which he has caused, as a defence or cause of action; *Potter v. Tuttle*, 22 Conn. 512; *Snyder v. Spaulding*, 57 Illinois, 480, 487. Hence a vendor who is unable to convey a good and unincumbered title, cannot take advantage of a stipulation that the contract may be avoided if the purchase-money be not punctually paid; *Wallace v. McLaughlin*, 57 Illinois, 53; *Converse v. Blumrich*, 14 Michigan, 109.

In like manner, a condition that

title shall be made, or the price tendered on or before a certain day, may be waived by the party who is entitled to insist on its fulfilment, and if he dispenses with punctual performance, or treats the agreement as still in force, he will not be allowed to insist on the forfeiture; *Ewing v. Gordon*, 49 New Hamp. 460; *Sharp v. Trimmer*, 9 C. E. Greene, 422.

EITHER PARTY MAY NOTIFY THE OTHER TO FULFIL, OR ABANDON THE CONTRACT.—A contract cannot be rescinded by one party, nor without the mutual consent which gave rise to the obligation. Where nevertheless a purchaser or vendor is so far in default, as to have lost the legal right to enforce the agreement, justice requires that the opposite party should have the privilege of naming a reasonable time within which, if the agreement be not fulfilled, all right under it shall cease. This modification is of comparatively recent growth, and reduces the doctrine that time is not of the essence of the contract to the reasonable proportions, which are not inconsistent with the justice that should not be lost sight of in administering equity; *Remington v. Kelley*, 7 Ohio, 432; *Kirby v. Harrison*, 2 Ohio, N. S. 326, 332; *Brashier v. Gratz*, 6 Wheaton, 528; *Jackson v. Ligon*, 3 Leigh, 161; *Wiswell v. McGowan*, 1 Hoffman Ch. 125; *Thompson v. Dulles*, 5 Richardson's Eq. 370; *Smith v. Lawrence*, 65 Michigan, 499; *Hatch v. Cobb*, 4 Johnson Ch. 559, *ante*, 1056.

The notice must not be arbitrary, but proceed from one who

is himself ready and willing to comply with the agreement, and should afford a reasonable time to perform the act or make the payment; *Tiernan v. Roland*, 3 Harris, 429, 431; *Wiswall v. McGowan*, 1 Hoffman's Ch. 125, 139; Fry on Specific Performance, 420, sec. 424, Am. ed. Still a peremptory notice that the contract is at an end, may no doubt suffice, if the party to whom it is given acquiesces or does not ask for time; *Mann v. Dunn*, 2 Ohio, N. S. 187. Conversely a purchaser may be entitled to a specific performance, on tendering the price within a reasonable time from the receipt of such a notice, although not until after the period which it prescribes has expired, especially if a negotiation has been going on during the interval, which explains and justifies the delay; *Prothero v. Smith*, 6 Richardson Eq. 324.

TIME IS MATERIAL.—The position of a vendor who retains the legal title has been likened to that of a mortgagee, and it has been contended that as a mortgagor may redeem at any time before sale or foreclosure, the same privilege should be extended to a purchaser. There is a debt in both cases, and a right depending on the payment of the debt. But *simile non est idem*; and no ingenuity of comparison can make a contract of sale, identical with a contract of pledge. The supposed analogy was accordingly declared to be unsound and fallacious in *Remington v. Kelley*, 7 Ohio, 432, and again in *Kirby v. Harrison*, 2 Ohio, N. S. 326, 333, where the

idea that a vendor and vendee stand in the mere relation of mortgagor and mortgagee, so that in equity the same time shall be given to the vendee to pay, that is given to a mortgagee to redeem, was said by Thurman, J., to be contrary to reason and the current of the modern authorities.

It has accordingly been declared in numerous instances, that one who desires to obtain the aid of a chancellor in enforcing a contract for the sale of land, must show himself ready, prompt and eager, and that a long and unexplained delay may preclude the right to a specific performance, although no change has occurred in the value of the premises, and the situation of the parties remains the same; *McClellan v. Darragh*, 50 Illinois, 249; *Fitch v. Boyd*, 55 Id. 307; *Ludlow v. Cooper*, 13 Ohio, 532; *Remington v. Israel*, 7 Id. 432, 437; *Higby v. Whittaker*, 8 Id. 198; *Rogers v. Saunders*, 16 Maine, 98; *DeCordova v. Smith*, 9 Texas, 129; *Lloyd v. Collette*, 4 Brown C. C. 469; 4 Vesey, 689; *Bullock v. Adams*, 5 C. E. Green, 367; *Ely v. McKay*, 12 Allen, 223; *Gentry v. Rogers*, 40 Alabama, 442; *Dubois v. Baum*, 10 Wright, 537; *Thorp v. Pettit*, 1 C. E. Green, 48; *Glessock v. Nelson*, 26 Texas, 150; *Bellas v. Hay*, 5 S. & R. 427; *Van Zandt v. New York*, 8 Bosworth, 375; *Anderson v. Fry*, 18 Illinois, 94; *McClellan v. Darragh*, 50 Id. 249; *Bennett v. Welch*, 25 Indiana, 140; *Booten v. Schaffer*, 21 Grattan, 474, 491. In *Anderson v. Fry*, the laches of the vendor in not executing a con-

veyance until two years after he had received the purchase-money, were held to be a sufficient answer to a bill filed by him for specific performance, and to enjoin the vendee from prosecuting an action which he had brought to recover back the consideration. In like manner where the vendee neither paid at the day, nor responded to a subsequent demand for the purchase-money, he was held to have lost the right to a specific performance, although time was not originally of the essence of the agreement, and the demand was not attended with a notification that the contract would be rescinded if the price was not paid; *Kirby v. Harrison*, 2 Ohio, N. S. 326.

It results from these decisions, that lapse of time may be a defence, although it is the only one, and the respondent can adduce no other fact or circumstance to indicate that it would be inequitable to enforce the contract; see *Delavan v. Duncan*, 49 New York, 485; *Peters v. Delaplaine*, Ib. 362; *Fitch v. Boyd*, 55 Illinois, 307; *Cadwalader's Appeal*, 7 P. F. Smith, 158. The statute of limitations does not extend to chancery, but the court in the exercise of a wise discretion refuses to encourage or enforce stale demands, unless the circumstances are such as to exempt the case from the general rule; *ante*, 1116; see vol. 1st, 236, 258; *Conway v. Kinsworthy*, 21 Arkansas, 9; *Nelson v. The Hagerstown Bank*, 27 Maryland, 51; *Johnson v. Hopkins*, 19 Iowa, 49; *Eyre v. Eyre*, 4 C. E. VOL. II.—72

Green, 102; *Eppinger v. McGreal*, 31 Texas, 147.

Equity also follows the law in holding that time does not run against one who is in possession, in the exercise or assertion of a right, and hence a vendee who enters upon and holds the land with the vendor's consent and acquiescence, will not be barred by the mere lapse of time, nor until he is put in default by a notice to surrender the premises or pay the price; *ante*, 1135; see *Dubois v. Baum*, 10 Wright, 537; *Williams v. Staake*, 2 B. Monroe, 196; *Schmidt v. Livingstone*, 3 Edwards, 213; *Ely v. McKay*, 12 Allen, 52.

In *House v. Beatty*, 7 Ohio, 417, Wood, J., held, on the authority of Story's Eq. Jurisprudence, 771, that to entitle the defendant to rely on the staleness of the plaintiff's claim, it must appear that he performed or was ready and willing to perform all the substantial conditions precedent on his part, and that the complainant omitted some duty or obligation resting on him, and then if the complainant suffered an unreasonable time to elapse without making good his default, the court might infer that he had waived or relinquished his right under the contract. For a like reason one who has occasioned the delay by his laches, cannot rely on it as a defence to the relief sought by the complainant; *Mix v. Beach*, 46 Illinois, 113.

The length of time which has elapsed since the making of the contract, is not necessarily a criterion of the staleness of the

demand; and it may on the contrary be kept fresh during an unlimited period, by acts or declarations which show that one party intends to exercise his right, or that the existence of it is admitted by the other; *Snowman v. Harford*, 55 Maine, 197; *Schroepfel v. Hopper*, 40 Barb. 425; *Williston v. Williston*, 41 Id. 635.

Though time be not of the essence of the contract as originally made, it may become material through the occurrence of subsequent events which render it inequitable to enforce the contract, and will then constitute a defence to a suit for specific performance; *Jackson v. Ligon*, 3 Leigh, 161, 171; *Peters v. Delaplaine*, 49 New York, 362; *Hubbell v. Van Schoening*, Ib. 326. Hence a specific performance will not be decreed where from the length of time before the suit is instituted, it is no longer practicable to accomplish the object which the parties mainly had in view, especially where the end of the contract might have been attained if the contract had been carried into effect at an earlier period; *Pratt v. Carroll*, 8 Cranch, 484. In the case last cited the covenant on the defendant's part was to convey, and on the plaintiff's to build; the defendant's motive for making the contract being to improve the value of his adjacent land, by attracting the nascent city of Washington in that direction. The court held that although the delay of the plaintiff in erecting the buildings, was excused by the failure of the de-

fendant to execute a deed, still as the suit was not instituted until the town had been erected in another quarter, and there was little or no hope that it would extend to the estate in controversy, the bill must be dismissed.

The time for speculation ceases on the execution of the agreement, and there arises a duty which it is incumbent on the parties to fulfil, without regard to actual or prospective gain, and one who shows himself remiss in the performance of this obligation, is not in a position to claim the aid of a chancellor; *Patterson v. Martz*, 8 Watts, 374, 380. This much is demanded by the moral considerations, which can never be laid aside in the administration of justice, and least of all by a court of equity; *Scott v. Fields*, 7 Ohio, 424, 431; *Kirby v. Harrison*, 2 Ohio, N. S. 326, 333; *Brown v. Harris*, 12 Ohio; *Andrews v. Bell*, 6 P. F. Smith, 343, 349.

Hence one who lies by without taking any step to assert his right under the contract, until the circumstances have changed to his advantage, and then comes forward to ask for a decree of specific performance, is not entitled to a favorable hearing; *Merritt v. Brown*, 4 C. E. Green, 286, and the bill will be unhesitatingly dismissed, if it appears that his motive in waiting was to ascertain whether the transaction would be a profitable one or the reverse; *Alley v. Deschamps*, 13 Vesey, 224; *Kirby v. Harrison*, 2 Ohio, N. S. 326, 333. Under these circumstances, a rise in the value

of the premises subsequently to the sale, and before the institution of the suit, may have much weight with a chancellor, as indicating that the delay was not in good faith, but from an unfair design to be governed by circumstances in determining whether to take the property, or leave it on the hands of the defendant; *Kirby v. Harrison*; *Hepburn v. Auld*, 5 Cranch, 262; *Richmond v. Gray*, 3 Allen, 25; *Goldsmith v. Gould*, 10 Id. 139; *Ely v. McKay*, 12 Id. 32; *Brashier v. Gratz*, 6 Wheaton, 539; *Ely v. McKay*; *Brashier v. Gratz*, 6 Wheaton, 528; *Rogers v. Saunders*, 16 Maine, 92; *Cooper v. Brown*, 2 McLean, 492; *McKay v. Carrington*, 1 Id. 50; *Patterson v. Martz*, 8 Watts, 374; *Colcock v. Buller*, 1 Dessausure, 307; *Pillow v. Pillow*, 3 Humphreys, 644; *Bellas v. Hays*, 5 S. & R. 427; *Hepburn v. Auld*, 5 Church, 262; *Patterson v. Martz*, 8 Watts, 373; *Dubois v. Baum*, 10 Wright, 537.

It should nevertheless be observed, that the purchaser becomes the owner of the premises immediately on the signature of the contract, and is as such entitled to the benefit of a rise in value, and must submit to the loss if there be a fall; *The Marble Co. v. Ripley*, 10 Wallace, 357. A change occurring after the sale, will not therefore be a ground for dismissing the bill, unless it appears that the complainant was wanting in diligence, and that the vendor did not acquiesce in the delay. If his inability to perfect the title stood in the way, he ought to execute a

conveyance as soon as the obstacle is removed, although the actual value of the land much exceeds the price, or the sale may appear improvident in the light of the event. See *Low v. Treadwell*, 12 Maine, 447; *Falls v. Carpenter*, 1 Dev. & Bat. Eq. 237.

A chancellor will not ordinarily decline to enforce a contract because it bears hardly on the defendant, but the case is widely different where the hardship grows out of the laches of the complainant, and would not have existed if he had been diligent; *Miller v. Henlan*, 1 P. F. Smith, 265. A material change of circumstances, rendering an enforced performance harsh and inequitable, and coupled with an unexcused delay, will therefore ordinarily discharge the party who would be the sufferer if the contract were enforced; *Booten v. Schaffer*, 21 Grattan, 474, 495; *Pegg v. Corder*, 12 Leigh, 69; *Garnet v. Macon*, 2 Brockenborough, 185, 6 Call, 308; *The Bank of Alexandria v. Lynn*, 1 Peters, 367. In *Porter v. Dougherty*, 1 Casey, 405, the purchaser did not apply for relief until after the lapse of eleven years, during which the vendor improved the land, and died having devised it to a child, and the case was held to be a clear one for the dismissal of the bill. Where the vendee fails to prosecute or enforce the contract, for such a length of time as to justify the belief that he has waived or abandoned the right which it confers, the court will not decree a specific performance to the preju-

dice of third persons who have acquired the title by devise or purchase; *Van Doren v. Robinson*, 1 C. E. Green, 256; *Gariss v. Gariss*, Ib. 79; *Anthony v. Leftwich*, 3 Randolph, 268; *Miller v. Henlan*; *Porter v. Dougherty*; *Smith v. Lawrence*, 15 Michigan, 499; *Cullen v. Ferguson*, 5 Casey, 247; *Hough v. Coughlan*, 41 Illinois, 130.

It is not a hardship that the property rises in value between the sale and the application for relief. If A. sells a house to B. for \$10,000, and the premises would bring \$20,000 six months afterwards, when B. tenders the price and demands a deed, A. is not worse off because of the gain to B. He may have made a disadvantageous bargain, but the loss is no greater than it would have been if the contract had been executed forthwith. There is a marked distinction between such a case, and one where the consideration or equivalent which the defendant is to receive for what he has agreed to part with, depreciates during a delay occasioned by the vendee's laches, and the court may then justly refuse to enforce the contract; *Ewing v. Beauchamp*, 6 B. Monroe; *Andrews v. Bell*, 6 P. F. Smith. 343, ante.

A vendor who has received the whole or a considerable part of the purchase-money, will not readily be permitted to rely on the purchaser's tardiness in bringing suit, as a ground for the dismissal of the bill. So an entry into possession with the vendor's assent, followed

by the expenditure of money on the land, may give rise to an equity requiring a specific performance, although the complainant is chargeable with delay or laches, that would otherwise preclude the intervention of a chancellor. See *Mason v. Wallace*, 4 McLean, 77. It is moreover a general, if not an invariable rule, that time does not run against one who is in possession, nor during a negotiation for the performance of a contract, or to remove an obstacle which hinders its fulfilment.

It results from what has been said that a fall in price or value, or a change in any other particular by which the contract is rendered less advantageous to the defendant, is not a sufficient reason for dismissing the bill, unless the complainant is chargeable with some default or backwardness, which has directly or indirectly contributed to the loss; *The Marble Co. v. Ripley*, 10 Wallace, 337; *Cooper v. Pena*, 21 California, 403; *Andrews v. Bell*, 6 P. F. Smith 343, 350, ante. If the contract was fair and reasonable when made, and the party who seeks to enforce it has been prompt and ready from the outset, it is not just that he should suffer from a delay arising from the defendant's inability or laches.

In *The Marble Co. v. Ripley*, 10 Wallace, 337, Strong, J., said, "It is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances

or changing events." Mr. Fry, in his work on Specific Performance, asserts that "the question of the hardship of a contract is generally to be judged of, at the time at which it is entered into; that if it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except when these subsequent events have been in some way due to the party who seeks the performance of the contract." Judge Story indeed states the rule somewhat differently, and there are some cases that support his statement; but the rule as stated by Mr. Fry must be applicable to contracts that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually."

So in *Willard v. Tayloe*, 8 Wallace, 558, 571, Field, J., observed, "The question in such cases always is, was the contract at the time it was made a reasonable and fair one? If such were the fact, the parties are considered as having taken on themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific performance." The vendor was accordingly ordered to convey, although the property had largely increased in value since the sale. The vendee had, been punctual and exact in tendering the price, and the prayer of the bill was granted on con-

dition that the consideration should be paid in specie, and not in the notes which had been made a legal tender during the interval. The same rule was laid down in *Lee v. Kirby*, 104 Mass. 420, 428.

It results from what has been said, that the destruction of the property by fire, is not a reason for refusing a specific performance, unless the loss is directly or indirectly due to the vendor's negligence, or there has been some default on his part; *Brower v. Herbert*, 30 Maryland, 301; and the rule was applied in *Brower v. Herbert*, although the complainant failed to renew the policy, or to notify the defendant that it was about to expire. This is entirely consistent with the maxim *res perit domino*, because the purchaser is virtually the owner, although he has not the legal title; *Kerr v. Day*, 2 Harris, 112, 114, *ante*. It will make no difference in the application of the principle, that the fire occurs before the time fixed for the delivery of the deed and payment of the price, if the buyer might have taken immediate possession under the terms of the contract, if so inclined; *Brower v. Herbert*, *ante*, 1109.

The principle was applied in another form in *Hale v. Wilkinson*, 21 Grattan, 75. The suit was instituted to enforce the specific performance of a contract made during the war, for the sale of land, payable in the notes of the Confederate States. The land was estimated to be worth \$6,000 at the time, and subsequently to the downfall of the Confederacy, and the value of the

notes when paid, as measured by the same standard was only \$385. Moncure, J., said, "We must carry ourselves back to the date of the contract, and the time when the purchase-money was paid. If at that time the consideration would have been deemed adequate; if the court would then have decreed a specific execution of the contract, the conclusion is inevitable that the consideration must now be deemed adequate, and the court must now decree such execution." So a vendor who had received the price of the land in 1864, in Confederate money, was compelled to execute a deed after the war was ended, although the notes were worth nothing when the decree was made; *Ambrose v. Keller*, 22 Grattan, 769; *Booten v. Scheffer*, 21, Id. 474, 494.

It follows conversely, that a purchaser will not be compelled to bear a loss arising from fire, or a depreciation of price or value, unless the title is clear, or where he has gone into possession, and thus manifested his intention to adhere to the contract notwithstanding the defect. Where the delay is attributable to the vendor, or his inability to give a good and marketable title, the injury if any, should fall on him, and not on one who has been ready and willing to do all that the agreement prescribes. Under these circumstances, the court will therefore refuse to compel the purchaser to take the land, or compensate him by a corresponding abatement in the price; *Christian v. Cabell*, 22 Grattan, 82; see *Garnett v. Macon*, 6 Call. 309; *Wyvell*

v. The Bishop of Exeter, 1 Price Exchequer, 294; *Paine v. Mellor*, 6 Vesey, 349. In *Christian v. Cabell*, the delay was due to an incumbrance which could not be removed, because the amount was in dispute; the premises were destroyed by fire before the difficulty could be obviated; and it was held that this discharged the purchaser. So a specific performance was refused where the vendor could not make title to one-sixth of the lot, in consequence of the loss of a deed, which was not found until the property had much decreased in value; *Griffin v. Cunningham*, 19 Grattan, 571.

In like manner, where the delay arises from the purchaser's default or laches, and the consideration which he has agreed to give depreciates during the interval, the vendor will not be compelled to execute the contract. In *Booten v. Scheffer*, 21 Grattan, 474, the purchaser held back until the notes which he agreed to give had depreciated in value, and the court refused a decree of specific performance. Sharpless, J. cited and relied on the dicta of Chief Justice Marshall, in *Garnett v. Macon*, 6 Call. 308, "that although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. And there is no difference between a contract unreasonable when made, and one which becomes so afterwards, if the applicant be in default." See *Kirby*

v. *Harrison*, 2 Ohio N. S. 326; *Merritt v. Brown*, 4 C. E. Green, 286; *Westerman v. Means*, 2 Jones, 97.

COMPLAINANT MUST BE READY AND WILLING TO PERFORM THE CONTRACT.—One who seeks to enforce a contract, must show that he has fulfilled or is ready and willing to fulfil the contract on his part. This is a general rule, and not less regarded in equity than in law; *Feversham v. Watson*, Cases temp. Finch, 445; *Sullings v. Sullings*, 9 Allen, 234; *Breckenridge v. Klinckenbeard*, 2 Littell, 127; *McCullough v. Davison*, 1 Indiana, 413; *O'Kane v. Kiser*, 25 Id. 168; *Thorp v. Pettit*, 1 C. E. Green, 48; *Gale v. Merrick*, 1 McCarter, 332. The doctrine that time is not of the essence of an agreement for the sale of real estate, is hardly an exception, because it presupposes that the complainant is prepared to carry out the agreement at the filing, or the hearing of the bill. The case is widely different where the prayer is that the defendant shall be compelled to accept, that which does not correspond with what he agreed to buy, and the court will not decree a specific performance unless on rare and peculiar grounds; see *Buchanan v. Lorman*, 3 Gill, 77.

It is accordingly well settled, that such a decree will not be made at the instance of a vendor who is unprepared to give a good title to the whole and every part of the land; *Cunningham v. Sharp*, 10 Humph. 116, 121; *Buchanan v. Atwell*, 8 Id. 516; *Hepburn*

v. *Auld*, 5 Cranch, 262; *Jackson v. Ligon*, 3 Leigh, 161; *McKean v. Reed*, 6 Littell, 395; *Read v. Noe*, 9 Yerger, 283; *Bryan v. Read*, 1 Dev. & Bat. Ch. 78; *Hoover v. Calhoun*, 16 Grattan, 109; *King v. Knapp*, 59 New York, 462. The objection cannot be obviated by an abatement of the price. It is hardly less unjust to compel a purchaser to pay a smaller sum for that which he did not agree to take, than to compel him to pay in full.

In *Hepburn v. Auld*, the defendant agreed to buy 6,000 acres of land on the Ohio, and it was held that the inability of the defendant to give a good title to a portion of the land amounting to 208 acres, was a defence to the bill. There seems to have been some diversity of opinion among the judges, as to whether such a deficiency is susceptible of compensation under any circumstances, but the principle was accurately stated by Livingston, J., who said, "This is like a contract for 5,000 bushels of wheat. A tender of 4,500 would not be good, and we could not compel the purchaser to take a less quantity than he contracted for. So here the contract was for 6,000 acres. The complainants have a title to a part only; we could not compel the defendant to take that part, and give him damages for the non-conveyance of the residue."

In *Jackson v. Ligon*, a bill to enforce a contract for the sale of a farm of 686 acres was dismissed, because the vendor's title to 209 acres proved defective, although

all the buildings and improvements were on the residue of the land, which lay on the other side of a public highway.

MAY BE ENTITLED TO SPECIFIC PERFORMANCE NOTWITHSTANDING A PARTIAL FAILURE WHICH ADMITS OF COMPENSATION.—It has nevertheless been declared that "Where a vendor is unable from any cause, not involving *mala fides* on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part that cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, in such case the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price if that has not been paid;" *Foley v. Crow*, 37 Md. Rep. 51; *Stoddard v. Smith*, 5 Binney, 355.

FAILURE OF TITLE TO ONE OR MORE OF SEVERAL LOTS OR PARCELS.—In *Stoddard v. Smith*, the defendant agreed to purchase forty-five lots in different parts of the city of Washington. The contract seems to have been entire, but the lots were valued severally in a schedule annexed to the agreement. The title to five of them proved defective, and it was held not to be a defence to a suit brought to compel the purchaser to accept and pay for the others. C. J. Tilghman said, "It has been contended that the contract was so entire as to be incapable of division, and that a failure as to part dissolved the contract in

the whole. It strikes me very differently. There are cases where the failure of title to part ought to dissolve the whole contract; because that part may be so essential that the loss of it would render the residue of little value. Such would be the case of the loss of a mine, or of a valuable fishery, attached to a parcel of poor land. Such also might be the case of a loss of a parcel of meadow or woodland, or of the right of water necessary for turning a mill. The principle is this, that when the part lost appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, the contract is dissolved in toto. But what is the case under consideration? The loss of five lots not adjoining or particularly connected with the others. There was no evidence of their being in any way essential to the use or full enjoyment of the residue, and as the price at which each of the lots was estimated in the contract was proved on the trial, there could have been no difficulty in making a proper deduction."

It was held in like manner in *Foley v. Crow*, that a failure of title to one of four lots embraced in the contract, did not invalidate it as to the other three; there being no evidence that they were in any respect less valuable to the purchaser than if he had obtained all.

The rule that a purchaser will not be compelled to accept part of the land, does not apply unless the contract is entire; or rather

the inability of the vendor to fulfil one agreement will not preclude him from enforcing a collateral agreement, although made at the same time; see *Johnson v. Johnson*, 3 Bos. & Pul. 162. The weight of authority is that where various lots are sold successively, or at once, to a purchaser for several sums or prices, each is *prima facie* the subject of a distinct contract, and the failure of title to one or more of them, will not discharge the obligation to accept and pay for the others; see *Casamajor v. Strobe*, 2 Mylne & K. 724; *Lewin v. Guest*, 1 Russel, 325; *Osborne v. Bremar*, 1 Dessausure, 486; *White v. Dobson*, 17 Grattan, 262. On the other hand an agreement to sell and convey several lots or parcels for a gross sum, is not less entire because the subject matter is divisible, and the vendor cannot enforce a specific performance, without giving a title to the whole; *Cunningham v. Sharp*, 11 Humphreys, 116.

Whatever the rule may be under other circumstances, it is clear that where the vendee purchases an outstanding title to the land, and thus prevents the vendor from remedying the defect, it will not be an answer to the bill, and a specific performance may be decreed with an abatement for the amount expended; *Weems v. Brewer*, 2 Harris & Gill, 390.

VARIATION FROM THE TERMS OF AGREEMENT.—Where the defence is not a defect of title, but that the land does not correspond with the terms of the

agreement, a chancellor may consider whether the variation is so material as to be an answer to the suit, or admits of compensation. In *King v. Bardeau*, 5 Johnson Ch. 38; the premises in controversy consisted of two lots, Nos. 42 and 43, on Broom street, in the city of New York, which though severally described in the advertisement, were sold as one lot or parcel. The purchaser subsequently discovered that the buildings on lot No. 42, projected about twenty inches on lot No. 43. This as he alleged prevented him from carrying out his purpose, which was to build a house twenty-two feet wide on the vacant lot, with an alley of three feet wide extending to the rear. Chancellor Kent held that as the alleged variation was patent, and might have been discerned with ordinary care, it was not a ground for dismissing the bill, but that the case should be referred to a master to ascertain how much it lessened the value of the premises, and that amount deducted from the purchase-money.

The doctrine that compensation should not be awarded for a defect, which is obvious to the senses, or of which the vendor was in fact apprised (see *Dyer v. Hargreaves*, 10 Vesey, 105; *Oldfield v. Round*, 5 Id. 508), was also advanced in *Clark v. Seirer*, 7 Watts, 107, 112; and Gibson, C. J., intimated, that one who agrees to buy real estate knowing that the vendor has a wife, is within the scope of this principle, and must take the risk of her re-

fusing to give a release of dower, or join in the execution of the deed.

It is open to the defendant in a suit for specific performance, to show that he was induced to buy by a representation which was not in accordance with the truth, and if such a defence is made out with sufficient clearness, the bill will be dismissed, unless the variation is immaterial or admits of compensation; *ante*, 1017; see *Miller v. Chatwood*, 1 Green Ch. 199; *Best v. Stow*, 2 Sanford Ch. 298.

DEFICIENCY IN QUANTITY.—A failure of title to part of the land, which may be the very part that formed the main inducement to the contract, is a very different thing from a deficiency in quantity. A purchaser, who buys by metes and bounds, gets what he purchased, although the number of acres proves to be less than that named in the agreement. What has been said of the buyer of a chattel, that his eyes are his market, may be said in this regard of him. He may be entitled to an abatement of the price, but he cannot resist 'a decree for specific performance, unless the deficiency is so great as to be a substantial breach of the contract, or frustrates the purpose for which it was made; see *Kent v. Carcand*, 17 Maryland, 291; *Foley v. McKeon*, 4 Leigh, 627.

A VENDOR MAY BE COMPELLED TO PERFORM SO MUCH OF THE CONTRACT AS LIES IN HIS POWER, AND MAKE COMPENSATION FOR THE RESIDUE.—It is now established that a vendor cannot rely

on his inability to fulfil part of the contract, as a reason for his being discharged from the whole, and that he may on the contrary be compelled to do what lies in his power, and make compensation for the residue. The doubt which formerly existed on this head, seems to have originated in the idea that a chancellor has no jurisdiction to assess damages, which may be true when they are the main object of the suit, but not when they are awarded incidentally; *McConnell v. Brilhart*, 17 Illinois, 354; *Harbers v. Gadsden*, 6 Richardson Eq. 284; *Clark v. Reins*, 12 Grattan, 35, 112; *Nagle v. Newton*, 22 Id. 814; *Morss v. Elmendorf*, 11 Paige, 287. In *Mortlock v. Buller*, 10 Vesey, 292, 315, Lord Eldon held that if a man who has but a partial interest in an estate agrees to sell the whole, he cannot afterwards allege that he does not own the entirety, as a reason for not conveying what he holds, and if the vendee is willing to take as much as the vendor can give, he has a right to that, with a proportional abatement of the price.

The case of *Waters v. Travis*, 9 Johnson, 450, illustrates this principle. The complainant asked for a decree of specific performance against a vendor who had disabled himself from fulfilling the contract, by conveying part of the land to a third person. It was contended for the defence, that as the court could neither make a contract for the parties, nor execute that which they had made for themselves, it

must dismiss the bill. But the chancellor, and the Court of Errors and Appeals, were clearly of opinion that the respondent could not set up his own default, as an answer to a demand that would otherwise be indisputable, and that the vendee was consequently entitled to have a conveyance of so much of the estate as the vendor had not parted with. The principle has been applied in other instances, and is generally recognized in the United States; *Stockton v. The Union Oil Co.*, 4 West Virginia, 273; *Voorhees v. De-Meyer*, 3 Sandford Ch. 614; 2 Barb, 37; *Wiswall v. McGowan*, 1 Hoffman, 125; *Wetherford v. James*, 2 Alabama, 170; *Bass v. Gilleland*, 5 Alabama, 761; *Jones v. Schakelford*, 2 Bibb, 410; *Williams v. Champion*, 6 Hammond, 169; *Jacobs v. Lake*, 2 Iredell Eq. 206; *Evans v. Kingsberry*, 2 Randolph, 120; *Matthews v. Patterson*, 2 Howard, Miss. 729; *Napier v. Darlington*, 20 P. F. Smith, 64; *Erwin v. Meyers*, 10 Wright, 116.

SALE OF ENTIRETY BY TENANT IN COMMON.—It has accordingly been held that where a tenant in common or coparcener, sells the entirety to one who is ignorant of the defect, the purchaser may elect whether he will rescind the contract, or demand a conveyance of the undivided share, with a proportionate abatement of the purchase-money; see *Napier v. Darlington*; *Erwin v. Meyers*; *Clark v. Reins*, 12 Grattan, 38.

In *Erwin v. Meyers*, the vendor contracted to give a good title to

the whole of the premises in controversy, but it appeared from the evidence that he was only seised of an undivided moiety, and consequently could only convey one-half of what he had agreed to sell. Strong, J., said the "vendee may rescind the contract, or at his election may bring an action at law for damages, or institute a suit in equity to enforce specific performance. His position is not to be confounded with that of a vendor praying in equity for a specific performance. There is a settled distinction between the two cases. If a vendor cannot make out title to the whole of the subject matter of the contract, equity will not compel the vendee to perform *pro tanto*. But, says Mr. Sugden (*Sugden on Vendors*, 193), "when a vendee seeks a specific execution of an agreement, there is much greater reason for affording the aid of the court to a purchaser when he is desirous of taking the part to which title can be made. And" he adds "a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it. So in *Mortlock v. Buller*, 10 Vesey, 315. Lord Eldon said, "If a man having partial interest in an estate, chooses to enter into a contract respecting it, and agrees to sell it as his own, it is not competent for him afterwards to say, though he has valuable interest, he has not the entirety and therefore a purchaser shall not have the benefit of his contract. For the purposes

of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement." In *Attorney General v. Gower*, 1 Vesey, Sr. 218, where tenants in common had contracted for the sale of their estate, and one of them died, it was held the survivors could not compel the purchasers to take their shares. But the converse of the proposition was denied, and it was held the purchasers might compel the survivors to convey their shares, although the contract could not be executed against the heirs of the deceased. The same doctrine was laid down in *Wood v. Griffith*, Swanston, 54; and in *Milligan v. Cook*, 16 Vesey, 1, specific performance was decreed upon the bill of a purchaser with a compensation for defect of title by reduction of the purchase-money. In *Hill v. Buckley*, 17 Ves. 394, Sir William Grant, M. R., stated the general rule to be that where a misrepresentation is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation." The same rule of specific performance, pro tanto, at the suit of the purchaser, with compensation for deficiency, by abatement of the purchase-money, was acted upon in *Graham v. Oliver*, 3 Beavan, 124; in *Wheatley v. Slade*, 4 Linn. 126; and in *Nelthorpe v. Holgate*, 1st

Coll, 203. It was also asserted unanimously, by the New York Court of Errors and Appeals, in *Waters v. Travis*, 9 Johns. 464. It is too strongly fortified, as well as founded in reason, to be successfully denied. Hence it has found its way into the best text-books as established doctrine. Adams in his *Treatise on Equity*, page 90, lays it down that, in favor of the purchaser the rule in equity is, though he cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterwards to take as much as he can get, he has generally, though not universally a right to insist on that, with compensation for the defect. He adds, the defect must be one admitting of compensation and not a mere matter of arbitrary damages. In Story's *Equity*, § 779, the general rule is also said to be that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate; and in *Morss v. Elmendorff*, 11 Paige, 288, the chancellor went so far as to say that in a case where the vendor never had it in his power to perform at all, if the purchaser had filed his bill in good faith, supposing at the time he instituted his suit specific performance could be decreed, he was not prepared to deny that the court

would retain his suit, and award the complainant a compensation in damages. However this may be, there is nothing in the general rule of which a vendor can complain. It is his own fault if he has assumed an obligation which he cannot fulfil. It cannot be inequitable to require him to perform as far as it is in his power, and being in a court of equity, a decree that he make compensation for all that he fails to perform, is but completing what the court has begun, and preventing a multiplicity of suits. In no just sense can it be said that thus a new contract is made for the parties. The vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets, according to the rate established by the agreement."

INDEMNITY AGAINST DOWER.—

In like manner where the vendor is unable to give a clear title, in consequence of the refusal of his wife to release her dower, the court may do substantial justice by directing the heirs to execute a conveyance, on receiving two-thirds of the purchase-money, and that the residue shall remain as a lien on the premises, and be paid when the right of dower terminates; *Sprigle v. Shields*, 17 Ala. 295; *Wingate v. Hamilton*, 7 Indiana, 73; *Hazelrig v. Huston*, 25 Id. 481. See *Young v. Paul*, 2 Stockton, Ch. 402, *post*; *Troutman v. Going*, 16 Iowa, 415.

VENDOR WILL NOT BE COMPELLED TO PERFORM A DIFFERENT CONTRACT.

—A chancellor will not, however, make a contract for the parties by

compelling the vendor to do what he did not agree to, because he cannot do as he agreed; *Clark v. Seirer*, 7 Watts, 107, 110; *Riesz's Appeal*, 23 P. F. Smith, 485, 491; *Bailey v. James*, 11 Grattan, 48; *Irick v. Fulton*, 3 Id. 193; *Morss v. Elmendorff*, 11 Paige, 185; *Graham v. Hendrew*, 5 Munford, 185; *Courrier v. Graham*, 2 Ohio, 341. In *Clark v. Reins*, 12 Grattan, 98, the joint owners of a tract of land, among whom were a married woman holding in her own right, and her husband, entered into a contract of sale. She refused to join in the deed, and the court ordered the other joint owners to convey their shares, but refused to direct him to release his interest as tenant by the curtesy, with such an abatement of the price as would make up for his inability to pass the fee.

It results from the same principle, that where a husband, or a husband and wife enter into a contract for the sale of the wife's land, with which she refuses to comply, he will not be directed to perform an impossibility by executing the contract, nor will he be compelled to convey his life estate, and take a corresponding proportion of the purchase-money; see *Young v. Paul*, 2 Stockton Ch. 402; *Evans v. Kingsbury*, 2 Randolph, 120; *Watts v. Kinney*, 3 Leigh, 272; *Glassell v. Thomas*, Ib. 113, 129; *Clark v. Seirer*, 7 Watts, 107, 110.

Agreeably to the authorities in Pennsylvania, where the land is the husband's, and his wife refuses to join in the conveyance, the case is so far within this

principle, that no modification which is not equivalent to a new contract, can do justice to both parties, and the purchaser must consequently choose between taking the title subject to the right of dower, and bringing an action for damages against the husband; *Clark v. Sierer*; *Burk's Appeal*, 25 P. F. Smith, 141; *Riesz's Appeal*, 23 Id. 425.

The rule, said Sharswood, J., in the case last cited "does not fall within the principle of those decisions, where a vendor, who cannot make title to all he has contracted to convey, is held to be not thereby relieved from specific performance as far as in his power; but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending as it does as well upon her surviving her husband, as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them; a contract which, perhaps, in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase-money in full may have been the main object of the sale, to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will

and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate, separate and apart from her husband. The learned master (Mr. Clay), to whom it was referred to report what amount of the purchase-money should be retained by the vendee upon mortgage, as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that, in his opinion, not less than forty per cent. of the price should be left in his hands for that purpose; a result no doubt just as to him, but how as to the vendor, who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree. Specific performance is a matter of grace, and these are considerations which address themselves powerfully to the conscience of the chancellor."

It is held in New Jersey that where a vendor procures or induces his wife to refuse to join in the deed, with a view to evade the obligation of the contract, he is guilty of a fraud, and may be compelled to execute a conveyance with an indemnity against her right; *Young v. Paul*, 2 Stockton Ch. 401. This case is not necessarily in conflict with the judgment in *Riesz's Appeal*; and in *Hawrally v. Warren*, 3 C. E. Green, 124, the court held in conformity with that decision, that where the refusal of the wife is spontaneous, and does not proceed from collusion with her

husband, the purchaser is not entitled to indemnity or compensation, and must take the title subject to her dower, or renounce the contract.

For a like reason where the vendor cannot make title to part of the land embraced in an entire contract, the vendee will ordinarily be compelled to choose between a rescission of the agreement, and paying the whole purchase-money for the part which the vendor is able to convey; *Bailey v. James*, 11 Grattan, 468. Such a case differs widely from that where a vendor who has agreed to sell the whole estate, proves to have only an undivided share, because there is no rule by which to apportion the consideration, or determine what is the relative value of the part which cannot be conveyed, *ante*, 1144. The principle may be just when there is no fraud or actual loss, but it is hardly applicable where the vendor's bad faith is the efficient cause of an injury which cannot be redressed without the aid of a chancellor.

CONVEYANCE TO THIRD PERSON SUBSEQUENTLY TO CONTRACT.—An entire failure of title is necessarily an answer to a bill for specific performance as such, and the court will not award compensation unless on some special ground; *Sims v. McEwen*, 27 Alabama, 184; *Lewis v. Yale*, 4 Florida, 418; *Hatch v. Cobb*, 4 Johnson Ch. 559; *Scott v. Billgury*, 40 Mississippi, 119; *Richmond v. The Dubuque Railroad*, 33 Iowa, 422. Such at least is the rule, where the defect existed at the making of the

agreement. When the vendor disables himself by alienating the premises subsequently to the sale, the case is so far different, that the default is wilful and may proceed from a perverse design to close the door to relief. It is nevertheless held in general, that a bill filed under these circumstances should be dismissed, and the complainant left to seek redress in the ordinary course of law; *Hatch v. Cobb*; *Kempshall v. Stone*, 5 Johnson Ch. 194; *Smith v. Kelly*, 56 Maine, 364; at all events if he was aware that the property had passed out of the vendor's hands, and that he was asking for that which was not in the power of the court to grant; *McQueen v. Chouteau*, 20 Missouri, 222; *Smith v. Kelly*, 56 Maine, 387; *Morss v. Elmsendorff*, 11 Paige, 277; *Kempshall v. Stone*. In the case last cited Chancellor Kent said that "the jurisdiction of chancery in this regard was discussed in the case of *Hatch v. Cobb*, 4 Johnson Ch. 559, and it was considered that the court ought not to sustain a bill merely for the assessment of damages. * * *

* When the defendant disables himself before the filing of the bill, and the plaintiff knows of that fact before he commences the suit (and I consider such knowledge a material circumstance), it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal and not of equitable jurisdiction."

The inclination of the authorities in the United States is, in accordance with the above intimation, that

one who comes in good faith before a chancellor for a decree of specific performance, ought not to be turned round and compelled to proceed at law, because facts which were unknown to him are disclosed by the answer, and preclude the relief prayed for; and that the court will on the contrary ascertain the damages by a reference to a master, or award an issue of quantum damnificatus; *Woodcock v. Bennett*, 1 Cowen, 71; *Wiswall v. McGowan*, 1 Hoffman Ch. 125; *Hopkins v. Gilman*, 22 Wisconsin, 476; *Hall v. Delaplaine*, 5 Id. 206; *Milkman v. Ordway*, 106 Mass. 253. A purchaser who files a bill for specific performance, in ignorance that the premises have been conveyed to a third person, is clearly within this rule, and his knowledge that such a conveyance has been made, should not prejudice him if he has good reason to believe that the grantee was cognizant of the fraud practiced by the vendor, and therefore affected with the trust. For as the complainant has, under these circumstances, a *prima facie* case for equitable relief, which would be indisputable but for facts of which he is ignorant, the court will not allow the defendant to rely on his own wrong, as an answer to the bill; *Milkman v. Ordway*, 106 Mass. 253. But one who knows that the premises have been sold and conveyed to a *bona fide* purchaser, is not entitled to the benefit of a principle, which does not apply unless the complainant filed the bill in ignorance of the

real state of the case; *Doan v. Mauzey*, 33 Illinois, 227.

In *Milkman v. Ordway*, the bill was filed by an undertenant, against the lessee of whom he held, and the paramount landlord. It alleged that the lessee acted as her trustee and agent in taking the lease, and had agreed in writing that she should occupy the premises during the continuance of the term. There was a further allegation that these circumstances were known to the landlord, but that he had notwithstanding made an arrangement with the other defendant for the cancellation of the lease. These allegations were all made in good faith, but it appeared from the answer and proofs, that the landlord was ignorant of the alleged trust, and had cancelled the lease some days before the institution of the suit, for a consideration which rendered him a purchaser for value. The court held that the bill must be dismissed as against him, but that the other defendant should be compelled to respond in damages for the injury resulting from his breach of faith. Wells, J., said, "It is settled with little or no divergence of opinion, that when a defendant in a bill of equity disenables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made; and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the

same as the party would otherwise recover as damages in an action at law.

There is also authority, though apparently questioned in the English decisions, for the application of the same rule when the disability was caused before suit, but after the date of the agreement relied on. In this country it seems to be generally accepted as the rule, provided the plaintiff brought his bill without knowledge of the disability, in good faith seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief. In the opinion of a majority of this court, there is equal ground in equity for applying the same rule, with the same qualifications, to all cases where a defect of title, right, or capacity in the defendant, to fulfil his contract is developed by his answer, or in the course of the hearing, or upon reference of his title or capacity, after an order of fulfilment."

The learned judge then went on to observe that where the complainant knows that the defendant is unable to fulfil the contract, and that he cannot have the relief for which he prays, the case is simply that of a bill filed for the purpose of assessing damages for a breach of contract, and therefore not within the ordinary jurisdiction of a chancellor; *Kempshall v. Stone*, 5 Johnson Ch. 193. But where on the other hand the complainant is not aware of the obstacle which precludes a specific performance, the bill may be retained and a pecuniary compensation

awarded for the breach. The case of *Denton v. Stewart*, 1 Cox Ch. 258, was in accordance with this principle, which was also recognized in *Gremaway v. Adams*, 12 Vesey, 395, and although it had been laid aside in England, it was sustained by the decisions in Massachusetts and in some of the other states; *Peabody v. Tarbell*, 2 Cushing, 226; *Andrews v. Brown*, 3 Cushing, 130; *Pingree v. Coffin*, 12 Gray, 288, 305; *Attorney General v. Deerfield River Bridge Proprietors*, 105 Mass. 1; *Rees v. Smith*, 1 Ohio, 124; *Gibbs v. Champion*, 3 Ohio, 335; *Jones v. Shakelford*, 2 Bibb, 410; *Fisher v. Kay*, 1b. 434; *Slaughter v. Tindle*, 1 Littell, 358; *Rankin v. Maxwell*, 2 A. K. Marshall, 488; *Copper v. Wells*, Saxton, 10; *Berry v. Van Winkle*, 1 Green Ch. 269. "In *Philips v. Thompson*, 1 John's Ch. 131; and *Parkhurst v. Van Cortland*, 1b. 273, the bill was retained for assessment of damages, only, upon the principle of the decision in *Denton v. Stewart*; and the authority of that case was distinctly recognized. The same eminent chancellor, in the case of *Woodcock v. Bennett*, 1 Cowen, 711, ordered a reference to a master to assess damages, because, since the execution of the agreement, the defendant had disabled himself to perform it. In the Court of Errors, the bill was dismissed upon other grounds; but the opinion delivered by Woodworth, J., approves of the doctrine of *Denton v. Stewart* upon which the reference was ordered. In *Morss v. Elmen-dorf*, 11 Paige, 277, the principle

is suggested as broadly, and substantially, in the terms and with the limitations, as we have stated it; and again in *Wiswall v. McGowan*, Hoffman's Ch. 125, where it is ably discussed, and the authorities, particularly those in New York, collated. This last decision was reversed by the Supreme Court in 2 Barbour, 270, but, upon appeal, the case was disposed of ultimately upon other grounds (see 6 Selden, 465), and the principle of *Denton v. Stewart* and *Woodcock v. Bennett*, was soon after asserted in the Supreme Court; *Woodward v. Harris*, 2 Barbour, 439. The case of *Denton v. Stewart* is not without support from early English authorities. See *Hedges v. Everard*, 1 Eq. Cas. Abr. 18 Pl. 7; *Cud v. Rutter*, 1 P. W. 570; *Wilkinson v. Forkington*, 2 Y. & Col. Exch. 726."

One who takes a deed, with notice of a prior contract of sale, stands in the shoes of the vendor, and may be compelled to do whatever would have been obligatory on the vendor if the legal title had remained in him; *Laverty v. Moore*, 33 New York, 658; *McMorris v. Crawford*, 15 Alabama, 271; *Dickinson v. Amy*, 25 Id. 424; *Fass v. Haines*, 31 Maine, 86, *Wiswall v. McGowan*, 1 Hoffman, 125; *Smoot v. Rex*, 19 Maryland, 398; *Kerr v. Day*, 2 Harris, 112, 117; *Haughwout v. Pomeroy*, 7 C. E. Green, 119; 8 Id. 531; *Coates v. Gerlach*, 8 Wright, 43. The equity depends on the nature of the transaction, through which the subsequent purchaser acquired the title, and

as this may not be known with certainty, the proper course is to make him a party to the bill, with a prayer in the alternative, that if he acted *mala fide*, he may be ordered to execute a conveyance; if he did not, that so much of the purchase money as remains in his hands shall be paid to the complainant; see *Kerr v. Day*, 2 Harris, 112. The first purchasers should, notwithstanding, seek relief at once, and will be precluded by laches, and *a fortiori* by accepting the whole or any part of the proceeds of the sale; *Haughwout v. Pomeroy*; *Doan v. Mauzey*, 33 Illinois, 227. And the inclination of the authorities in the United States, is that a specific performance will not be enforced against a subsequent purchaser, who does not receive notice until after he has obtained a deed or made a partial payment, and that the remedy of the former buyer will be limited to a decree for so much of the price as still remains unpaid; see *Flagg v. Mann*, 2 Sumner, 487; *Haughwout v. Pomeroy*, *ante*, 78.

On the execution of a contract for the sale of real estate, the vendor becomes a trustee for the vendee, and if he sells the land subsequently to a third person, the proceeds will be affected with the trust, and the vendee is entitled to require that they shall be paid over to him, in lieu of the estate which has been placed beyond his reach, *ante*; see *Oliver v. Crosswell*, 42 Illinois, 41; *Haughwout v. Pomeroy*, 7 C. E. Green, 119; 8 Id. 581; *Tinney v. The State*

Bank, 20 Wisconsin, 152, 164; *Dustin v. Newcomer*, 8 Ohio, 49. Such relief is based on the well settled and reasonable rule, that one whose property is wrongfully converted into money, may waive the tort, and will then be as much bound by, and entitled under the contract, as if it had been made with his knowledge and assent.

Whatever the rule may be when the property is conveyed before the filing of the bill, it is clear that an alienation *pendente lite* will not oust a jurisdiction which has already attached, and that the court may, under these circumstances, award a pecuniary compensation if the contract cannot be specifically enforced; *Chapman v. The Mad River Railroad*, 6 Ohio, N. S. 119, 139; Story, Eq. Jurisprudence, sect. 794. *Meason's Appeal*, 20 P. F. Smith, 27, 29.

COMPENSATION FOR ACTS DONE UNDER A CONTRACT WHICH CANNOT BE SPECIFICALLY ENFORCED.—It is well settled that where acts are done under a contract for the sale of land which must be injurious to one of the parties to the contract, if it be not fulfilled, and the contract fails in consequence of the refusal or inability of the opposite party, a court of equity may take cognizance, for the sake of affording the vendee a remedy which cannot so well or readily be had at law; *Bowie v. Stonestreet*, 6 Maryland, 418. Such is the case of a purchaser who is ejected, after having made valuable improvements on the faith of an oral con-

tract which the vendor refuses to fulfil; *Parkhurst v. Van Cortland*, 1 Johnson Ch. 131, and such that of a vendor, who, having authorized the purchaser to demolish buildings, take down a dam, or make other changes which detract from the value of the premises, finds them thrown back on his hands, on the ground that there is no certain or written evidence of the contract; *Phillips v. Thompson*, 1 Johnson Ch. 191, and the court may, under these circumstances, assess the damages from the want of a legal remedy, and in order to prevent a failure of justice; *Evans v. Battle*, 19 Alabama, 398; *Adey v. Echols*, 18 Id. 353.

In *King v. Thompson*, 9 Peters, 204, the complainant expended large sums of money on the land, in reliance on an unwritten agreement which was too uncertain to be specifically enforced, and the court directed a sale of the premises, and that the proceeds should be applied in the first instance to reimburse the complainant, and that the defendant should receive the residue.

In like manner when a vendor who has received the purchase-money, is unable or refuses to give a title, a court of equity may direct him to reimburse the purchaser, and that the amount shall be a lien or charge on the land; *Rider v. Gray*, 10 Maryland, 282; and it may be said in general, that where either party is entitled to a rescission of the contract, an account may be taken between him and the other party, and the

payment of the balance enforced by a decree; *Erwin v. Meyers*, 10 Wright, 96.

It has been held that when an oral contract which has been so far executed as to be obligatory on the vendor, is frustrated by a

conveyance, a subsequent bona fide purchaser from the vendee, may seek the compensation in equity, which he cannot obtain by a suit for damages; see *Lee v. Homer*, 27 Missouri, 531; *Bourland v. Peoria*, 16 Illinois, 538.

[*556]

*HUGUENIN v. BASELEY.

NOV. 14, 16, 17, 18, 23, 1807.

REPORTED 14 VES. 273.

VOLUNTARY SETTLEMENT OBTAINED BY AN AGENT—UNDUE INFLUENCE.]—*Voluntary settlement by a widow upon the defendant, a clergyman, and his family set aside, as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward.*

THE object of the bill in this cause was to set aside a conveyance, made by the plaintiff Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained. The following are the principal circumstances, established by evidence, and admission, under which this relief was sought.

In 1803, Mrs. Huguenin, then Mrs. Hill, appeared to be entitled in fee simple to the manors of Cleydon and Hampton Gay, and other estates in Oxfordshire, under the ultimate limitation of the reversion by a will, dated in 1768, to her father, Richard Hindes, who had gone to Jamaica, where he acquired considerable property, real and personal, which upon his death also descended to her.

After some correspondence with their solicitors in England, she, in September, 1803, returned with her husband from Jamaica. He died in October, 1803; and in November, she being then about the age of forty, first became acquainted with the defendant, Thomas Baseley, a clergyman, who was also connected with the family of *Hindes, and had with other [*557] persons, upon the death of the testator in 1798, instituted a suit claiming as heirs at-law of Richard Hindes; in which cause an inquiry, directed by the Lord Chancellor, produced the title of Mrs. Huguenin as the only child of Richard Hindes.

The bill stated, that the defendant Baseley, with the view of getting the control and management of the said estates, and of getting ultimately settled upon himself, procured an introduction

to Mrs. Huguenin; and having by various means ingratiated himself with her, represented that her solicitors had mismanaged and neglected her property, and induced her, then a stranger, having no friends or relations in England, and being quite ignorant of the value of property, to withdraw her affairs from those solicitors and to place them in the hands of the defendant; who, with such design, wrote the following letter, which she, by his inducement, caused to be copied and signed, and sent to the solicitors:

“Sirs,—Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I fell myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs, and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection, I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself. Impressed with this agreeable idea, I beg leave to inform you that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley’s hands; and hope that you will prepare, without any delay, every account that you have standing against me, with the deeds, &c., of the estate at Hampton. As I wish to leave London at Lady-day next, I must desire that no delay on your part will take place. Mr. Baseley *will be ready to meet you on the business whenever you will appoint a day. [*558] With this determination, I remain, &c. ANN HILL.”

The deeds were accordingly delivered to Baseley, and were deposited by him with his solicitor. The bill farther represented, that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate, as she had proposed, and recommended to her a surveyor, who gave a very unfavourable account of the situation of the estate; and the defendant Baseley soon afterwards offered her 40*l.* a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing 420*l.* a year as the utmost value, which was confirmed by his solicitor; that she executed the deeds under the persuasion of the solicitor that they were her will, and the lease to Baseley, and that she had no intention to give away or settle her estate, &c.

By the deed dated the 5th of May, 1804, which was the subject of the bill, the plaintiff Mrs. Huguenin, in consideration of 10*s.*, conveyed the Hampton Gay estates to a trustee, his heirs and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, &c., an annuity of 400*l.*, secured by a trust term of 500 years; and subject thereto, to the

use of the defendant Baseley, for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders to his wife for life, to their children, born or to be born, in tail, with cross remainders, and the ultimate remainder to Mrs. Huguenin. The value of that estate was rather more than 400*l.* per annum.

The defendant, Thomas Baseley, by his answer, represented, that from the time of his first acquaintance with the plaintiff, a great intimacy took place, and she expressed great affection for him and his family; that she complained of the conduct of her solicitors, declaring her intention of taking the management of her affairs from them; and upon her application, he recommended [559] to her *his solicitor and a surveyor, and she intimated to the defendant her intention of settling her estates on him and his family, and requested him to write to her solicitors, to acquaint them that she should take her affairs out of their hands; and the defendant at her request did in her presence, and with her sanction, and according to her directions, write the form of a letter, for that purpose, which the plaintiff, as he believes, copied, and sent to her solicitors; but the defendant positively denies that such letter was written at his instigation, or by his desire; on the contrary, he wrote the same at the pressing desire of the plaintiff; and though the language of the letter was the defendant's, yet the substance was in fact dictated by her. In another part of the answer, the defendant denied that he induced her to send that letter, stating his belief that it was written by him, but that it was so written at the particular instance and request of the plaintiff, who desired him to draw up such letter, as before mentioned; and he believes he did, upon that occasion, state to the plaintiff, that, if it was her wish to discharge her solicitors, such letter ought to be in her own handwriting, as it would not be so proper for it to appear in his handwriting, and the plaintiff did copy such letter.

The answer farther stated, that the plaintiff frequently expressed to the defendant a wish to settle her affairs, and make a disposition of her property, inquiring whether the defendant was related to her, and who was her heir-at-law; and being informed, expressed a great dislike to that family. And after various conversations, she repeated her determination to settle the Hampton Gay estate on the defendant and his family; and in March, 1805, without any persuasion, suggestion, or influence, she gave instructions accordingly; and the defendant understood her intention to be, to settle the estate, so as to reserve to herself a rent-charge for her life about equal to the reasonable rent; and that it was her wish that the defendant should go and reside there immediately with his family, so that the mansion house might be kept up; declaring, that she would never reside there [560] on *account of the trouble of repairing, &c.; and the defendant denied all the charges of fraud, influence, &c.

The answer of the attorney who prepared the deed, stated, that

when instructed by her to prepare the settlement, he recommended to her to make a will, which might be revoked or altered; when she replied, that she would not do it by will, on that account, as, if she should alter her situation, she intended it should not affect the settlement of her property. The defendant, according to the voluntary instructions of the plaintiff, prepared two deeds of settlement; viz. that of the 5th of May, 1804, as to the Hampton Gay estate, in the bill mentioned; and the other, dated the 21st of June, 1804, relating to all her other estates and property. In the former deed, blanks were left for the plaintiff's rent-charge and the names of the trustees, and she made alterations as to the uses among Baseley's children, and as the ultimate limitation, which originally was to Baseley in fee. That deed was settled, and the other prepared by counsel; and they were voluntarily and deliberately executed, and the blanks filled up by her direction.

This answer farther stated, that, in the deed of the 21st of June, 1804, the defendant Thomas Baseley, and this defendant, and William Sleet, of Jamaica, were named trustees, and the estates and property therein comprised were conveyed and assigned upon trust during the life of the plaintiff Ann Huguenin, to convey, &c., according to her appointment, and to her separate use, notwithstanding coverture; and, after her decease, for any future husband surviving her, for his life, with remainder to her children by any such marriage, as tenants in common in tail, with cross remainders; remainder to her mother and William James Clarke and the survivor, and to the children of Clarke; with remainder to Thomas Baseley and the two other persons named as trustees, as tenants in common; and 5000*l.* was settled on Mary Ann Elliott: and she was directed, during her minority, to be brought up by Mrs. Baseley, who was to receive the interest of her fortune; 2000*l.* on Elizabeth Eleanor Clarke; 100*l.* *a year on Mrs. Hindes; 200*l.* a year on William James [*561] Clarke; and by that deed are settled several estates in Jamaica, with the stock; several sums of money due from different persons; a leasehold estate in Middlesex; the manor of Cleydon, in the county of Oxford, and all the estates real and personal, then late the property of Thomas Hindes, not before conveyed and settled by the plaintiff, and other estates real and personal, stated to be mentioned in the schedules.

This answer also denied all the charges of fraud, misrepresentation, &c.

Sir *S. Romilly*, Mr. *Hollist*, and Mr. *Trower*, for the plaintiffs. —The authorities against permitting a transaction of bounty to take effect between persons standing in certain relations are numerous. Among those relations, that of guardian and ward is not for this purpose confined to persons so related in a strict sense—as under an appointment of guardian by will, or by order of this Court; but the rule includes any person placing himself in

that situation: *Hylton v. Hylton*, 2 Ves. 547; *Pierce v. Waring*,¹ *Griffin v. De Veulle*,² *Hatch v. Hatch*,³ *Proof v. Hines*,⁴ *Dixon v. Olmius*,⁵ *Wright v. Proud*,⁶ *Newman v. Payne*.⁷ The last of these cases is perhaps the most applicable to this—one person undertaking to manage the affairs of another. Such a transaction as this, between persons so connected, cannot, upon principles of public policy, or, as Lord Hardwicke expresses it, public utility, be permitted.

The law of other countries, however, affords authorities more precisely applying to the circumstances of this case. According to Pothier,⁸ by the ancient law of France, the same doctrine, that by our law prevails as between guardian and ward, is applied to an administrateur—a person managing the affairs of another, who cannot take a bounty either for himself or his children, what is given to the children being, with reference to natural affection, considered as given to the parent; and this, by a singular concurrence with Lord Hardwicke, is expressed to be [*562] *upon the ground of public utility. This case, however, goes beyond that. This is an instance of a very peculiar species of influence gained over the mind of this lady by no common means; appearing by the letter, written or dictated by the defendant for Mrs. Huguenin to copy, in terms which he cannot be supposed to use in the light and profane way that too frequently occurs. The English Courts of justice do not afford an instance of influence acquired by such means;⁹ but in foreign Courts such instances have occurred. According to Pothier, it has been decided, upon the same principles of public utility that a confessor, or director of the conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character; and the apprehension of the empire which these persons obtain, was carried so far, that a gift to the order of which they were members was not allowed to have effect.

Mr. Richards, Mr. Fonblanque, Mr. Hart, Mr. Martin, Mr. Leach, and Mr. Wetherell, for the defendant.—The conduct of persons who place themselves in situations of confidence, must be examined with the most scrupulous attention; but there is no rule that creates a disability to take a bounty under these circumstances. The result of the authorities is, that the transaction must be fairly sifted; but a voluntary deed, free from any imputation of surprise, or undue influence, spontaneously executed by a person with her eyes open, cannot be set aside in a Court of equity. In *Villiers v. Beaumont*¹⁰ the principle that has con-

¹ Cited 1 Ves. 880; 2 Ves. 548, stated from the Reg. Lib. in Mr. Cox's note, 1 P. Wms 121.

² 3 Wood. App. 16; 1 Bac. Ab. 109, ed. by Gwill. ; 3 P. Wms. 181, Mr. Cox's note

³ 9 Ves. 292.

⁴ 13 Ves. 186.

⁵ Ca. t. Talb. 111.

⁶ 2 Ves. jun. 199.

⁷ 1 Cox, 414.

⁸ Poth. Traité des Donations entre Vifs, s. 1.

⁹ See Norton v. Rely, 2 Eden, 286.

¹⁰ 1 Vern. 100.

stituted the rule ever since, is laid down by Lord Nottingham, that, if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, that a man can make no voluntary disposition of his estate but by his will, which would be absurd.

It is not the province of this Court to enable a person
 *to rescind an absurd disposition of property. The pro- [*563]
 vidence of improvidence of it, though an ingredient, with other circumstances, forming the inference that the donor had not the free uncontrolled possession of his mind, will not do alone. The law of this country does not prevent even a prodigal disposition by a person of sound mind and under no duress. The case of *Dixon v. Olmuis* ended in a compromise, Lord Thurlow finding it impossible judicially to act upon his inclination to extend the principle. A deed obtained by duress or by fraud, as where the party is deceived by the substitution of one instrument for another, is void throughout, not only as to the author, but as to all persons claiming under it; but if a person, actuated by motives of gratitude for services received and benefits enjoyed, desirous of requiting those services and benefits, executes a purpose of bounty, and not only to the author of them, but also to his children, and the father, standing in a relation of confidence, is disabled by the rule, founded on general policy or public utility, to take in his own person, the failure of the purpose as to the father, merely by the effect of that rule of general policy, not through any misconduct or vice in the transaction, shall not be extended to the disappointment of the children, as it would, if the disability arose from want of will in the donor, as in the instances of duress or fraud. Upon the ground of general policy, therefore, the interest of the children must be distinguished from that of the parent.

In the case of *Wright v. Proud*,¹ the transaction was set aside, as the party had been deceived and practised upon, not exercising a fair unbiassed purpose of bounty. The authority cited from the French law is not supported by the civil law, which, prohibiting donations inter vivos on the ground of relationship, does not go beyond that of husband and wife; but Pothier² goes much further than the case of administrateur, to a physician, a surgeon, a confessor, every one who may have influence, and extends it even to wills. The rule thus extended can stand only upon the principle of the civil law, by which an act of
 *improvidence even may be restrained by the Judge. In [*564]
 this country a man has the absolute dominion over his property, and may give it away in any manner he thinks proper. Then, to whom is bounty usually distributed,—to strangers, to persons

¹ 13 Ves. 136.

² *Traité des Donations entre Vifs*, s. 1.

in whom no confidence is placed? It is the natural effect of habits of intimate connection and friendship. It is not unusual for a gentleman at a certain age to remunerate his tutor by a gift, who has never been deemed incapable of taking in that way; yet that would be within the restriction of the French ordinance, which, singular and severe as it is, does not go the length of prohibiting a present to the minister of a parish or chapel attended by the donor.

Admitting, what is not clear upon the authorities, that the relation of guardian and ward creates an absolute disability in the former, precluding a gift by the latter, without distinction between an act the result of abused confidence, under an impulse preventing the free exercise of judgment, and the spontaneous bounty, springing from affection, of a person emancipated from control, all accounts settled. Admitting also, according to *Griffin v De Veulle*,¹ that the restriction applies to any person assuming the office and functions of a guardian, though not legally so constituted, is there any case upon the relation of guardian and ward in which youth and inexperience on one side were not ingredients? Was that character ever applied to a confidential intercourse between persons of advanced life and equal age? In those circumstances their intercourse was merely that of mutual kindness and reciprocal esteem. The defendant undertook no office. He never assumed the functions of her attorney,—a relation involving necessary confidence on one side, and probably influence on the other, calling for application of the principle of public policy; but in the capacity of attorney another person was employed by the plaintiff, her own attorney, who prepared the deed from her instructions, without any direction or interference of the defendant. She went alone to the attorney's office, and [*565] gave her own instructions, from time to time dictating alterations. It is then said, the defendant was her agent. There is no authority that a mere agent, generally employed in receiving rents, &c., is not capable of receiving a gift; and the case of *Gartside v. Isherwood*,² where the leases were set aside expressly on the ground of fraud, disproves it. The principle of public policy has no reference to that mere naked relation.

This defendant, however, cannot be represented as an agent in that sense, undertaking for remuneration. If he was an agent, every man acting for his friend is so. Can it be stated, that a man who goes beyond mere professions, engaging actively in the concerns of his friend, is therefore obnoxious to this principle of public policy? The utmost extent to which this case can be carried is, that the defendant, as a friend, advised the plaintiff as to the management of her affairs. Her purpose was settled to withdraw her affairs from her former solicitors. The letter was obtained from the defendant in pursuance of that, her own

¹ 3 Wood. App. 16; 1 Bac. Ab. 109, ed. by Gwill.; 3 P. Wms. 181, Mr. C. x's note.

² 1 Bro. C. C. 558.

purpose. Incapacity being neither proved nor alleged, the only ground for relief between such parties must be direct fraud. The latter amounts to no more than a warm testimony of her grateful sense of the defendant's friendship.

Sir *Samuel Romilly*, in reply.—This bill puts the relief it prays, directly upon the ground of undue influence, exerted by the means of spiritual ascendancy, distinctly charging that the defendant had taken upon himself to be the adviser of this lady, and the manager of her property, and stating the letter as an instance of that influence. But, divesting this case of that relation and influence, and considering it as the case of a stranger, the evidence of fraud or misapprehension is so strong, that this transaction could not possibly stand. Upon all the evidence it cannot be represented that, when she executed the deed, she was apprised of its nature. How is her sudden change in so short a period, from great anxiety about this estate, to be accounted for, but from the effect of a sort of fascination? Of what consequence was it to Mrs. Huguenin what repairs were to be done, what conditions *were to be kept, according to [566] the evidence, upon the supposition that she was parting with the estate for ever? The removal of her husband's corpse to be buried at Hampton Gay is another circumstance utterly inconsistent with the defendant's representation that she did not intend to remain the proprietor. Having a mother, a half-brother, and sister, she was not at a loss for an object of bounty. The evidence as to her conversation with the attorney, suggesting to her that a will would be revocable by a change of her circumstances, shows that she looked to the possibility of a second marriage. Her expression of satisfaction at having attained her object cannot be explained upon the supposition that she was giving away her estate, but may be accounted for if she was to get rid of the trouble attending it.

In these cases, one of the strongest circumstances is the appearance by one person of consulting only the interest of another, and neglecting his own. The passage of Cicero¹ is most applicable:—

"Totius autem injustitiæ nulla capitalior est quam eorum, qui, cum maximè fallunt, id agunt, ut viri boni esse videantur."

The duty imposed upon the defendant by merely undertaking the concerns of this lady, made it impossible for him to take the whole of her estate; for it is not necessary to go to the extent that he could not accept any bounty. He took upon him the entire management of her affairs—acting as her agent, receiving her rents, attending arbitrations, &c., &c. The rule is not confined to attorneys, or persons entitled to reward. *Proof v. Hines*² was the case of a tradesman, who officiously interfered; the relief stands upon a general principle applying to all the variety of relations

Cic. de Off. Lib. 1, s. 18.

² Ca. t Talb. 111.

in which dominion may be exercised by one person over another;¹ and this case discovers one of a very peculiar nature,—influence obtained through the sacred character of a minister of religion. Though there is no case² in which the Court has proceeded upon such grounds, the general principle has prevailed, where the [*567] means of acquiring influence were much less *powerful,—the respect of a child or ward for a parent or guardian. Pothier says, that, by a latitude of interpretation, proceeding upon principles of public utility, that ordinance, expressly concerning only a tutor or administrateur, has been extended to the master of a school; the director of the conscience; the physician, who is not permitted during his attendance to take a conveyance from the patient; and to other relations, in which authority or influence must be supposed to exist.

For the proper determination of this case, however, it is not necessary to rely on such authorities. The decisions of English Courts of Justice are amply sufficient. The same doctrine, stated by your Lordship in *Hatch v. Hatch*,³ was laid down by Lord Chief Justice Wilmot in *Brugeman v. Green*.⁴ There was in that case much evidence, that the person was perfectly aware of what he was doing, and had repeatedly confirmed it. Upon that, Lord Chief Justice Wilmot's observation is, that it only tends to show more clearly the deep rooted influence obtained over him.⁵ "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition, they prove nothing; for the same power which produces one, produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it."

Having before⁶ mentioned the distinction of the Roman law between liberality and profusion, he says, our laws strike no such boundary—"stat pro ratione voluntas is the law with us;" and this Court never did nor ever will annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honour have accepted; nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But, though this Court disclaims any such jurisdiction, yet, where a gift is immoderate, [*568] bears no proportion to the circumstances *of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is

¹ See *Dent v. Bennett*, 4 My. & Cr. 277, where this proposition is approved of by Lord Cottenham.

² See *Norton v. Rely*, 2 Eden, 286.

³ 9 Ves. 292.

⁵ *Wilm.* 70.

⁴ 2 Ves. 637; *Wilm.* 58.

⁶ *Wilm.* 6, 61.

made; and if it sees that any arts or stratagems, or any undue means have been used—if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him—if there be the least scintilla of fraud, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the danger, either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority, as the relation of husband and wife is guarded from the effects both of indulgence and severity.

If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority; what are the means of influence, by severity or indulgence, in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire, as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive that can actuate the human mind? Though no direct authority is produced, your Lordship, dispensing justice *by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, [*569] will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has yet occurred, upon this ground alone, from its infinite importance to the community.

LORD CHANCELLOR ELDON.—With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with the reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridgeman v. Green*¹ is an express authority, that it

¹ 2 Ves. 627; Wilm. 58.

is within the reach of the principle of this Court, to declare that interests so gained by third persons, cannot possibly be held by them; and Lord Hardwicke observes justly, that if a person could get out of the reach of the doctrine and principle of this Court, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance, therefore, the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners; and Lord Chief Justice Wilmot expresses himself thus: '—

"There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out [*570] amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

This was also the doctrine of Lord Thurlow, in the case that has been referred to: *Luttrell v. Lord Waltham*, sometimes cited as *Dixon v. Olmius*; and, though it was not practically acted upon, Lord Thurlow was inclined to carry it farther. The object of the bill in that case was, that an estate should be enjoyed as if a recovery had been suffered, upon the ground that Luttrell had, while Lord Waltham was upon his death-bed, engaged in suffering a recovery, prevented it with the view that the estate should devolve upon the person with whom he was connected. The estate was by the law vested in that individual: a much stronger case, therefore, than the acquisition of property through imposition. Lord Thurlow, whatever might have been his final decision upon that case, had no doubt that it was against conscience, that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would have not discussed the case so much at large, if it had been no more than that. These plaintiffs, therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

Then, as to the persons concerned in these transactions, I agree with the argument, that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments, taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this Court to prevent a voluntary gift, by a man stripping himself entirely of his property, if undue influence is not imputed, that any judge

sitting here has ever thought himself at liberty to interpose. I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining; that their complaints must be treated as effectual or ineffectual, according to what they have, not what they could have, represented: [*571] *also, as to the defence, it may frequently happen that many passages may have taken place in the course of the transaction, that are not brought into view; but the case must be dealt with as it is alleged and proved. I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached, if the situation of the parties had enabled them to go through all the difficulties as to the amendment; also, that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at: but taking the case as it stands though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill, and in evidence, to show that this deed cannot stand, if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates; unquestionably has very different provisions, for very different persons; reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think, that deed could not be made the subject of the same bill: at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of this case is this: that, attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this: that the Court is, by the nature of the defence, required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions, in the course of which it was executed; and it is much the same as if the defendant had said, he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs; and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which this deed forms a part.

*The great body of evidence shows the alarm of this lady, at the trouble of taking possession of an estate, [*572] dilapidated. Upon the evidence, until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother; had great regard for a female child, Mary Ann Elliott; and had also a natural half-brother, named Clarke, of the age of sixteen, in whose education she appears to have been much interested. She brought him over to England; placed him with Mr. Baseley, at an expense to herself of 200*l.* a year. Her brother-in-law,

Benjamin Hill, states, that he, previously to the introduction of Baseley, managed her concerns; and that, until after that introduction, she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed, which is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management, and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley, is too strong: that she entertained that disaffection is clear: that Baseley did not discourage it, that he gave into it, is in evidence: that he created it, I cannot say: that he participated in, and acted upon it with her, is clearly established.

In October, preceding the month of January when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, died. She lived with, or was frequently with the two brothers of her deceased husband. The answer, therefore, stating that she was not without friends in this country is material; but in this view only, that it could be supposed she had ever consulted with them. There is, however, no evidence, that either Baseley ever stated to them what she proposed to do, or that the attorney concerned in the transaction, as Lord Chief Justice Wilmot says, felt the obligation of taking both with the grantor and the grantee, before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business after the *solicitors were [*573] discharged; and as to George Hill, though there is evidence that she did declare her purpose, it was in conversations, in which it was suggested to them both, and that ample provision was to be made for their children, which I fear had some influence with them. No such provision, however, was made.

It is doubtful, upon the report, whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report, the rents remained to be accounted for by Baseley, to the amount of 300*l.* or 400*l.* After the date of that report, small sums were lent to her: she had not even then paid the costs of the deed; she had borrowed 100*l.* from the attorney; and there is one item of 57*l.*, advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in the condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors, in January, 1803, either she adopted the resolution of dismissing them, and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it, or it was suggested to her by Baseley. My opinion is, that the weight of the evidence, which does not agree upon this, is, that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction, in a Court of justice, has this character at least, that it was demonstration to

Baseley that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account; and his answer represents it thus, that she called and requested him to write a letter to the solicitors; and at her request he did, in her presence, with her sanction, and by her direction, write the form of a letter, which he believes she copied and sent to them; but he positively denies that it was written at his instigation or by his desire, and says he wrote it at her pressing desire; and though the language was his, the substance was hers. Who dictated that letter is of very little [*574] importance. If at her dictation he wrote it, and permitted her to send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him; and the language of a Court of justice has in all times been, *that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in him, he ought to reject it as soon as proposed.* This letter is, therefore, upon the answer, to be taken as expressing her sentiments in his language. The effect of it is, at least, a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs; that she wanted that friend which Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage, and her affairs brought into such a plan that she could conduct them with facility to herself.

This letter produced from the solicitors, rather too hastily, a total severance of themselves from the concern; and Baseley entered, to a certain degree at least, upon the management of them. The purposes expressed and alluded to in that letter, cannot mean that all her estate should be given away: that she was to be enabled to conduct her affairs with facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared in June these two deeds, conveying this estate, worth at that time, at the lowest calculation 420*l.* a year, which Annesley wished to purchase upon the supposition that it is worth 610*l.* a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life; with remainders to Mrs. Baseley for life, and to all their children, born or to be born, and the ultimate limitation to Mrs. Hill. A deed was prepared at the same time, which appears intended to be a conveyance of all her property, but which they were very much perplexed to describe, conveying all her freehold estates in the West Indies and everywhere, none of the parties knowing what they were; all the leaseholds for **lives* mentioned in the schedule, of which [*575] there are none; and all the leaseholds for years, of which there are some, to her for her separate use for life; with remainders to the husband whom she should marry, surviving

her, and to Mrs. Hindes and young Clarke and his children ; and the ultimate limitation for what reasons is not explained, to Baseley and the attorney, and a person resident in the West Indies: this contemporaneous deed permitted to be made by her, having in contemplation a second marriage, which appears upon the deed itself.

To the question, whether these instruments being such as I have represented them, the consequence is, that this Court shall undo them, I answer, no, if they are pure, voluntary, well-understood acts of her mind ; but if they have not that character, if they are the results of her notion, that this is the true effect of that friendly assistance, that kind providential interference to which she was looking for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well-understood acts of her mind, this Court will undo them.

Has an instance ever occurred that a person, situated as this lady, was permitted to execute such instruments as these, with a purpose of marriage demonstrated upon one of them, and having a mother, and other persons whom she regarded with affection and anxiety for their welfare in life? Lord Hardwicke reasons with great force as to the voluntary deed, upon the same principle which induced me to ask, how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation: but it was a power to revoke in the presence of three persons, who, perhaps, never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered [*576] strong evidence *that the party did not understand the transaction, whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation; and that is a part of the transaction one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, it is too much to say the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by the various limitations in the other deed? I do not say, instruments are to be set aside by the want of great delicacy in the person who prepared them: but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief

Justice Wilmot says,¹ go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was, whether a fine and recovery were necessary. Why that should be thought of I do not know, as she had the remainder in fee simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of 400*l.* is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rent-charge are left in blank before the deed was laid before counsel, and the filling up those blanks is left to Baseley and herself; and the power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The *reason that there is no power of revocation is, that the gentleman before [577] whom the draft was laid thought his business was to execute the intention of the parties. There is a difference of opinion upon that, other gentlemen thinking some observation necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation, or that she is to have any power to alter the uses. Not a word is dropped upon the subject. But by that deed this lady, who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will to alter completely these uses. Is there any evidence showing why that power should be there?—a power not to revoke the uses, but much less convenient, yet open to all the objections that she could have to a temporary instrument, as not binding herself down.

Other observations occur upon these instruments. This latter deed, in the limitation as to all the estates, provides an interest to a husband surviving, and to her children. According to the instructions, as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children, which, however, they though they had inserted, as there is afterward, a provision upon failure of children. Another circumstance, as to the instrument of the 21st of June, 1804, is, that the instructions as to the trustees' names mention Baseley, the attorney, Sleet, and Anderson; and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee; but his name is afterwards struck out. Clearly at the time of the instructions, it was not intended that there should be an ultimate limitation to the trustees for their own use; but they were to be trustees for undefined purposes. The deed was

¹ Wilm. 69.

originally drawn so, expressing the trust to be for such uses as they should think necessary and proper; but that was afterwards struck out, and the use for the benefit of the trustees themselves substituted.

[*578] *It does not rest there. Suppose these transactions entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property, for the purposes of facility of management, and putting it out of her own reach, she is permitted to place her West India property under the care of a clergyman and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life, subject to her control; how efficacious, every one knows, without any control whatsoever after her death. The management is perfectly ad libitum, to lease and carve out of the estates other interests; and they have all discretionary powers as to the children, Mary Elliott, and Clarke; and she could not charge any of the trustees without executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds, and the defendant, according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit, without considering what an agent engaged for reward can do, the known doctrine is, that the fruit of that relation, if it was not absolutely dissolved, cannot be permitted to subsist. Then, was the relation dissolved? Look at the transactions from the date of the letter to the end of the year: possession taken, and her anxious wish that Baseley should be the occupier, proved; her satisfaction expressed at seeing the house repaired; her declarations that she could not possibly think of undertaking that trouble; and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate; that it was no object to her; that she had so much property, it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that she intended to give it to him, it is by no means out of the reach of the principle. *The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that* [*579] *care and providence was placed round her, as *against those who advised her, which from their situation, and relation with respect to her, they were bound to exert on her behalf.* Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband, a few weeks before, having been relieved from distress by a sum of money advanced by Baseley.

In that view of the case, no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, further, that the parties to the transaction did not understand it. Repeating, therefore, distinctly, that this Court is not to undo voluntary deeds, I represent the question thus—

whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and though, perhaps, they were not aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments.

As to the costs, the same principles of public utility that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered up, I have not, upon this form of the bill, authority to examine here the contents of the rest of the attorney's bill of costs, who, by happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deeds, I am bound by the principle established in *Bridgeman v. Green*,¹ and other cases, to hold, that if an attorney thinks proper to do more than obey the instructions which he ought not to have permitted to take effect, the Court has frequently said that it is not [580] sufficient; and if he has not only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration whether he shall not pay the costs, if the other cannot. If, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments which the decree says ought not to have been executed.

One circumstance now occurs to me, which I shall notice, that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstances that Baseley would repair, and lay out money upon the estate. If that had been expressed, it would have amounted to so little, as valuable consideration, that the Court would not have been justified in paying much attention to it; but I cannot find in any of these cases in which a deed has been effected on account of undue influence, that the Court has ever attended to anything supposed merely to oblige the parties, if not expressed.

Huguenin v. Baseley is a leading case on the very salutary jurisdiction of equity, to set aside, upon the principle of general public policy,

¹ 2 Ves. 627; Wilm. 58.

voluntary donations obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him. Sir Samuel Romilly, in his celebrated reply, in the principal case, most ably argues, that undue influence exerted by means of spiritual ascendancy comes within the principle on which relief had been granted, in the case of a gift from a child, or ward, to a parent or guardian; but he and the other counsel, and the Lord Chancellor, were evidently not aware of *Norton v. Rely*, a decision of Lord Northington's (since reported in 2 Eden, 286), in which a grant of an [*581] annuity obtained by a dissenting minister having a spiritual ascendancy over a woman under a state of religious delusion, was set aside upon principles of public policy. See also *Nottidge v. Prince*, 2 Giff. 246; and see and consider *Kirwan v. Cullen*, 4 Ir. Ch. Rep. 322; *Maccabe v. Hussey*, 2 Dow & C. 440.

See as to the validity of gifts from nuns to their convents, *Whyte v. Meade*, 2 Ir. Eq. Rep. 420; *M'Carthy v. M'Carthy*, 9 Ir. Eq. Rep. 620; *S. C.*, nom. *Fulham v. Macarthy*, 1 Ho. L. Ca. 703; or to trustees for religious purposes, *In re Metcalfe's Trusts*, 2 De G. Jo. & Sm. 122, as to which, see article in 10 Jur. N. S. p. 91. There are some interesting cases on this subject in the Pleadings of Aguesseau in his character of Advocate-General. See "*La Cause des Héritiers de la Dame de Vaugermain contre les Religieuses du Saint-Sacrement*." (Œuvres d'Aguesseau, tom. 1 pp. 284, 297. Paris, ed. 1819); and "*La cause des Religieuses Ursulines de Castel-Sarrazin contre Guillaume-Gabriel de Charron, intimé, et Jean de Charron, intervenant*." (Ib. tom. 5, p. 514).

In *Huguenin v. Baseley* the donation was set aside, it seems, not merely on the ground of the spiritual ascendancy, and undue influence obtained by the defendant over the mind of the plaintiff Mrs. Huguenin, but also on the ground of his having abused the confidence placed in him by her, as an agent managing her affairs. See *Middleton v. Sherburne*, 4 Y. & C. Exch. Ca. 390, 391.

The principle upon which courts of equity set aside such donations, has been so accurately stated by Sir Samuel Romilly, in his argument, that Lord Cottenham, in the case of *Dent v. Bennett*, fully adopted it. "The relief," observes his Lordship, "as Samuel Romilly says in his celebrated reply in *Huguenin v. Baseley* (from the hearing of which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years), "the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another:" 4 My. & Cr. 277.

Before entering further into the consideration of the subject of this note, it may be as well to mention that the case of *Villers v. Beaumont*, 1 Vern. 100, as is correctly observed in the argument for the

defendant in the principal case, clearly establishes the rule that in the case of a stranger, that is to say, a person not standing in any confidential or fiduciary relation towards the donor, equity will not *set aside* a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence, and spontaneously executed or made by the donor with his eyes open. And it is *equally clear, that in all cases where it [*582] has been proved that a mere stranger, connected with the donor by no peculiar or fiduciary relation from which undue influence can be inferred, has either by fraud, surprise, or undue influence, obtained from him a voluntary donation, a court of equity will at once set it aside; in such cases, however, the proof of fraud, surprise, or undue influence is completely thrown upon the donor, for *prima facie* the donation is valid: *Hunter v. Atkins*, 3 My. & K. 113; *Toker v. Toker*, 31 Beav. 629.

However, according to the opinion of Sir John Romilly, M. R., in a recent case, the court throws upon parties taking an advantage by a large voluntary donation, whether they stand in a fiduciary relation to the donor or not, the onus of proving that the transaction is such as can be supported. "Wherever, observed his Honor, "one person obtains, by voluntary donation, a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord Eldon, in *Gibson v. Jeyes* (6 Ves. 266), falls on the person taking the benefit. But this proof is given, if it be shown that the donor knew and understood what it was that he was doing. If, however, besides the obtaining the benefit of this voluntary gift from the donor, the donor and the donee were so situated towards each other, that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord Eldon, in *Huguenin v. Baseley*, 'whether the donor knew what he was doing, but how the intention was produced;' and though the donor was well aware what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside.

"In many cases, the court, from the relations existing between the parties to the transaction, infers the probability of undue influence having been exerted. And in such cases the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself, flowing from such relations, is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds, as an

inseparable condition, that this influence should be exerted for the benefit [*583] of the person subject to it, and not for the advantage *of the person possessing it:" *Hoghton v. Hoghton*, 15 Beav. 299; and see *Cooke v. Lamotte*, *Ib.* 234. The wholesome doctrine, according to which in equity, undue influence is presumed from certain fiduciary relations, between the parties in the case of gifts inter vivos, unfortunately does not apply to gifts by will. See *Parfill v. Lawless*, 27 L. T. Rep. (N. S.) 215.

In the present note, it is proposed to consider, first, that class of cases, in which actual proof of undue influence may not be required, but will, upon grounds of *public policy*, be more readily presumed from the peculiar relation subsisting between parties.

As to the relation of parent and child.—Courts of equity, although there is no very great evidence of undue influence, will always look with a jealous eye upon donations from a child to a parent, especially where the child has just come of age, and will set them aside if any advantage has been taken by means of the exercise of parental authority: *Cocking v. Pratt*, 1 Ves. 401; *Baker v. Bradley*, 2 Sm. & Giff. 531; 7 De G. Mac. & G. 597; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. Mac. & G. 133; *Potts v. Surr*, 34 Beav. 543, 552; *Davies v. Davies*, 4 Giff. 417; *King v. King*, 3 Jur. N. S. 609, 611; *Chambers v. Crabbe*, 34 Beav. 457. In *Carpenter v. Herriot*, 1 Eden, 338, where a father having advanced a child in his infancy, upon his coming of age took a bond from him to a greater amount than the sums advanced, and which it appears the son was totally unable to pay, Lord Keeper Henley held that the bond was obtained by parental influence, and decreed that it should not stand as a security for the sums advanced, but be set aside altogether. "If," said his Lordship, "a bond be given with advice and deliberation, this Court will not set it aside for the obligor, but if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on the one side, and a sort of imposition on the other." See also *Blunden v. Barker*, 1 P. Wms. 639; *Young v. Peachy*, 2 Atk. 254, 258; *Glissen v. Ogden*, cited 2 Atk. 258; *Heron v. Heron*, 2 Atk. 167; *S. C.*, Barnard, 430, nom. *Herne v. Herne*; *Hawes v. Wyatt*, 3 Bro. C. C. 156; *Hoghton v. Hoghton*, 15 Beav. 278; *Meadows v. Meadows*, 16 Beav. 401; *Bury v. Oppenheim*, 26 Beav. 594; *Turner v. Collins*, 7 L. R. Ch. App. 329, 342.

The same principles are applicable to a person obtaining a voluntary gift, who has put himself in loco parentis towards the donor. Thus, in the case of *Archer v. Hudson*, 7 Beav. 551, a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing in loco parentis. Lord Langdale, M. R., set aside the security. "Nobody," observed his Lordship, "has ever asserted that there

cannot be a pecuniary transaction between a parent and child, the child being of age; but *everybody will affirm in this Court that, if there be a pecuniary transaction between parent and child, just [*584] after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, *the presumption is, that an undue influence has been exercised* to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavors to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted, is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child; but it will take care (under the circumstance in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control." And see *Revett v. Harvey*, 1 S. & S. 502; *Dettmar v. Metropolitan and Provincial Bank (Limited)*, 1 Hem. & Mill. 641.

If the transaction between parent and child is reasonable, and entered into with good faith, equity will not interfere, as in *Blackborn v. Edgeley*, 1 P. Wms. 600, 606, where a son in plentiful circumstances gave his father a bond to pay him an annuity of 120*l.* for his life. Lord *Macclesfield* held, that, as it appeared to have been the free act of the son, and what he thought himself obliged in honor to do, and there being no proof to impeach it, it ought not to be set aside in equity.

So it seems, if a father prevail upon a son, tenant in tail under a settlement, to take an estate for life only, with remainder to his first and every other son, the transaction will not be set aside upon the suggestion of the father's having an undue influence over him: *Tendril v. Smith*, 2 Atk. 86; *Jenner v. Jenner*, 2 De G. F. & Jo. 359. So, if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside. Per Lord Hardwicke, C., in *Cory v. Cory*, 1 Ves. 19; and see *Hartopp v. Hartopp*, 21 Beav. 259. But these cases would come within the nature of family arrangements; as to which see *Stapilton v. Stapilton*, and note, post; *Meadows v. Meadows*, 16 Beav. 401; *Baker v. Bradley*, 2 Sm. & Giff. 531; 7 De G. Mac. & G. 597; *Jenner v. Jenner*, 2 De G. F. & Jo. 359.

It has been held in a recent case, that the relation of father and daughter did not of itself render the validity of an arrangement between them respecting *a reversionary interest of the daughter [*585] so doubtful as to justify a trustee in refusing to transfer a fund in pursuance of the arrangement without the indemnity of the Court.

And a trustee so refusing, and who did not show that he had endeavored to ascertain the real nature of the transaction, was decreed to pay the costs of a suit rendered necessary by his conduct: *Firmin v. Pulham*, 2 De G. & Sm. 99; *In re Cater's Trust*, 25 Beav. 361. But see *King v. King*, 27 L. J., N. S. (Ch.) 29.

As to the relation of guardian and ward.—A donation from a ward to a guardian is looked upon with great jealousy: and if it has been obtained immediately upon the ward's attaining his majority, it will be set aside, upon the presumption of undue influence having been used by the guardian; and even a considerable time after that event, upon proof that the influence of the guardian over the ward still existed; and if undue influence can be fairly presumed from the relative position of the parties, or proved, the trouble or loss of time the guardian may have sustained in fulfilling the duties of his office will not avail him as a defence or excuse for accepting or obtaining such a donation. "Where," says Lord Hardwicke, "a man acts as guardian, or trustee in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or cestui que trust coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery of force—by good usage unfairly meant, or by bad usage imposed—to take such an advantage. And, therefore, the principle of the Court is of the same nature with relief in this Court, on the head of public utility; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokerage bonds. All depends upon public utility; and, therefore, the Court will not suffer it, though, perhaps, in a particular instance, there may not be any actual unfairness. . .

. . . The rule of the Court as to guardians is extremely strict, and in some cases does not infer some hardship; as where there has been a great deal of trouble, and the guardian has acted fairly and honestly; and yet he shall have no allowance. But the Court has established that on great utility and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances:" *Hyllon v. Hyllon*, 2 Ves. 549.

A gift from a ward to a guardian will be the more readily set aside, if, at the time of its being made, the guardianship accounts *are [*586] not all settled, or the ward's property is retained by his guardian. Thus, in *Pierse v. Waring*, 1 P. Wms. 121, Cox's note; *S. C.*, cited 2 Ves. 549, a ward, immediately on coming of age, directed his guardian to retain and invest, in his own name, a sum of money in the purchase of 3000*l.* East India Stock; and afterwards, by a deed of gift, confirmed the 3000*l.* stock to his guardian. After the death of the ward, a bill being filed by parties claiming under him, Lord Hardwicke decreed

that the 3000*l.* stock having been retained by the guardian out of the estate of his ward, just on his attaining twenty-one, on pretence of reward or present for his trouble in the guardianship, ought not, under the circumstances, to be allowed, and ordered the deed of confirmation to be delivered up to be cancelled. And in *Hyllton v. Hyllton*, 2 Ves. 547, where an uncle, who was trustee and acted as guardian to his nephew, upon coming to an account and delivering up the estate to his nephew, who was then about twenty-two, took from him a general release and written discharge, and also a voluntary grant of an annuity of 60*l.*, Lord Hardwicke set the annuity aside, upon a bill filed by the nephew. And see *Dawson v. Massey*, 1 Ball & B. 219, where a lease granted to a guardian, and *Aylward v. Kearney*, 2 Ball & B. 463, where leases granted to a guardian's son were set aside. See and consider *Cray v. Mansfield*, 1 Ves. 379; *Thorner v. Sheard*, 12 Beav. 589. In *Hatch v. Hatch*, 9 Ves. 292, a guardian, who was incumbent of a living, obtained from his ward, soon after she came of age, a conveyance of the advowson of the living expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, &c.; and 10*s.* to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterwards became her husband. She continued to live with her guardian for about four years afterwards, when she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against the conveyance. Lord Eldon, considering that she had never been her own mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time which had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up to be cancelled; but as the husband was particeps criminis, the order was made without costs.

Another case may also be mentioned, that of *The Duke of Hamilton v. Lord Mohun*, 1 P. Wms. 118. There the duke, being about to marry, entered with great deliberation into marriage articles, one of which was, that he should, *within two days after the marriage, release his intended wife's mother, who was her guardian, of all accounts of [*587] the mesne profits of the estate. Lord Chancellor Cowper, admitting that there had been no surprise, held, that the covenant to make such release ought to be set aside, as it seemed to be extorted from the duke by one who had a power over the young lady as a parent, which ought not to have been made use of in that manner; that it was as if the mother should say, 'You shall not have my daughter unless you will release all accounts; and that, to tolerate such an agreement, would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian.'

So a voluntary settlement, made by a female ward soon after she came of age, under the influence of her guardian, and without the advice of an independent solicitor, and the effect of which was to deprive her of the control over her own property was set aside as improvident, especially as no power of revocation was reserved : *Everitt v. Everitt*, 10 L. R. Eq. 405.

The principle applies also to any person assuming the office and functions of a guardian, although not legally so constituted. *Griffin v. De Veulle*, ante, p. 546, cited.

Where, however, the influence, as well as the legal authority of the ward, has completely ceased, and the ward has been put in possession of his property, after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian. See *Hylton v. Hylton*, 2 Ves. 549; *Hatch v. Hatch*, 9 Ves. 296, where Lord Eldon says, "There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui qui trust taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given."

As to opening the accounts of guardians, see *Wych v. Packington*, 3 Bro. P. C. 46, Toml. edit.; *Mellish v. Mellish*, 1 S. & S. 138; *Revett v. Harvey*, 1 S. & S. 502.

As to the relation of trustee and cestui qui trust, to which much the same principles apply as in the above-mentioned relations of parent and child, and guardian and ward, see *Hatch v. Hatch*, 9 Ves. 192; *Hunter v. Atkins*, 3 My. & K. 113, 135; *Ellis v. Barker*, 19 W. R. (M. R.) 963; S. C., 20 W. R. (L. J.) 160.

[*588] *As to the relation of legal adviser *and client.*—Courts of equity have always acted strictly up to this rule, that a solicitor can, by act inter vivos, take nothing for his own benefit from his client, pending a suit, save his demand, or indeed at any time while the connection between them subsists, with the influence attending it; for though the transaction be as righteous as ever was carried on, it is the settled law, that the connection must, as in the case of guardian and ward, be bona fide dissolved, before he can take anything beyond his regular fees: *Proof v. Hines*, Ca. t. Talb. 116; *Walmesley v. Booth*, 2 Atk. 25; *Drapers' Company v. Davis*, 2 Atk. 295; *Oldham v. Hand*, 2 Ves. 259; *Welles v. Middleton*, 1 Cox, 112; 4 Bro. P. C. 245; *Newman v. Payne*, 2 Ves. jun. 199; *Hatch v. Hatch*, 9 Ves. 296; *Wood v. Downes*, 18 Ves. 120; *Strachan v. Brandon*, there cited, p. 127; *Moore v. Prance*, 9 Hare, 299; *Re Ingle*, 21 Beav. 275; *Walker v. Smith*, 29 Beav. 394; *Re Holmes's Estate*, 3 Giff. 337; *O'Brien v. Lewis*, 4 Giff. 221; 32 L. J. N. S. (Ch.) 665; *Gardener v. Ennor*, 35 Beav. 549.

And evidence is admissible to shew that a consideration expressed upon the face of the deed by which a client conveys property to his attorney is fictitious (*Tompson v. Judge*, 3 Drew. 306).

Where, however, there was no cause pending, and it was proved that there was no undue influence exercised by the attorney, a gift to him has been held valid: *Oldham v. Hand*, 2 Ves. 259; and see *Harris v. Tremenheere*, 15 Ves. 34.

It appears that an attorney, although he himself has prepared it, may take a gift under the will of a client, for his own benefit as devisee or legatee, if the will was not made under any mistake, or misapprehension caused by the attorney: *Hindson v. Weatherill*, 5 De G. Mac. & G. 301; reversing *S. C.*, 1 S. & Giff. 604; *Walker v. Smith*, 29 Beav. 394.

A voluntary conveyance to counsel by the client, expressed to be in consideration of the services of counsel, will be set aside on the ground of public policy: *Broun v. Kennedy*, 33 Beav. 133; 4 De G. J. & Sm. 217.

Whenever a professional man is called upon to give his services to his client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared; and if he fail to do so, a court of equity will deprive him of it. See *Segrave v. Kirwan*, Beat. 157; there a barrister drew a will for a friend, and was made executor, in which character he became entitled to the personal estate; he was held, however, by Lord Chancellor Hart *to be a trustee for the next of [*589] kin. "The testator's intention," said his Lordship, "was not directed to his personal estate, and he thought he was only disposing of his real estate: it became the bounden duty of the defendant to have informed him, that if he made no disposition of his personal estate, the law, in consequence of his being the executor, would entitle him to retain it for his own benefit. He was bound to inquire of the testator in plain and distinct terms, whether it was his will that the defendant should so retain the personal estate for his own benefit. . . . The defendant has stated that he did not know the rule of law which gives to an executor the undisposed residue. Be it so: but in the administration of justice, what ought to result from that ignorance? The testator relied on the defendant's knowledge of law, as well as on his integrity. Will the avowal of ignorance of the law in the legal adviser justify the dis-inheriting of the testator's relations in favour of that adviser?" See also *Buckley v. Wilford*, 2 C. & F. 102; 8 Bligh, N. S. 111; *Nanney v. Williams*, 22 Beav. 452; *Corley v. Stafford*, 1 De G. & Jo. 235; Sugd.

Prop. 192; and see *Ex parte Collins*, 2 Ir. Ch. Rep. 618; *Garrett v. Wilkinson*, 2 De G. & Sm. 244.

Until recently an attorney could not take a security from his client for *future* costs (*Jones v. Tripp*, Jac. 322); though he might for costs *then due*; and if it were for costs *due and to become due*, it has been held valid as to the costs *then due* only (*Williams v. Piggott*, Jac. 598; *Pitcher v. Rigby*, 9 Price, 79); and where an account was decreed to be taken of the dealings between an attorney and his client, in the course of which the attorney had taken securities from his client, the attorney was obliged not only to prove the securities, but the consideration for which they were given (*Jones v. Thomas*, 2 Y. & C. Exch. Ca. 498); and a mortgage, bond or judgment given by a client to a solicitor to secure costs was formerly held only to stand as a security for as much as was actually due, and would be set aside after a considerable time: *Newman v. Payne*, 4 Bro. C. C. 350; *S. C.*, 2 Ves. jun. 199; *Langstaffe v. Taylor*, 14 Ves. 262; *Wood v. Downes*, 18 Ves. 120, 127; *Pitcher v. Rigby*, 9 Price, 79. See also *Drapers' Company v. Davis*, 2 Atk. 295; and *Saunderson v. Glasse*, 2 Atk. 296; *In re Moss*, 17 Beav. 346; *Moss v. Bainbridge*, 17 Beav. 478; *Morgan v. Higgins*, 1 Giff. 270.

If, however, an account had been settled, and a security taken by a solicitor from his client, though it was viewed with jealousy, it would not be treated as a nullity. Where, therefore, a solicitor and client had settled an account, and the client gave a mortgage and a covenant to pay the sum alleged to be due, and the *solicitor having sued [*590] on the covenant, the client filed a bill impeaching the transaction on the ground of surprise, undue influence, and error, which being denied by the answer, a motion to stay proceedings on the covenant was refused: *Jones v. Roberts*, 9 Beav. 419; but see *Pince v. Beattie*, 32 L. J. N. S. (Ch.) 734.

But after acquiescence for a long time, although a solicitor might, pending his employment, have taken security from a poor and illiterate client for costs due, *and to become due*, unless actual fraud, such as intentional misrepresentation or concealment on the part of the attorney, were proved, the accounts would not be opened. *Shaw v. Neale*, 20 Beav. 157, 180; and see *Blagrove v. Routh*, 2 K. & J. 509; 8 De G., Mac. & G. 620. Now, however, by the Attorneys' and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 16, an attorney or solicitor may take security from his client for his future fees, charges, and disbursements, to be ascertained by taxation or otherwise.

An agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done, was formerly held not to be binding upon his client, who was notwithstanding payment under it, entitled to an order of the Court for the delivery of a bill of costs and its taxation. *In re Newman*, 30 Beav. 196.

Now, however, by the Attorneys' and Solicitors' Act, 1870 (33 & 34

Vict. c. 28), s. 4, "an attorney or solicitor may make an agreement in writing with his client, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary, or otherwise, and either at the same or at a greater, or at a less rate as, or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of the Act contained." These provisions, which are somewhat stringent, provide (amongst other things) for the taxation in certain cases of amounts payable under agreements (sect. 4), save the rights of third persons (sect. 5), exclude further claims on the part of the attorney or solicitor (sect. 6), prevent their relieving themselves from responsibility for negligence (sect. 7), provide for the determination of all questions relating to such agreements, by motion or petition without suit or action (sect. 8), and that agreements may be set aside (sect. 9) or reopened after payment thereunder in special cases (sect. 10).

The doctrine of equity, upon the subject of voluntary donations conferred upon persons standing towards the donee in the intimate *relations before referred to, has been well summed up by Lord Brougham, in his elaborate judgment in *Hunter v. Atkins*, 3 [591] My. & K. 135. "There are," said his Lordship, "certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client, ward, or cestui que trust, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule, rightly considered, is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in; so that he may gain no advantage whatever from this relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor, by whose assistance he has long benefited, and he may fairly and wisely desire to benefit him by a gift; or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease; no law that is tolerable among civilised men, men who have the benefits of civility, without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to with

hold any knowledge, or to exercise any influence hurtful to others, and advantageous to himself; in a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him), to show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened which might not have happened had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson v. Jeyes* (6 Ves. 277), that attorney and client, trustee and cestui que trust, may deal, but that it must be at arm's length, the parties putting themselves in the situation of purchasers and vendors, and performing, as the Court said (and I take leave to observe, not very felicitously or even very correctly), all the duties of those characters; the authorities mean no more, taken fairly [*592] *and candidly towards the Court, when they say, as in *Wright v. Proud* (13 Ves. 138), that an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature: a dictum, reduced in *Hatch v. Hatch* (9 Ves. 206), to this, that it is almost impossible for a gift from a client to attorney to stand, because the difficulty is extreme of shewing that everything was voluntary and fair, and with full warning and perfect knowledge; for in *Harris v. Tremenhere* (15 Ves. 40), the Court only held, that, in such a case, a suspicion attaches on the transaction, and calls for minute examination."

As to the exercise of jurisdiction where no peculiar relation exists between the donor and donee.—The principle upon which equity will give relief as against the persons standing in the above-mentioned relations to the donor, will, as has been before stated, be extended and applied to all the variety of relations in which dominion may be exercised by one person over another. And see *Smith v. Kay*, 7 Ho. L. Ca. 750. In *Dent v. Bennett*, 4 My. & Cr. 262, where a gift, obtained by a medical attendant from his patient, was set aside by Lord Cottenham, it was argued, upon the authority of the civil law and some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. "Undoubtedly," observed his Lordship, "they are; but I will not narrow the rule, or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this Court by any enumeration of the description of persons against whom it ought to be most freely used." In *Lyon v. Home*, 6 L. R. Eq. 655, Mrs. Lyon, a widow, aged seventy-five, within a few days after seeing one Home, who claimed to be a "spiritual medium," was induced from the belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of Home, to adopt him as her son, to transfer 24,000*l.* to him; to make her will in his favour; afterwards

to give him a further sum of 6,000*l.*; and also to settle upon him, subject to her life interest, the reversion of 30,000*l.* These gifts were made without consideration, and without power of revocation. It was held by Sir G. M. Giffard, V. C., that the relation proved to have existed between them implied the exercise of dominion and influence by Home over Mrs. Lyon, and, consequently, that as Home had failed to prove that these gifts were the pure, voluntary, well-understood acts of Mrs. Lyons' mind, they must be set *aside*. See also *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Fowler v. Wyatt*, 24 Beav. 232, 237. [*593]

So, where a widower married the sister of his deceased wife, it was held by Lord Campbell, C., affirming the decision of Sir J. Stuart, V. C. (reported 2 Giff. 279), that the relation thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly, and truly informed of its character and of her legal status: *Coulson v. Allison*, 2 De G. F. & Jo. 521.

The influence of a man over a woman to whom he is engaged to be married is presumed to be so great, that the Court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used: *Page v. Horne*, 11 Beav. 227, 235, 236; *Corbett v. Brock*, 20 Beav. 524; *James v. Holmes*, 31 L. J. N. S. (Ch.) 567.

In *Harvey v. Mount*, 8 Beav. 439, a voluntary settlement by a younger sister of the whole of her present and future property principally in favour of her eldest sister, was set aside upon the same principle as the transaction in the principal case, viz, that the eldest sister had obtained great ascendancy and influence over the younger sister, and was allowed to assume the management of *all* her affairs; the circumstances of the transaction moreover being open to suspicion, the settlement being very improvident, and the younger sister not having had the benefit of independent professional advice: And see *Osmond v. Fitzroy*, 3 P. Wms. 129, and note; *Bridgman v. Green*, 2 Ves. 627; Wilm. 58; *Norton v. Relly*, 2 Edn. 286; *Wright v. Proud*, 13 Ves. 136; *Purcell v. M'Namara*, 14 Ves. 91; *Collins v. Hare*, 1 Dow. & C. 139; *Cooke v. Lamotte*, 15 Beav. 234; *Wilkinson v. Fowkes*, 9 Hare, 592; *Custance v. Cunningham*, 13 Beav. 363; *King v. Smith*, 21 Beav. 522; where deeds, upon proof of undue influence, independent of any fiduciary relation, were set aside.

Perhaps no general rule can well be laid down, as to what amounts to undue influence; that will be a question for the Judge to decide, upon the circumstances of each particular case, and such circumstances as the non-intervention of a disinterested person, or professional adviser on the behalf of the donor; especially if the donor is, from age or weakness of disposition, likely to be imposed upon (*Griffiths v. Robins*

3 Madd. 191; *Dent v. Bennett*, 4 My. & Cr. 273; *Harvey v. Mount*, 8 Beav. 439; *Page v. Horne*, 11 Beav. *227): the statement of [*594] a consideration, where there was actually none (*Hawes v. Wyatt*, 3 Bro. C. C. 156; *Gibson v. Russell*, 2 Y. & C. C. C. 204; *Sharp v. Leach*, 31 Beav. 491); the absence of a power of revocation (*Coutts v. Ackworth*, 8 L. R. Eq. 558; *Wolluston v. Tribe*, 9 L. R. Eq. 44; *Everitt v. Everitt*, 10 L. R. Eq. 405; *Lyon v. Home*, 6 L. R. Eq. 655; *Hall v. Hall*, 27 L. T. R. (N. S.) 115; 20 W. R. (V. C. W.) 797; 41 L. J. (N. S.) Ch. 667; the improvidence of the transaction (*Harvey v. Mount*, 8 Beav. 439), furnish a probable though not always a certain test of undue influence or fraud: *Phillips v. Mullings*, 7 L. R. Ch. App. 244.

But in such cases, where the intimate relations before mentioned do not exist between the donor and donee, undue influence must be proved against the donee, in order that the gift may be set aside. Thus in *Hunter v. Atkins*, 3 My. & K. 113, Lord Brougham, overruling the decision of Sir John Leach, M. R., sustained a gift by deed subject to a power of appointment by the donor from Admiral Hunter, then upwards of ninety years of age, to Alderman Atkins, his confidential agent, who had for many years been in habits of friendship with him, although made without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the Alderman, who took the benefit by it; his Lordship being of opinion, that the circumstances of the case did not warrant the Court in ascribing the deed in question to undue influence, or influence improperly exerted, over a person, either of insufficient understanding, or under the control or management of another. "There is no dispute," said his Lordship, "upon the rules which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of an agent confidentially entrusted with the management of Admiral Hunter's concerns—a person at least in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favour must stand good, unless some direct fraud were practised upon the maker of it; unless some fraud, either by misrepresentation or by suppression of facts, misled him, or he was of unsound mind when the deed was made. If the Alderman did stand in a confidential relation towards him, then the party seeking to set aside the deed may not be called upon to show direct fraud, but he must satisfy the Court, by the circumstances, that some advantage was taken of the confidential relation in which the Alderman stood. If the Alderman stood towards the Admiral in any of the known relations of guardian and ward, attorney and client, trustee and cestui que trust, &c., then, in order to support the deed, he ought to show that no such advantage [*595] *that was taken, that all was fair, that he received the bounty freely and

knowingly on the giver's part, and as a stranger might have done. . . . Where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished. A confidential adviser, one who has been *generally consulted* in the management of the person's affairs, though he may also have been employed specially in his business, does not lie under the same suspicion with an attorney or a steward, or any one who has a *general management*. In *Pratt v. Barker* (1 Sim. 1; 4 Russ. 507), the object of bounty was one who had been employed for many years as the surgeon and apothecary of the donor, had received his dividends for him, and had oftentimes been consulted by him respecting the management of his property. Through him the instructions to frame the deed were conveyed to the donor's solicitor, who so far deviated from those instructions as to leave a blank for the donee's name till he saw his client; and because it was proved that the donor understood the nature of the gift, and had the deed read over and explained to him, the Court refused—and without hesitation, or even hearing the defendant—to set it aside. In the famous case of *Huguenin v. Baseley*, remarkable, among other things for the display of those transcendent talents, and that pure taste, by which among many other accomplishments, Sir Samuel Romilly elevated and adorned the bar, there was a great and general influence exercised of a peculiar kind. It led to the giving up of the whole direction of the party's concerns into the defendant's hands, even to the delivering over of her title deeds by her solicitor. It ended in a conveyance of an estate without consideration; and yet the Court held, that the proper inquiry was, were her bounties the pure, voluntary, well understood acts of her mind? Did she execute the deeds not only voluntarily, but with all the knowledge of their effect, nature, and consequences, which the defendants, Baseley and the attorney, were bound by their duty to communicate to her?

“The rule cannot be much more precisely stated than this—that where the known and defined relation of attorney and client, guardian and ward, trustee and cestui que trust exists, the conduct of the party benefited must be such as to sever the connexion, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connexion; and that, where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some *sort of business, care must be taken that no undue ad- [*596] vantage shall be made of the influence thus acquired. The limits of natural, and often unavoidable kindness, with its effects, and of undue influence exercised, or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down,—any precise line drawn. If it were stated that certain

acts should be the only test of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognised, which, from its vagueness, cannot be obeyed because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breast; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.

"The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition; and, on the result of the inquiry, we are to say, has, or has not, an undue influence been exerted,—an undue advantage taken?" See *Beanland v. Bradley*, 2 Sm. & Giff. 339; *Toker v. Toker*, 31 Beav. 629. See however, the remarks of Sir John Romilly, M. R., 15 Beav. 241, on the judgment of Brougham in *Hunter v. Atkins*.

It may, however, be laid down, that even in the absence of any special relation between the parties, where a person *gains a great advantage* over another by a voluntary instrument, the burden of proof is undoubtedly thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction is fair and honest; for although the Court never prevents one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influence or misrepresentation (see *Blackie v. Clark*, 15 Beav. 600; *Cooke v. Lamotte*, 15 Beav. 234; *Custance v. Cunningham*, 13 Beav. 363; *Billage v. Solhee*, 9 Hare, 534; *Allen v. Davis*, 4 De G. & Sm. 133; *Price v. Price*, 1 De G. Mac. & G. 308; *Phillips v. Mullings*, 7 L. R. Ch. App. 244), and also that the donor, especially when of weak mind, fully understood the effect of the transaction, otherwise it will be set [*597] aside: (*Anderson v. Elsworth*, 3 Giff. 154;) even after the death of the donor and donee; *Phillipson v. Kerry*, 32 Beav. 628; 11 W. R. (M. R.) 1034.

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of little importance in such cases; they are important only when no such confidential relation exists: *Rhodes v. Bate*, 1 Law. Rep. Ch. App. 252. And it seems that where a confidential relation is established the Court

will presume its continuance, unless there is distinct evidence of its termination: *Rhodes v. Bate*, 1 Law Rep. Ch. App. 252.

Where one party has acquired undue influence over another by operating on his fears, as for instance by threatening to bring ruin and disgrace upon his son by indicting him for forgery, any agreement executed by the father while under such influence will be set aside with costs; and it seems that even the intervention of other circumstances or collateral advantages to the father will not be sufficient to sustain such an agreement: *Bayley v. Williams*, 4 Giff. 638, affirmed, nom.: *Williams v. Bayley*, 1 L. R. Ho. Lo. 300.

An appointment made in exercise of a power by a wife in favour of her husband will be considered good unless the wife, or other persons impeaching the instrument, show that it was executed under circumstances sufficient to invalidate it, and the evidence of one of the witnesses that the wife was agitated and distressed and signed the deed in a reluctant manner, has been held to be insufficient: *Nedby v. Nedby*, 5 De G. & Sm. 377, 384.

Where a person executes a voluntary deed in the expectation of his immediate death, but not with the intention that it should be operative in case he recovers, and such deed will be set aside, even in the absence of undue influence, if no power of revocation has been introduced into the deed: *Foreshaw v. Welsby*, 30 Beav. 243.

Although, as a general rule, if a voluntary deed does not express the intention of the parties, it cannot be rectified so as to carry out their intentions, but if impeached it must wholly stand or wholly fall (*Philipson v. Kerry*, 32 Beav. 628; 11 W. R. (M. R.) 1034; *Broun v. Kennedy*, 33 Beav. 133. See ante, vol. 1, pp. 41, 42); nevertheless when the plaintiff agrees that the deed ought to stand, and takes objection only to part thereof, the Court has jurisdiction to reform the deed, by striking out *such part as it may deem objectionable: *Turner* [*598] v. *Collins*, 7 L. R. Ch. App. 342.

How far the Court will interfere as against third parties.—An interest obtained by undue influence, as Lord Eldon decided in the principal case, cannot be held by third parties, although innocent of fraud. "Whoever," to use the expressive language of Chief Justice Wilmott, "receives the gift, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relatives and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." *Bridgman v. Greene*, Wilm. 58, 64; S. C., 2 Ves. 627. And see *Goddard v. Carlisle*, 9 Price, 169; *Scholefield v. Templer*, Johns. 155; *Smith v. Kay*, 7 Ho. L. Ca. 750.

Where a creditor obtains a security from a person likely to be under

the influence of his debtor, as for instance, in the case of a son or younger brother of the debtor's just come of age, the onus will lie upon the creditor of showing that such person understood the transaction, and that he did not act under any undue influence, otherwise the transaction will be set aside (*Berdoo v. Dawson*, 13 W. R. 420, 11 Jur. N. S. 254; *Baker v. Bradley*, 7 De G. Mac. & G. 597, 2 Sm. & G. 531; *Sercombe v. Sanders*, 34 Beav. 382).

Upon the same principle in *Maitland v. Irving*, 15 Sim. 437, Irving and Brown, who were partners as coal-merchants, consented to postpone the payment of 5000*l.* due to them from Maclean, in consideration of his procuring and giving the guarantee of the plaintiff, Miss Maitland, for that sum; and Maclean, at the same time, informed Irving and Brown that Miss Maitland was his niece, and was possessed of considerable property; that she had resided with him for some time, that he had been her guardian, and that she had been of age about a year and a half. Afterwards, another was made between Irving and Brown and Maclean, in pursuance of which Irving and Brown delivered up the guarantee, and Maclean procured and gave them the plaintiff's cheque for 3000*l.* and her promissory note for 1200*l.*, as securities for his paying them those sums. Sir L. Shadwell, V. C., granted and afterwards continued an injunction, restraining Irving and Brown from prosecuting an action against the plaintiff to recover the 3000*l.*; and notwithstanding they had obtained a verdict, he refused to order the money to be paid into Court. "The case," said his Honor, "has been [*599] argued for the *defendants as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person, who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She was influenced by him, or, at least, allowed by him, to give this very guarantee, which was a direct benefit to all the defendants (Maclean was a defendant), in the situation in which they then stood with respect to each other. The facts of the case seem to me to amount to this: that Irving and Brown knowing the defenceless situation of the young lady, combined with Maclean, who disclosed it to them, in order that advantage might be taken of her defenceless situation, for the benefit of all the three. And my opinion is, that they must all three be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it is the foundation of the whole case; for, what subsequently took place was nothing more than a substitution of the note and the cheque for the guarantee." And see *Maitland v. Backhouse*, 16 Sim. 58; *Archer v. Hudson*, 7 Beav. 551; *Espey v. Lake*, 10 Hare, 261; *Deltmar v.*

Metropolitan and Provincial Bank (Limited), 1 Hem. & Mill. 641; *Rhodes v. Bate*, 1 Law Rep. Eq. App. 252; *W. v. B.*, 32 Beav. 574.

The principles, however, laid down in these cases are not it seems applicable to the case of a *bona fide* purchase without notice. Thus in *Blackie v. Clark*, 15 Beav. 595, a married woman having separate estate, joined with her trustee who was her confidential medical adviser in granting annuities secured on her separate estate for his benefit. Upon her filing a bill to set them aside as against the grantees, it was held by Sir J. Romilly, M. R., that the burden of proving their invalidity was on her, and as it appeared that she understood the transaction, and that no undue persuasion or coercion had been proved, the annuities could not be impeached, and his honor, without absolutely determining that the Court would not act in the same way in both cases, thought there was a manifest difference between such a case, and the cases of *Archer v. Hudson*, and *Mailland v. Irving*, for the latter were neither of them cases of a purchase for valuable consideration. "They were cases," he added, "in which money had been *already* lent, and the creditor finding his security very imperfect, obtained from the volunteer, *who gained no benefit at all*, a distinct and manifest advantage. The same observations do not apply to the case of a *bona fide* purchase, in the first instance, for valuable *consideration, because, if the purchase be a fair one, the purchaser gains no ad- [*600] vantage, for he would simply abstain from purchasing if the volunteer did not think fit to join in the transaction."

In *Corbett v. Brock*, 20 Beav. 524, a debtor induced a lady, to whom he was engaged to be married, to become security for a debt. After the marriage she insisted that she had been imposed upon. It was held by Sir John Romilly, M. R., that the only duty of a creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. "I fully adhere," said his Honor, "to what I expressed in the cases of *Cooke v. Lamotte* (15 Beav. 234), and *Hoghton v. Hoghton* (15 Beav. 278), and if this were a case between the husband and wife I should require him to prove all the requisites I pointed out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of, or privy to, the fraud. The fact of the intended husband saying, 'I am about to marry a lady who will give you security,' does not amount to notice to them that this security could only be obtained by undue influence."

As to acquiescence and confirmation, see *Wright v. Vanderplank*, 2 K. & J. 1; 8 De. G. Mac. & G. 133; *Stump v. Gaby*, 2 De G. Mac. &

Gt. 623; *Wollaston v. Tribe*, 9 L. Rep. Eq. 44; *Jarratt v. Aldam*, 9 L. Rep. Eq. 463; *Turner v. Collins*, 7 L. R. Ch. App. 342; and ante, Vol. I. pp. 174, 175.

It is essential to the validity of a gift that the donor should understand what he is doing, and the effect that it may have in impairing his ability to provide for himself and others. This marks the distinction between a voluntary grant and a contract for value, where the question is what was the common purpose, and neither party can allege his ignorance, oversight, or negligence as a reason why he should not be bound, unless the opposite party is chargeable with imposition or undue influence. The act may speak for itself, as where a father makes an advancement which is not excessive as compared with his resources and the wants of the child; *Van Deusen v. Rowley*, 4 Selden, 358; or it may be one that manifestly stands in need of explanation. When one divests himself of his estate without receiving an equivalent, it is incumbent on the person who receives or profits by the gift, to give such an account of the transaction as will satisfy a chancellor that the donor was of sound mind, and had a full and accurate understanding of the nature of the act, and the consequences that it would produce; ante, 1175; *Phillipson v. Kerry*, 32 Beavan, 628; *Coutts v. Ackworth*, L. R. 8 Eq. 558; *Russell's Appeal*, 25 P. F. Smith, 269, 279, 289; *Tyler v. Gardiner*, 55 New York, 559; *Conant v. Jackson*, 16 Vermont, 335, 352.

This rule is aside from the doctrine of undue influence, and must be observed, although the donee was an entire stranger to the gift, and could have had no share in producing the mental condition of which it was the fruit. Much more may be required where one accepts a benefaction from another, who is subject to his control or influence, and it may then be incumbent on the donee to show that he did not induce or prompt the act, and that it was the spontaneous and unforced growth of the donor's mind. If such evidence be not adduced, and the gift is out of proportion of the giver's means, or will be prejudicial to those who have a paramount claim on his bounty, a chancellor will infer that it is the result of undue influence, although there may be no direct proof; see *Brook v. Berry*, 2 Gill. 83, 100; *Rhodes v. Bate*, 1 Ch. Appeals, 252, 261; *Greenfield's Estate*, 2 Harris, 489, 506; *Dunn v. Chambers*, 4 Barb. 376; *Sears v. Shafer*, 2 Selden, 272; *Casborne v. Barham*, 2 Beavan, 75; *Bergen v. Udall*, 31 Barb. 9, 34; *Mason v. Ring*, 3 Abbott, App. Dec. 211; *Lee v. Pearce*, 68 North Carolina, 76; *Conant v. Jackson*, 16 Vermont, 335, 350; *Long v. Mulford*, 17 Ohio, N. S. 484, 505.

It has accordingly been held in numerous instances, that where the donor is so placed that he might

have been swayed by the donee, and the act is one which the exercise of such a power would have induced, the onus is on the donee to show that he did not take advantage of the opportunity, to bring about a result that would not have ensued if the donor had been left to his own guidance. It is not enough, under these circumstances, to prove that the instrument of gift is in accordance with the purpose which the donor entertained at the time, and was bent on carrying into effect, because the question is not merely what his intention was, but how that intention was produced; and the donee must consequently cover the whole ground by establishing not only that he had no share in producing the mental condition which produced the gift, but, if the relation be one of confidence, that he did all that it required to enlighten the donor, and enable him to form a correct judgment; see *Todd v. Grove*, 33 Maryland, 183, 189; *Tyler v. Gardener*, 35 New York, 559, 589; *Boyd v. Boyd*, 16 P. F. Smith; *Howell v. Ransom*, 11 Barb. 546; *Long v. Mulford*, 17 Ohio, N. S. 484, 504.

Ordinarily the presumption is one of fact, and may be rebutted by proof that the donor acted throughout, of his own motion, and without solicitation or inducement. But there are cases where the improvident or disadvantageous nature of the grant, and the dependence or weakness of the donor and his reliance on the donee, give rise to an irrefragable presumption of undue influence;

or, to speak more accurately, where it will be conclusively inferred that the grantee is chargeable with a breach of confidence in not having used his control over the donor to prevent the gift.

The principle runs through all the various relations, where from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy, which prevents the other from exercising an unbiassed judgment. It may, therefore, apply as between parent and child, guardian and ward, husband and wife, counsel and client, and finally where a spiritual pastor, or director, is dealing with a member of his flock or congregation, whom he has taken peculiarly in charge; see *Marsh v. Tyrell*, 2 Haggard, 187, 186; *Houghton v. Houghton*, 15 Beavan, 278, 299; *Todd v. Grove*; *Rockafellow v. Newland*, 57 Illinois, 186, 195; *Garvin v. Williams*, 44 Missouri, 465.

These are but instances, and the principle may be called into operation, wherever weakness, ignorance, or an implicit reliance on the good faith and rectitude of another, gives occasion for an abuse of influence; see *Bellage v. Southee*, 9 Hare, 540; *McCormick v. Malins*, 5 Blackford, 509; *Mason v. Rings*, 3 Abbott's App. Dec. 210, 213; *Long v. Mulford*, 17 Ohio, N. S. 484, 505.

One who proffers his services; as a friend, and acts in that capacity, in the investigation or defence of the right or title of him whom he undertakes to serve, is as much within the reason of the rule, as if

he were a paid agent or attorney, and will be presumed to have the power to influence his principal, although there be no express proof; *Bayliss v. Williams*, 6 Caldwell, 442.

It is not essential to the application of the principle, that the testator or donor should be unsound in mind, or even that he should have less than the ordinary strength of will and intellect. One who has sufficient capacity to make a will, or for the ordinary affairs of life, may be so much under the sway of an agent, relative, or dependent, as virtually to have no will of his own. The experience of life shows that an artful, designing man, may obtain a controlling influence over one whose intellect is superior to his own. Still intelligence, force of character and knowledge, necessarily tend to repel an allegation of undue influence; see *Crispell v. Dubois*, 4 Barb. 393; *Todd v. Grove*, 33 Maryland, 188, 197; *Rhodes v. Bate*, 1 L. R. Ch. App.; *Shailer v. Bumstead*, 99 Mass. 112, 121; *Lindsey v. Lindsey*, 50 Illinois, 79. "However ingenious the fraud, or coercive the influence may be, it is of no consequence, if there was intelligence enough to detect, or strength enough to resist;" *Shailer v. Bumstead*. But it has been said with much truth, that this argument is of little moment, where relief is sought against an abuse of confidence; *Rhodes v. Bate*, 1 L. R. Ch. App. 252, *post*.

In the application of the principle, regard should be had to the nature of the act, as well as to the

means by which it was induced; see *Howe v. Howe*, 99 Mass. 88, 90; *Todd v. Grove*, 33 Maryland, 183, 196; *Hildreth v. Elliott*, 8 Pick, 293, 297. That influence cannot justly be called undue, through which one is led to pay a just debt, or provide for a deserving child; *Houghton v. Houghton*, 15 Beavan, 278, 289, 303; *Dean v. Negley*, 5 Wright, 312; *Boyd v. Boyd*, 16 P. F. Smith, 283, 293. On the other hand, a benefaction which though rash and ill considered, might well stand if it were the deliberate resolve of one dealing with his own, will be unhesitatingly set aside, if it appears to have been brought about by the procurement of another; see *Houghton v. Houghton*.

It is moreover requisite to consider the motives of him who is charged with having used undue influence; *Hildreth v. Elliott*, 8 Pick, 293, 297; and if his suggestions, although erroneous, were disinterested and sincere, the transaction will not be set aside, merely because he was not a judicious counsellor, and prompted that which a wiser man would have disapproved; see *Eckert v. Flowery*, 7 Wright, 46, 52; *Boyd v. Boyd*, 16 P. F. Smith, 283, 293. To seek, or to be guided by the advice of an indiscreet or ignorant friend, is an error of judgment for which the law does not afford a remedy. But this argument is out of place, where importunity is carried so far from whatever motive, as to subjugate the donor's mind, or substitute another's purpose for his own.

Where the circumstances are such as to give rise to an inference of undue influence, the burden of proof is on him who claims under the deed or transfer, to rebut the presumption, and show that the gift was not obtained through means which the court must condemn; *Todd v. Grove*, 33 Maryland, 183, 194. It should, consequently, appear: 1. That the donor understood and knew what he was doing; 2. That the act proceeded from his own mind, or if the suggestion came from without, that it was deliberately adopted by him; and finally, that if, in carrying out his purpose, he reposed a confidence in another, or relied on him for guidance, that the latter did all which the acceptance of such a trust implies, viz.: giving the advice and information which, if duly weighed, might operate to prevent the execution of the act; see *Tyler v. Gardner*, 35 New York, 559, 596; *Bergen v. Udall*, 31 Barb. 932; *Boyd v. Boyd*, 16 P. F. Smith; *Brooks v. Martin*, 2 Wallace, 84; *Brock v. Barnes*, 40 Barb. 521, 523; *Long v. Mulford*, 17 Ohio N. S. 484, 504. These principles are indicated by the dicta of Lord Eldon in the principal case. He there said, that "if a man does not choose to act upon the confidence appearing to be so reposed in him, he ought to reject it as soon as proposed;" and again, "the question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced, and whether all that care and providence was placed round her, as against those who

advised her, which, from their situation and relation in respect to her they were bound to exert in her behalf;" *ante*, 1172; see *Gibson v. Jeyes*, 6 Vesey, 266, 271.

In *Brock v. Barnes*, 40 Barb. 521, a man whose mind was enfeebled by age and disease, granted an annuity to one who had acted as his agent for many years, and whom he habitually consulted in the management of his affairs. The grant purported to be on account of the services rendered by the agent, but it was in evidence that these had been fully compensated. The court held, that if such a transaction had taken place between strangers, the execution of the instrument would have been *prima facie* evidence of the validity of the grant, and the burden of proof would have devolved on those who sought to set it aside. The case was widely different where an agreement between a principal and agent redounded to the advantage of the agent, and was in a corresponding degree disadvantageous to the principal.

Such an instrument should not be upheld without clear proof outside of the writing, that the course of the party who claimed under it had been entirely fair and just. The presumption was adverse, and it could only be met and overcome by evidence that the grantor proceeded understandingly, and with a full knowledge of all the facts.

Where the grantee takes merely as trustee or executor, and has no personal or selfish end in view, the presumption of undue influence is

measurably repelled, and it may not be incumbent on him to call in third persons to give the unbiased advice, which he is equally competent to afford; see *Eckert v. Flowry*, 7 Wright, 140; *Boyd v. Boyd*, 16 P. F. Smith, 283, 293; *Hildreth v. Elliott*, 8 Pick. 293.

PARENT AND CHILD.—It is well settled that when a son or daughter has just come of age, and is subject to the parental control and influence, there is not only a confidential relation, but ground for an inference that a power existed which the parent could not legitimately exercise except for the good of the child, and a court of equity will, therefore, unhesitatingly set aside any gift or contract to which both are parties, and by which the child's position is changed in any material regard for the worse; *Bergen v. Udall*, 31 Barb. 9; *Taylor v. Taylor*, 8 Howard, 183.

In the case last cited, a young lady, who was not much over twenty-one years, and still resided with her father and mother, received a large bequest from a deceased uncle, and not long afterward wrote a letter to her parents, stating that the property had been bequeathed with the expectation that she would use it for the benefit of her family, and that she desired to carry the testator's purpose into effect. A deed was accordingly prepared and executed, conveying the whole amount of the bequest to the mother for life, and after her death, to her surviving children and their heirs.

It appeared in evidence that the

complainant was unkindly treated by her parents during the period which immediately preceded the preparation of the deed, and that they withheld their consent to the fulfilment of a marriage engagement which she had contracted, until the instrument was executed. There was, moreover, nothing to indicate that the allegation that the bequest had been left to her in confidence, was well-founded, or that it was other than an artfully devised means of bending her to their wishes, and giving a color of right to a transaction that would otherwise have been manifestly unjust.

The deed was set aside on these grounds, which appear more fully in the following extract from the opinion of the court: "And now let the character of the contract under consideration, and of the circumstances surrounding the execution of that contract, be subjected to the test rationally and justly imposed by the rules above stated.

"This is a contract between parent and child, operating by its terms exclusively for the benefit of the former, and to the prejudice of the latter; for it transferred from her a valuable interest, by the very terms of the transaction admitted to be legally and absolutely hers, and by the same terms transferred it without the shadow of an equivalent received or proffered; and for which the testimony conclusively shows, none could possibly be given. So much for the provisions of the contract.

"With regard to the circumstances attending and surrounding its execution, it is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents—her only home; and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would control the dispositions and conduct of a youthful female thus situated. She might be moulded to almost anything, in compliance with the earnest wishes (with her habitually yielded to as commands) of her parents. Those parents, who had once lived in affluence and luxury, had, with all the habits and necessities which such a condition naturally creates, by commercial reverses, been brought to indigence; from the date of the purchase by Robert Isaac, of the property in dispute, had been permitted by him to occupy and enjoy it. In fact, it was apparently their only means of shelter or support. In this state of the family, Robert Isaac, by his will, bestowed the whole of his property upon the complainant; and it has been argued that, with her knowledge of the situation of her parents, the impulses of filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the law

does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operations. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor; and would have been satisfied with a concession, as to which there probably would never have existed a difficulty—one, indeed that seems to have been assented to in practice—the occupation and enjoyment of the property during their lives, by the parents of the grantor. Nay, it would seem that proper *parental* tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. And in the estimate of motives which may have led to the transaction under review, it should not be without weight, that this same filial duty and affection, however commendable in themselves, and however their spontaneous action may be recognized and binding, strengthen the probability of their being converted into means of wrong and oppression; and this very probability it is which challenges the duty of watchfulness and jealousy in the courts, in scanning

the transactions of those whose peculiar situation exposes them to danger from such means.

"Immediately after the death of Robert Isaac, it seems that the various appliances designed to withdraw from the complainant the fruits of the bounty of her affectionate uncle were put into strikingly active operation. Directly following the death of Isaac, it is charged in the bill, came the urgency of the complainant's family, and their reproaches against her for having intercepted, as they said, the bounty which but for her would have flowed to the family; and for having dictated to her uncle the disposition of his property; thereby having ruined their prospects, and broken the heart of complainant's father. The natural effects of such appeals upon the feelings of an affectionate and sensitive girl, or even upon a spirit awake to the impulses of pride alone, can easily be comprehended. Then, as is alleged, was the reluctance of the complainant to despoil herself of her property ascribed to the avarice of her intended husband; and then, too, amidst her perplexity and distress, upon consultation between both her parents, was suggested to her the device of a letter from her, declaring her belief of the wish of the testator, Isaac, to bestow the property for the benefit of the family; and asking the consent of the father of the complainant to a settlement of the property in conformity with such a wish. Although these allegations are not supported by direct

statements of witnesses, yet the intrinsic evidence flowing from other conduct of the parties to these transactions, and that presented by the written documents in this cause, impart to the above allegation a force equal, if not surpassing, that which an explicit narrative by witnesses could give them. And here it is worthy of remark, that the will of Robert Isaac contains no expression nor hint of a desire, or intention, that the property should go according to the supposition assumed; or according to the provisions of the deed subsequently executed. This circumstance alone should be one of controlling influence, even if the testator could be regarded as a person of capacity and character of the most inferior grade. But none can fail to perceive, from the proofs in this cause, that the testator was a man of intelligence and sagacity, extensively practised in the business of life. He strongly declares his affection for his niece, and as clearly gives to her only, the property in dispute. What room is here for assuming, that others, and not this niece, were the *chief* objects of this bounty? Such an assumption is forbidden by every rule of law, or of common sense; it goes very far, of itself, to stamp with fraud and contrivance the means resorted to in order to divert that bounty to other ends.

"We will next consider the letter (Exhibit A, filed with the answer of Goodwin) addressed by the complainant, then Charlotte Scarborough, to her father; con-

cocted, as is alleged by the complainant, between her parents, as preparatory and introductory to the wrong about to be consummated; in which letter she professes her readiness and her desire to settle the property derived from her uncle to the use of her parents for their lives, and after their deaths to the use of all the children equally. The will of Robert Isaac was admitted to probate on the 9th day of January, 1828, and amongst the persons who qualified as executors of that will, were William Scarborough, the father of the complainant, and William Taylor, the trustee in the deed now sought to be vacated. These men, the depositaries of the solemn trust reposed in them by Isaac—fully capable of comprehending his will, and one of them sustaining the further obligation of a parent to protect the interests of this young woman—make themselves the ready instruments to betray this confidence, and this in violation of the clearest language in which their duty could possibly have been prescribed. How far this conduct can be excused or palliated under the pretext of duty to Mrs. Scarborough, founded on the alleged marriage contract, or on any supposed intention of Isaac flowing from the same source, will hereafter be shown in the conduct of Scarborough and Taylor in reference to this very property, when dealing with it for their own personal advantage. This conduct will furnish a most efficient clew in unravelling the texture of the deed in question.

“On the 10th of January, 1828, the day succeeding the probate of the will of Robert Isaac, was written the letter above mentioned from Charlotte Scarborough to her father. It seems impossible to resist the evidence furnished by this singular production, that it was a fabrication, designed to conceal the very facts and circumstances which it palpably betrays. In the first place, it may be inquired why such a letter should be written, and whether it would be usual or probable in a transaction between persons thus situated, if dictated solely by an admitted sense of propriety, and sanctioned by a willingness of both the parties to it. Can we accredit the probability of a formal diplomatic communication from a daughter just grown, to her father, residing under the same roof, to justify an act which they both believed it a sacred duty to perform? Again, let us look at the declaration here so anxiously and pompously paraded, that, in the act about to be performed by this daughter, she ‘was unbiassed by any control whatsoever; and that, in the *liberty* she was then using, she was acting by her own free will, dictated by her feelings alone, and unknown to any person,’ and we shall perceive an apprehension, or consciousness of suspicion, which it was believed the simple transaction itself would neither prevent nor allay. Here are the very *clausulæ inconsuetæ* pointed to in *Twyne’s case*, as the sure badges of that which they are intended to hide. Why should this young

woman have taken such deliberate pains to declare, and to place as it were on record, a history of her motives—her entire exemption from persuasion, authority, or even advice, in what she was about to do in obedience to affection and a sense of duty? If these had constituted the real incentive to her act, would they have left room for one thought or surmise of dishonor, connected with the objects of that affection and duty? Such suspicions and surmises are rather the offspring of colder calculation, and of the ‘compunctious visitings’ that wait on contemplated wrong. And again, in the concluding paragraph of this letter, may be seen a strong corroboration of this charge in the complainant’s bill, of the painful and discreditable imputations which had been made against her, as inducements to come into the proposed arrangement. The language of this paragraph is as follows: ‘Most thankful do I feel for being made the simple instrument of accomplishing the will of him who has so kindly and generously placed his confidence in me, and in acting thus, convince *the world* that my devoted affection for him was pure, disinterested, and unbiassed by future expectation.’ It will naturally occur to every one to inquire, why this young woman should accuse herself, or fancy herself accused by others, of unworthy motives or conduct, because she had been the object of her uncle’s affection? The rational solution of the matter would seem to be this,—that the assumption

of such motives on the part of those around her, represented by them, too, as entering into the opinions of the world, had been pressed as efficient means of influence; and that a vindication from their existence furnished a plausible coloring for the proceeding about to be effected. The tone, the language, the artificial structure of this letter, its familiarity with the terms peculiar to the business of life, all bespeak it, in our judgment, not the production of an inexperienced girl, but of a far more practised and deliberate author. Lastly may be mentioned, with respect to this letter, the care with which it has been preserved, and placed beyond the control of this daughter, as a prop to a transaction which could not stand alone, and as a means of stilling the murmurings of future complaint; the very ends for which it at last emerges from its secret recess.

“Next in the chain of evidence, and closely following its harbinger and herald, we will notice the deed itself from the complainant, conveying from her every description of property derived from her uncle; and it is one of the peculiarities of this conveyance, not without significance, that it was executed before there was an inventory made by the executor, to inform the grantor specifically what she had a right to claim or to bestow. Turning then to the recitals of this deed, they must be regarded as wholly irreconcilable with truth; and especially with that *uberrima fides*, that fulness of candor and fairness, required



in transactions between parent and child; transactions upon their face, too, operating to the disadvantage of the latter. This deed sets out a marriage contract entered into between Scarborough and his wife, anterior to their marriage, purporting to cover a portion of the property in dispute; it then states the failure of this contract by reason of an omission to record it, and proceeds to declare, that, some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same, the said William Scarborough *did, in consequence of such doubts*, transfer and convey all his right, &c., to the said Robert Isaac, and that the said Isaac, having departed this life, had left this property, with certain personal estate, to his niece Charlotte Scarborough; and that she to whom the devise and bequest had been made, *being desirous of carrying the marriage settlement into effect according to the original intent of the parties*, had, on coming of age, determined to convey all her right, title, and interest in the property derived from her uncle, for that purpose.

“The deductions from these recitals—nay, their necessary meaning, we may add, their literal import—are these: That the conveyance from Scarborough to Isaac was with the sole view of effectuating the marriage settlement, and of curing any defects attributable to that contract;—that Isaac took the property clothed with this trust, and for no consideration moving from himself, and vesting

in him an absolute title or estate;—that his devise and bequest to his niece were purely to secure the same objects, and that *she*, fully aware of these acts and intentions, had, as soon as she could legally do so, determined upon their accomplishment. Such are the declarations and recitals contained in this deed; not one of which, save the statement of a project of a marriage settlement, that is not by the evidence on the record shown to be palpably false. Thus, if we look to the deed from Scarborough to Isaac of the 13th of May, 1820—to the agreement between Isaac and M’Henry as the agent of A. Low & Co., in February, 1826—and to that between Robert Isaac and Andrew Low, on the 8th of March, 1827—and also to the return of the marshal of the sale under execution of the personal property in dispute, we find that Isaac was the purchaser and exclusive owner of all this property, for a pecuniary consideration paid by him of nearly twenty-three thousand dollars. Looking next from the recitals of this deed to the will of Robert Isaac, we find no ambiguity, no declaration, hint, or implication in the will to sustain these recitals; but everything to falsify and condemn them. We there see clearly the motive of the testator; *his affection* for his favorite niece, and the subjects and the mode with and by which he designed that his affection should be manifested. He gives to her, clear of all trusts or encumbrances, ‘the lot, dwelling house, and all other improvements thereon, which

formerly belonged to her father, together also with the plate, furniture of all kinds, books and prints, all of which were purchased and paid for at marshal's sale by me.' If this clause of the will were shown to, and clearly understood by the complainant, it is difficult to conceive how it could be made rationally to express or imply a duty on her part to disrobe herself of this bounty, as being clearly designed for others, and not for herself. The conduct of these persons, Scarborough and Low, and of Taylor, who was named as trustee, both in the marriage settlement and in the deed from Charlotte Scarborough, furnishes convincing evidence of the light in which they viewed any obligation supposed to be adhering to this property, and forming a binding consideration, either legal or moral, for the deed now impugned; that is, an obligation to bestow it in conformity with the stipulations of the marriage contract. But it may be naturally asked, if this supposed obligation was limited to Charlotte Scarborough. Did it not, if existing at all, extend equally to her father, and to the trustee in the settlement, and to others acquainted or connected with that contract? In a moral view, at least, no difference is perceived in the position of these parties, and it is not pretended, that Charlotte Scarborough sustained any legal obligation to convey away this property. Yet it is seen by the record, that William Scarborough, to serve his convenience or his interest, had no difficulty in

subsequently encumbering it both to Low and to Taylor, the trustee in the marriage settlement, or in subsequently selling it out and out to Isaac; and that this same trustee, Taylor, manifested as little scruple for the sanctimony of his trust, in its application for his own benefit. And it seems to us to be a most pregnant state of facts connected with this deed, that, when it was to be executed, Taylor and Low, who had so dealt with this property as to be necessarily cognizant of the falsehood of the recitals it contained, were carried to the house of Scarborough to become, the first the trustee, the second a witness to this instrument. The other witness to this deed, John Guilmartin, seems to have been taken under the stress of necessity, from the refusal of James Taylor to attest the deed, and the manner in which the transaction impressed itself upon Guilmartin is evinced in his deposition, in which he says that he inquired of Miss Scarborough whether this deed was her voluntary act, but was permitted to have no answer from her, and was silenced in his inquiries by the remark from Low, that the witness had been sent for to *attest the deed, and for no other purpose*. This witness further swears, that the deed was not read to nor by the grantor, in his presence. He states, moreover, this uncalled for remark on the part of the father (although witness was not permitted to obtain information from the child)—that he, Scarborough, had sent for the witness to attest 'a

deed from Miss Scarborough to her mother, *which as a dutiful child she had made.*' Again, when this deed from Charlotte Scarborough was to be proved, the only witness to its execution called on was Andrew Low; he who knew that its recitals were inconsistent with truth, he who deemed all inquiry about the willingness of the grantor to make it to be impertinent. John Guilmartin was passed by; he might have revealed, if called, circumstances coeval with the transaction, which would be calculated to remove or to weaken the influence of seeming acquiescence, or of the lapse of time; circumstances, which time alone, in the absence of direct impeaching testimony, would be competent entirely to cover up. The testimony adduced in support of the deed from the complainant falls far short of the object for which it was intended; much of that evidence, too, seems to have been given under influences necessarily detracting from the weight which it otherwise might have had. It wholly fails to countervail the evidence arising from the statements of witnesses on the other side; from the relative positions of the parties; and, more than all, from the intrinsic nature and force of the documents relied on both by plaintiff and defendants, in the court below. From a careful analysis of the facts and circumstances of this case, we think the conclusion cannot be resisted, that the deed from Charlotte Scarborough to William Taylor, of the 22d of

January, 1822, was not a fair and voluntary transaction; but was drawn from her by means and under influences which rendered that conveyance void. We are, therefore, of the opinion, that the real property conveyed by that deed should be reconveyed to the said Charlotte, now Charlotte Taylor; and that the several articles of personal property bequeathed to her by her uncle, Robert Isaac, so far as the same are now in existence, and in the possession or under the control of Mrs. Julia Scarborough, or of any other person acting under her authority, or claiming from her, and not for valuable consideration without notice, or claiming under like circumstances from any person by virtue of the provisions of the deed of trust above mentioned, should be delivered up to the complainant as her own property; but it is the opinion of this court, that rents and profits for the use and occupation of the real estate above mentioned, or compensation for the use and enjoyment of the personal property bequeathed to the complainant, should not be allowed her under all the circumstances attending this case; they are accordingly hereby denied her."

The relation between a parent and a child who though legally emancipated is still under tutelage, does not preclude the parties to it, from entering into such contracts or arrangements as are conducive to the good of both; nor does it preclude the child from making such a provision for an aged or indigent parent as will put him beyond the reach of want. *Haw-*

kin's Appeal, 8 Casey, 263. All that the law requires is that the child should part with nothing by way of contract, for which he does not receive a full equivalent; or, in the case of a gift, that it should bear such a proportion to his means, and the necessities of the parent that the latter could not reasonably reject the offer. *Bergen v. Udall*, 31 Barb. 9. But the burden of proof is throughout on the parent, and he must show not only that the child was not unduly influenced, but that he thoroughly understood what he was doing, which will not be inferred from evidence that he heard or read the provisions of the instrument, unless their actual and prospective bearing was fully explained, or they are so plain and obvious, as to speak for themselves; see *Houghton v. Houghton*, 15 Beavan, 270. *Greenfield's Estate*, 2 Harris, 489, 507. It is moreover eminently a case for the application of Lord Eldon's doctrine that the question is not merely whether the donor knew what he was doing, but how the intention was produced; *Bergen v. Udall*, 13 Barb. 9, 340; *ante*, 1167.

The criterion as indicated in *Houghton v. Houghton*, is that if the father acquires nothing that is not already possessed by him, although it may be in a different and less advantageous form, and the transaction is not injurious as it regards the child, the court will not intervene to set it aside, unless the evidence not only shows that influence was used, but that it was undue; *Hildreth v. Elliot*, 8 Pick,

293, 297. On the other hand, when the child's position is altered for the worse, while the parent is unduly benefited, the onus is on the latter, and it will not be enough for him to show that the instrument was read to the child, and executed by the latter without objection, unless it also appears that he had a disinterested adviser, who was competent to explain the legal effect and consequences of the deed; *Houghton v. Houghton*, 15 Beavan, 278.

In *Jenkins v. Pye*, 12 Peters, 214, a daughter of twenty-three years of age, but residing with her father, and therefore presumably much under his influence, conveyed her reversionary interest in an estate which had descended to her from her mother, subject to his right as the tenant by curtesy, for a pecuniary consideration which was confessedly inadequate. She married within two years, and died not long afterwards, leaving two minor children. In consequence perhaps of their tender years, or it may be from the fear of alienating their grandfather, no steps were taken to impeach the transaction during his life. He died leaving a will, and a suit was instituted to set aside the grant on the ground of undue influence. Thompson, J, said in pronouncing judgment, that the court was not prepared to adopt the English doctrine, that a conveyance from a child to a parent was subject to an adverse presumption which must prevail unless rebutted. The inference should rather be, that the parent had the good of the child in view

not less than his own. Every such case should be viewed in the light of its own circumstances. In the instance before the court the transaction was not an unreasonable one, because the property was in a dilapidated condition, and required the expenditure of money, which the father could not lay out with justice to his other children, unless he held the fee. The transaction was not therefore one which a court of equity should condemn without some affirmative proof of undue influence. Moreover the bill was not filed for nearly twenty years, nor until after all the parties to the transaction had been removed by death. Such a prolonged acquiescence would be a defence, though the case were one for relief in other respects. The minority of the complainants might relieve them from the imputation of laches, but did not render it less unjust to proceed after the evidence had been obliterated by the lapse of time.

But for the last mentioned ground this judgment could scarcely be reconciled with the general course of decision. There are a multitude of cases where a court of equity intervenes, not because there is fraud, but that fraud may not exist. As a father may unduly influence a child, who though of full age, has always yielded to his will, so the only safeguard against the temptation to abuse his power, is that a contract which is injurious to the child shall not stand. If the transaction is demanded by the circumstances, and will be mutually

advantageous, some disinterested third person should be consulted who can prescribe the terms and fix the price or value. The failure to adopt this course may not be a badge of fraud, but it casts the burden of proof on the parent, to show that he took all the care for the child, which he could not exercise for himself. In *Slocumb v. Marshall*, 2 W. C. C. R. 397, a daughter conveyed the reversion in a tract of land to her father, who was the tenant for life. She resided in his house at the time, and was about to be married, but the grant which was alleged to have been made on the faith of an oral declaration of trust, was not made known to her intended husband. Washington, J., said, that the trust could not be proved as such, consistently with the statute, but that it was notwithstanding clear under the evidence, that the daughter had been impressed with the belief that the conveyance would promote her interests, and not less clear than it was prejudicial. Such transactions were viewed with jealousy by a court of equity, and the one in question must be set aside, although there was no reason for supposing that the father intended a fraud, or had any other than a fair intention, which he had been prevented from carrying out by death.

It was held in like manner in *Bergen v. Udall*, 31 Barb. 9, that where a daughter, immediately upon her arrival at lawful age, makes a voluntary conveyance for the benefit of her father, the transaction will be examined with the

most jealous scrutiny, and the person relying upon the conveyance must show affirmatively, not only that she understood its nature and effect, and executed it voluntarily, but that her intention did not result from misrepresentation or mistake, or from the parental control and influence.

As life draws to a close, the relation which existed at an earlier period is not unfrequently reversed. The parent comes under the sway of his children, and is liable to be influenced by them; and if they procure, or even suffer him to make a contract, or execute a deed which operates disadvantageously to him, or by which they are unduly benefited, a court of equity will avoid the instrument without other proof of breach of confidence, or of an undue exercise of influence, than that afforded by the nature of the transaction; see *Whelan v. Whelan*, 3 Cowen, 557; *Brice v. Brice*, 5 Barb. 533; *Comstock v. Comstock*, 57 Id. 473; *Highberger v. Stiffler*, 21 Maryland, 338. "The natural relation of the parties," said, Bowie, C. J., in the case last cited, "was reversed in this instance by the hand of time. The parent had become a child, and the child was guardian to the parent. There was the same dependence, overweening confidence and implicit acquiescence which had rendered one an automaton in the hands of the other; *et ubi eadem ratio, ibi idem jus*. The wish of the agent had become the will of the principal. Whatever the former suggested the latter executed.

There was no consent of two minds, but a merger of the principal's mind to the agent's. In such cases it is not necessary to prove the actual exercise of overweening influence, misrepresentation, importunity or fraud, *aliunde* the act complained of."

In *Whelan v. Whelan*, 3 Cowen, 587, a man whose intellect was impaired by age, although he was not imbecile, or unfit for the transaction of ordinary business, lived apart from his wife and daughters, with two sons to whom he intrusted the management of his farm. Legal proceedings were instituted on behalf of the wife for a separate maintenance, and he became apprehensive that all his property would be taken to satisfy the decree, and for the payment of his debts. The erroneous impression was fostered, if not inspired, by one of his sons, who took advantage of it to obtain a deed, by which his father's entire estate was vested in him and his brother. The court held that the conveyance was void, not only as regarded the party who had used undue means, but that no right accrued under it to the other grantee, who was free from blame.

"It is sufficient," said Woodworth, J., "if on an examination of the whole bill, the facts stated show that the respondents necessarily had undue influence or control over the appellant, so that the parties did not treat on equal terms. The rule requires everything essential to the appellant's right to be alleged, is then satisfied. His equity will then appear,

and the court may administer the relief to which he is entitled. Whether undue influence has been used, is an inference from the facts alleged and proved, and does not require the averment of the pleader to put them in issue. It is enough if they authorize the court to draw the conclusion.

"I will briefly state some of the leading features of this case. The appellant is far advanced in years. He is probably not exempt from the infirmities incident to mind and body in the last stage of human life. In this second childhood, a surrender of business into other hands becomes indispensable. Something like a guardianship of the person and property is in most cases necessary. The appellant had reared a numerous family. For several years there appears to have been much family contention, arising from dissensions between his children with respect to the use and management of his estate. The appellant's wife took part with some of the children. She and her husband lived unhappily, and separated. The bill alleges that the appellant had committed the management of his estate chiefly to his sons, John, Joseph, and William; that after his wife left her home, the farm was in the exclusive possession of the appellant and the respondents. It is in proof that the appellant was very credulous, and easily persuaded by those whom he believed his friends; that he was easily led by William; that in the family strifes the appellant and the re-

spondents were on one side—the wife and the other children in opposition; that the appellant could be persuaded to do any act dictated to him, when apprehensive that his property was in danger. It cannot be doubted that he was placed in a situation highly favorable to the views of the respondents. They had full opportunity for operating on his hopes and fears. A contract obtained from one party so much in the power of the other, cannot be sanctioned, if confidence has been abused, if there is inadequacy of price, or the inference is plain that advantage has been taken of age and imbecility, and that the partiality of a parent has been artfully made use of to strip him of his property, and reduce him to a state of dependence and want."

In *Martin v. Martin* 1 Heiskell, 653, a man advanced in years, and afflicted with disease, although in the judgment of the court retaining sufficient capacity to make a valid contract, conveyed his real estate to his sons, Joseph and Henry Martin, to the exclusion of his daughters and the offspring of a deceased child, and there was reason to believe that the grant was antedated with a view to defraud his second wife of her dower. It appeared that the deed was prepared at the instance of one of the grantees, and brought to the grantor for execution, and that the grantor had previously been induced to give a bond to his sons, for which there seemingly was no consideration. The court said, "whilst Joseph was arranging to defeat

his father's wife, he was also arranging for his own advantage. He procured the deeds and bond to be antedated, and then procured their execution. As he was the active agent in procuring the preparation of the papers and in having them signed and witnessed, and as he was to be largely benefited from the transaction, the law presumes from the relation of father and son, of principal and agent, that the latter had influence over the former. Express proof of influence need not be made, it is implied from the relation. But when to this is added that the father was far advanced in years was greatly enfeebled in body and mind, actually verging upon mental incapacity and was greatly troubled and uneasy in his mind, and that the son and agent used his influence in procuring a deed, which secured to himself more than two-thirds of his father's entire estate, and to his brother the residue, to the total exclusion of two sisters and several grandchildren, the law raises the presumption of fraud, and this presumption can only be overturned by clear and satisfactory proof, that the son and agent dealt with entire fairness and good faith in the transaction. It is incumbent on him to show affirmatively that his father comprehended fully the purport and effect of the conveyances, and that he executed them freely and understandingly, knowing that he thereby divested himself of the absolute title to the lands, and that they would not operate merely as a will. No such

proof is made or attempted to be made, and the deeds must consequently be set aside."

The judgment in *Brice v. Brice*, 5 Barb. 549, is substantially to the same effect. "The relation of both child and confidential agent," said Harris, P. J., "which James R. Brice sustained to the plaintiff, seems to me to bring this case most emphatically within what Lord Eldon called the great rule of the court, that 'he who bargains in a matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.'"

It results from these decisions, that when a parent from age or infirmity is unable to think and act for himself, it is the duty of a child to whom he has recourse for information or advice, not to suggest or sanction any disposition of the estate that will give him an undue advantage over the other members of the family. Such a case is clearly within the "great rule," that one shall not use the confidence reposed in him by another, for any end that an enlightened conscience would not approve.

A recent case in Massachusetts follows a different rule, which affords scope for some of the least estimable faculties of our nature. In *Howe v. Howe*, 99 Mass. 88, a man eighty-three years of age, and enfeebled in mind and body by a recent and severe attack of disease, conveyed all his estate, real and personal, to

his surviving sons, Nathan and Eldridge, and to his son-in-law, Holman, whose wife was his nurse and attendant. The transfer was made in consideration of an agreement by the grantees, to provide for the grantor as long as he lived, and the effect was to exclude the only child of a deceased son, for whom he had previously declared his intention to provide by giving him "the Berlin wood lot." It also appeared in evidence, that the grantees had charge of the grantor's affairs under a general power of attorney, and that the deeds were drawn as they directed, without consulting him. He died not long afterwards, and his grandson sought to avoid the grant on the ground of undue influence. The judge who tried the cause was requested to instruct the jury: "That though the influence may have been gained by kind offices of duty or affection, or attention to the grantor's bodily infirmities, still if that influence so acquired was abused for a selfish and unjust purpose, or to obtaining an unjust and unfair advantage over others equally entitled to his bounty, such influence was undue influence. "That the circumstances attending the execution of the deeds, viz., that they were prepared, by Eldridge's dictation, by an attorney employed by him, and who never saw the grantor nor communicated with him; that they were executed in Eldridge's house in the presence of himself and his family; that Eldridge brought the justice to his house, who only staid long enough to put the formal question

and receive a nod or word in reply; that they were not read over to him; that the grantor's wife did not execute the deeds; that they embraced all his real estate; and that there was executed at the same a bill of sale of all his personal property; that Eldridge had charge of the grantor's affairs at the time under a power of attorney; and that the transaction was contrary to the grantor's previous declaration of his intention, that the petitioner should be remembered in the disposition of his estate, and have the Berlin wood lot—raise a presumption of fraud and undue influence."

These instructions were declined, and the jury were instructed that in order to avoid the deed it must appear that the influence, however obtained, was abused, or made use of improperly for the purpose of inducing the grantor to execute an instrument which was not, in fact, his own free act and deed; and that the various facts referred to in the plaintiff's prayer for instructions, so far as proved, were for the consideration of the jury. The jury were also told that a deed would not be set aside upon the ground that the grantor had been annoyed by "teasing" into making it, if he was of sound mind, and able to exercise his own free will notwithstanding such influence.

The plaintiff excepted to the charge, which was affirmed on error by the court above. Hoar, J., said: "Influence properly gained, although used for a selfish purpose, and to obtain an unjust and unfair advantage, will not avoid a deed

thereby obtained, unless there is fraud or duress, or the influence is exerted by a stronger mind over a weak one, in such a manner and to such a degree as to substitute the will of the person exerting the influence in place of that of him upon whom it is exerted, so that the latter is no longer a free agent.

Notwithstanding this judgment, we may believe that the purpose for which the influence is exercised should be the criterion rather than the way in which it is acquired. The means of obtaining influence may no doubt be so unworthy or perverse, as to justify an inference that the intention was to use it for a wrongful end. Such perhaps is the case where a mistress receives an estate which should have devolved on the rightful heirs. Yet if the same influence were employed to reconcile a father with a child whom he was about to disinherit, it could not be challenged as undue. In the great majority of instances, influence is acquired by means which no one need be ashamed to avow. A confidential agent may obtain an almost unbounded sway over the mind of his principal, through superior intelligence, or the gift of pleasing with which some men are naturally endowed, without saying or doing anything that the most fastidious moralist could disapprove; but if he uses that power to procure a benefaction which exceeds a just compensation for his services, a chancellor will not allow the gift to stand. So one who is charged with having unduly procured a conveyance from his parent, does

not rebut the allegation by showing that his hold on the mind and heart of the donor came through kind and unremitting attentions during illness, or from ministering to the infirmities of old age. Such services beget a trustfulness which is greater in proportion to the sense of gratitude, and which brings the case within the rule enunciated by Lord Eldon in *Gibson v. Jezes*, 6 Vesey, 266, 271, that he who bargains in a matter of advantage with a person who places confidence in him, is bound to show that a reasonable use has been made of that confidence; see *Brice v. Brice*, 5 Barb. 540; *Dean v. Negley*, 5 Wright, 312; *Boyd v. Boyd*, 16 P. F. Smith, 283, 293.

The case of *Dean v. Fuller*, 4 Wright, 474, may be referred to in this connection as showing how necessary it is to cast the burden of proof on a party who would sustain a voluntary deed, when the circumstances are such that he might have influenced the donor, and the gift is not one that an unbiassed judgment could approve. Jackson, a man of advanced age, and overcome with grief by the recent loss of his wife, conveyed his real estate to his brother-in-law, James Fuller, and at the same time bequeathed one-half of his personal estate to him by will. This arrangement was made the night after the funeral, and the papers were drawn and executed before the close of the week. The effect was to give Fuller three-fourths of Jackson's entire property, to the exclusion of his kinsmen, and of

the other relatives of his wife. It was conceded that Fuller was Jackson's confidential adviser, that he was present at the preparation of the will and of the deed, and that they were drawn at his instance and in conformity with his suggestions. The deed was without consideration, and the grantor gave no other reason for parting with his property, than that Fuller had done a great deal for him and for his deceased wife. He did not understand what he was doing, or changed his mind, and Fuller brought an ejectment against him soon afterwards, for the land. The court held that there was no direct proof of fraud or undue influence, and that the grantor's mental weakness was not a sufficient ground for setting aside the deed, unless the grantee stood in a confidential relation, which did not sufficiently appear from the evidence.

The error in this case seems to have been in analyzing that which should have been considered as a whole. Jackson's advanced age, distress and weakness, Fuller's position as a confidential friend, and that he was present at, and directed the preparation of the instrument of gift, were circumstances which, in the aggregate, threw the burden of proof on him, though each of them might have been inadequate if standing alone; see *Boyd v. Boyd*; *ante*.

In *Greers v. Greers*, 9 Grattan, 332, a man in extreme old age conveyed the whole of his estate to one of his sons, and the court held that as he had sufficient capacity

to understand what he was doing, and there was no direct proof of fraud or undue influence, the improvidence and injustice of the act as disinheriting his other children did not give rise to a presumption of an abuse of confidence, or justify the court in setting aside. A similar decision was made in *Wray v. Wray*, 30 Indiana, 126. These cases may be classed with *Dean v. Fuller*, and like it can hardly be reconciled with the principles that have been laid down by courts of equity for the protection of age, weakness of mind, and distress, from abuse of confidence. The same remark applies to *Darnell v. Darnell*, 32 Indiana, 342, although the question arose out of a grant to a brother-in-law while residing in his house.

It is nevertheless well settled that when one who, though weak and failing, is not of unsound mind, deliberately bestows his property on a child in consideration of the latter's undertaking to provide for his support, a court of equity will not avoid the grant, if it appears that he was aware of the consequences of his act, and that it could not be recalled; see *Howe v. Howe*, 99 Mass. 88; *Hadley v. Latimer*, 3 Yerger, 537; *Nace v. Boyer*, 6 Casey, 99, 111; *Darnell v. Rowland*, 32 Indiana, 342. In the case last cited the court refused to set aside the deed, although the facts were strongly indicative of undue influence, if not of an abuse of confidence.

The absence of a power of revocation is explained under these circumstances by the end in view,

which is to place the grantor beyond the reach of want, and requires that both parties should be absolutely bound. In *Nace v. Boyer*, 6 Casey, 99, a conveyance in trust to convert the grantor's estate into money, invest the proceeds, apply the interest to his support, and distribute the fund among his children when he died, was held to be within the same principle, although a testamentary power of appointment might seemingly have been reserved, consistently with the object which the settlement was designed to promote; see *Hall v. Hall*, 14 L. R. Eq. 365; *Russell's Appeal*, 25 P. F. Smith, 281.

GUARDIAN AND WARD.—A guardian's influence may obviously, like a parent's, continue after the condition of dependence which gave birth to it has ceased, and his dealings with a ward, who has recently attained his majority, will consequently be scrutinized with much the same severity as if they were between a father and child. "Settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are accordingly viewed by the court with a watchful and even jealous eye." *Lay v. Barnes*, 4 S. & R. 112; *Elliott v. Elliott*, 5 Binney, 8; *Fish v. Miller*, 1 Hoffman Ch. 267. A guardian who relies on a release given under such circumstances, must show that the ward had a reasonable time to examine the account, and possessed the requisite information, skill and knowledge, or that he had the aid of some adviser who was competent for such a task;

and, unless this appears with sufficient clearness, the release will be regarded as an empty form, and leave the case precisely as it was before; *Fish v. Miller*; *Stanley's Appeal*, 8 Barr, 431, 433; *Garvin v. Williams*, 44 Missouri, 465; *In re Van Horn*, 7 Paige, 46; *Sullivan v. Blackwell*, 28 Mississippi, 724; *Wills' Appeal*, 10 Harris, 325, 332; *ante*, 1178.

A contract with the ward, or a conveyance from him, is within the principle, and the *onus* is on the guardian to prove that the transaction was in all respects fair and equal, and that it was not the result of undue influence; *Somes v. Skinner*, 16 Mass. 348; *Carberry v. Tannehill*, 2 Harris & Johnson, 224; *Wills' Appeal*, 10 Harris, 22; *Ebert v. Ebert*, 5 P. F. Smith, 110. Inadequacy of consideration is, under these circumstances, not merely *prima facie*, but conclusive evidence of fraud. *Ebert v. Ebert*; *Long v. Mulford*, 17 Ohio, N. S. 484.

The law does not prohibit a guardian from dealing with his recently emancipated ward, although it regards the transaction with jealous eyes; and a release of the guardian, or a gift to him, may consequently stand, if shown to have been made deliberately, and with a sufficient opportunity for consultation and advice; *Sherry v. Sansbury*, 3 Indiana, 820; *Hawkins' Appeal*, 8 Casey, 265; *Cowan's Appeal*, 24 P. F. Smith, 329; *Kirby v. Taylor*, 6 Johnson's Ch. 248.

Long and unexplained acquiescence is, moreover, in this, as in

other cases of a like kind, an effectual bar; *Lukens' Appeal*, 7 W. & S. 48; *Bane's Appeal*, 3 Casey, 492; *Chorpenning's Appeal*, 8 Id. 315; and it seems that the court should not permit the account to be reopened, after the lapse of six years, from the settlement which the ward seeks to impeach.

In *Gale v. Wells*, 12 Barb. 94, a guardian induced his ward to endorse a note for his accommodation, and transferred it to the plaintiff for an antecedent debt, in consideration of an agreement for forbearance. The transaction took place before the guardian's account was settled, and while the ward was still at college. The court held that undue influence was to be inferred, as matter of law, from the circumstances, and that as these were known to the plaintiff, he was not a *bona fide* purchaser.

A will from a recently emancipated ward to his guardian, is received with suspicion, as having presumably been induced by the guardian's influence, and if it makes an inequitable disposition of the testator's property, the presumption is that the influence was unduly exercised; *Meek v. Perry*, 36 Mississippi, 190; *Burd v. Pratt*, 18 Pick. 155; *Garvin v. Williams*, 46 Missouri, 477; *Morris v. Stokes*, 21 Georgia, 552. Much, nevertheless, depends in such cases on the amount of the bequest, and on whether it could be made consistently with the ties of blood and family affection.

NEAR RELATIVES.—The princi-

ple is the same when the members of a family are so placed that one of them stands *in loco parentis* to another, or can exercise a controlling power over him; *Long v. Mulford*, 17 Ohio, N. S. 484, 502. Moreover, if the relation between persons who are of the same blood, is not necessarily one of confidence, it may readily acquire that character, when they are dealing with property inherited from a parent or common ancestor. They are consequently under a mutual obligation not merely to say or do nothing that is calculated to mislead, but to give such counsel as would presumably proceed from a third person who was equally concerned for all; *ante*; *Brook v. Berry*, 2 Gill, 83, 103; *Hunt v. Hunt*, 2 Beasley, 161. *Dunnage v. White*, Swanton, 138; *Haney v. Mast*, 8 Beavan, 439; *Coutts v. Ackworth*, 8 Eq. L. R. 558; *Long v. Long*, 9 Maryland, 461; *Todd v. Grove*, 33 Id. 183; *Sears v. Shafer*, 2 Selden, 272; *Dunn v. Chambers*, 4 Barb. 376, 381; *Stewart v. Stewart*, 7 J. J. Marshall, 183; *Rutherford v. Huff*, 4 Dessausure, 350; *Kennedy v. Kennedy*, 2 Alabama, 571; *Boney v. Hollingsworth*, 23 Id. 690; *Doughty v. Doughty*, 3 Halstead, 227, 292; *Gordon v. Gordon*, 3 Swanton, 400; *Long v. Mulford*, 17 Ohio, N. S. 484, 504; see vol. 1, 252. It is not enough under these circumstances to aver that the proposition came from the complainant, if it was one which the respondent should have rejected from a sense of propriety and justice; *Kennedy v. Kennedy*, 2 Alabama, 571;

M'Cant v. Bee, 1 M'Cord Ch. 383; *Doughty v. Doughty*; *Dunn v. Chambers*. "The double relationship," said Harris, J., in the case last cited, "which the parties bore to each other as kinsmen and joint recipients of their grandfather's bounty, should have prompted the defendant, instead of profiting by the recklessness and improvidence of his cousin, to take measures more effectually to secure the property for his benefit."

In *Sears v. Shafer*, 2 Selden, 268, a father gave a pecuniary bequest to his daughters, and devised his real estate to his sons without words of inheritance. They induced their sister to release her reversionary interest without consideration, and the instrument was set aside, after the lapse of twenty-six years, at the instance of her children, it appearing that she was in feeble health at the time, and had died soon afterwards. Gridley, J., said, the relation which the Shafers, who procured the execution of the release, bore to Elizabeth Sears, was that of brothers. They were executors of their father's will, and the trustees of the legacy bequeathed to her, and were the habitual and confidential advisers of their sister, who was then a widow and in ill health. It is scarcely possible to imagine a more intimate and influential position than that held by Daniel, one of the brothers, towards his sister at the time when the release was executed. She was accustomed to rely on his advice in all her business matters,

and to follow it implicitly. This influence on the one side, and a yielding compliance on the other, was increased by the circumstances in which Mrs. Sears was placed during the last part of her life."

In *Harvey v. Mount*, two sisters, of mature age, lived together, and the elder who kept the house was implicitly confided in by the younger. The elder sister was about to marry, and the younger, who was much distressed at the thought of separation, transferred all her property to her brother-in-law, in consideration of a covenant to provide her with "sufficient meat and drink, and all other necessities suitable to her degree." The court held that the nature of a grant, which reduced the grantor to dependence, gave rise to a presumption that the power of the elder sister had been unduly exercised. Moreover, it did not appear that the attorney who drew the deed was acting for the complainant, or that he had made the representations that would probably have induced her to refrain from adopting a course that was eminently unwise. The transaction should consequently be set aside.

In *Kennedy v. Kennedy*, 2 Alabama, 571, 604, one who had recently lost his wife, and had in consequence become addicted to habits of intoxication, went with his children to reside with a brother, and while there conveyed all his real and personal property to him. The consideration as recited in the deed was \$10,000, but it did not

appear that this amount or any other was paid at the time, and the bill alleged that the transfer was to guard against the grantor's prodigality while under the influence of liquor, and that it was executed on the faith of an assurance that the property should be held in trust for his children. The answer averred that the deed was given in satisfaction of antecedent loans or advances; that there was no such trust; and that if there were it would be invalid under the statute of frauds. The court held that, although the parties did not hold the relation of trustee and *cestui que trust*, or of principal and agent, there was still a confidence and dependence, which made it incumbent on the defendant not to procure or accept any grant that must prejudice one who relied on him for counsel or assistance.

It is not a sufficient answer in cases of this description, that the trust is not reduced to writing, or that it is in fraud of creditors, because such evidence indicates that the grantee took advantage of the hopes and fears of the grantor to obtain the estate on terms that could not be enforced; see *Brogden v. Walker*, 2 Harris & John. 285; *Lony v. Long*, 9 Maryland, 348; *Rutherford v. Huff*, 4 Dessaussure, 350; *Conant v. Jackson*, 16 Vermont, 335, 353; *Harding v. Handy*, 11 Wheaton, 125. If, said Marshall, C. J. in the case last cited, "these deeds, were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against

conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case, is among its best settled principles;" see *Brogden v. Walker*, 2 Harris & J. 285.

HUSBAND AND WIFE.—The relation of husband and wife obviously admits of an influence that may be carried beyond just bounds, but it seems that either of the parties to it, may accept a benefit from the other, without being under the necessity of proving that it was not obtained by undue means; *Handy v. Van Harlingen*, 7 Ohio, N. S. 208; *Dixon v. Dixon*, 7 C. E. Green, 99. This is apparently, because the near regard and community of interest which is presumed to subsist between persons who are so situated, afford the explanation which it would be otherwise requisite to give. In *Handy v. Van Harlingen*, the court, said, that, although gifts from a wife to her husband after marriage, should be jealously and closely scrutinized, yet undue influence would not be presumed, but must be shown by direct proof, or by circumstances from which it might reasonably be inferred. See *Orr v. Orr*, 8 Bush, 156, vol. 1, 434.

The question could not well arise under the common law, which viewed the wife as one with her husband, and gave him the control of her entire personal estate, while it afforded a safeguard against his influence in the dis-

posal of her land. Now, that the property of a *feme covert* is her own, it may be requisite to take care that she be not induced to part with it by the methods which Lord Thurlow is said to have regarded as infallible.

In *McMahon v. Ryan*, 8 Harris, 339, Woodward, J., said, that general maltreatment of a wife by her husband does not impair a bequest from her to him, unless it is shown to have been an immediate or moving cause for the execution of the will, and should rather be viewed as affording a presumption against influence as distinguished from duress. Be this as it may, there is no doubt that where undue influence appears to have been exercised between husband and wife, a remedy may be had in equity for the abuse; *Fry v. Fry*, 7 Paige, 461; *Delafield v. Parrish*, 25 New York, 9, 96; *Marsh v. Tyrrell*, 2 Haggard, 87; *Williams v. Baker*, 21 P. F. Smith, 482; *Hall v. Patterson*, 1 Id. 289; *London v. Blythe*, 4 Harris, 582; *Schrader v. Decker*, 7 Barr, 14; *White v. Greaves*, 107 Mass. 325.

ATTORNEY AND CLIENT.—The relation of attorney and client is among those which imply the existence of an influence that may be abused.

In England the policy of the law forbids an attorney to contract with his client, or accept any benefit from him, beyond the remuneration to which he is entitled for his professional services; *ante*; see *Miles v. Ervin*, 1 McCord Ch. 524, 535; *Buller v. Has-*

kell, 4 Dessausure, 651, 702; and although, the rule in this country is less stringent, such transactions are closely scrutinized, and the burden of proof is on the attorney to show, not only that he used no undue influence, but that he gave his client all the information and advice as against himself, which it would have been his duty to afford, if he had been duly retained in a matter where his own interests were not involved. It should moreover appear that the transaction was not disadvantageous to the client, nor one which a prudent man would have declined. If it is a contract, the consideration must be full, if a gift, it must not be so large as to impair the donor's ability to provide for himself, and the members of his family; and the burden of proof on these and other material points is on the attorney, and not on those who seek to avoid the deed or transfer; see *Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 539; 2 Barb. Ch. 540; *Lewis v. J. A.* 4 Edwards Ch. 579; *Mason v. Ring*, 3 Abbott, App. Dec. 210; *Miles v. Ervin*, 1 McCord Ch. 526; *Mills v. Mills*, 26 Conn. 213; *Hawley v. Cramer*, 4 Cowen, 717; *Mott v. Harrington*, 12 Vermont, 199; *McMahon v. Smith*, 6 Heiskell, 167; *Brook v. Berry*, 2 Gill. 83; *Poillon v. Martin*, 1 Sandford Ch. 569; *Evans v. Ellis*, 5 Denio, 646; *Gibson v. Jeyes*, 6 Vesey, 266; *White v. Whaley*, 3 Lansing, 327; 40 Howard Pr. 353; *Jennings v. Connell*, 17 Illinois, 148. *Trotter v. Smith*, 59 Id. 240; *Atwood v.*

Mansfield, Ib. 496; see vol. 1, 227. The question belongs to the chapter of constructive fraud not less than to that of undue influence; and the rule broadly stated is, that one who accepts a benefit from a person towards whom he stands in the relation of a counsellor, must show that the client had the advice and information which he presumably would have received, if he had consulted an adviser who had no selfish or interested end in view. This may sometimes bear hardly on the attorney, but the hardship is one to which he exposes himself by undertaking a double and ambiguous part; *Wistar's Appeal*, 4 P. F. Smith, 60; *Rhodes v. Bate*. L. R. 1 Ch. App. 252.

"From the relation of attorney and client which existed between the complainants and the defendant Ransom, it was not necessary for them to prove actual fraud on the part of the latter, in obtaining an assignment of their judgment for about one-tenth of its actual value, including the interest which was due thereon at the time of such assignment. It is a case of constructive fraud which relieves the clients from the burden of proving that their attorney intentionally deceived them, or made any misrepresentation whatever in relation to the value of the judgment, or the probability of its collection; and if the court is not bound to set aside the sale as a matter of course upon the application of the client, in such a case the whole burden of establishing the fairness of the sale,

and that it was made upon a full or adequate consideration, is at least cast upon the attorney. The attorney, therefore, can never sustain a purchase of this kind without showing that he communicated to his clients everything, which was necessary to enable them to form a correct judgment of the actual value of the subject of the purchase, and as to the propriety of selling at the price offered; and his neglect to ascertain the true state of the facts himself, will not sustain his purchase;" *Howell v. Ranson*, 2 Barb. Ch. 540.

Greenfield's Estate, 2 Harris, 489, is in entire conformity with this principle. There a woman eighty-six years of age, hard of hearing, and as it would seem infirm of purpose, although her mind appears to have been clear and vigorous, informed Mr. Howell, who was her confidential friend and adviser, of her desire to dispose irrevocably of her property, which amounted to more than two hundred thousand dollars. She had no kinsfolk or descendants, and her object seems to have been to guard against the importunity of the persons who were continually soliciting her to relieve their wants, or for donations to religious and charitable institutions. Bouvier, an attorney, who had not long before drawn Mrs. Greenfield's will, was then called in, and she informed him of her desire to "put her property in such a form that she could have no power to change it; as she was growing old, and might become unable to manage

her concerns." He prepared a deed in accordance with her instructions, by which all her property was conveyed to himself, Howell, and two other persons, in trust to apply the net income to Mrs. Greenfield's use during her life, and after her death to convert the estate into money, pay \$10,000 to each of the trustees, and a further sum of \$5,000 to Howell, and then distribute the residue among different persons. The instrument was left with Mrs. Greenfield for consideration, and some days afterwards the trustees called to accept the deed which she was prepared to execute. Two men of high character were present as subscribing witnesses. The answer alleged that one of them, who was an eminent judge, explained the nature of the instrument, and told her that once executed, it would be as unalterable as "the laws of the Medes and Persians." She replied, "that was what she wanted." This allegation was denied, and both the subscribing witnesses having been removed by death could not be satisfactorily established. Mrs. Greenfield survived the transaction for some years, and having become dissatisfied with what she had done, disposed of her property differently by will. The suit was instituted by her executors to set aside the deed. The court held that there could be no doubt of Mrs. Greenfield's competency. Nor was it at all questionable that she might by a free and unbiassed exercise of her will, divest herself of her whole estate and confer it

on third persons. It was equally clear that she had not executed the instrument under an erroneous belief, that it was a last will, or in the nature of one. The proof was directly the reverse, that she chose this method because it was unalterable, and would relieve her from the intrusive solicitations to which she would be exposed if she retained the power of revocation. The deed must consequently be regarded as the fruit of a resolve, which having been deliberately executed, and not being inconsistent with any legal rule or policy, could neither be recalled by the donor nor vacated by the court. The gifts to the trustees stood on another footing, and should be tested by different principles. Bell, J., said: "The deeds were prepared by Mr. Bouvier, who, for some time prior, had been the legal adviser and confidential attorney of Mrs. Greenfield. In this instance, he acted upon the express suggestion and recommendation of Mr. Howell, in whom the donor reposed the most implicit faith. It is evident both these gentlemen exercised over her an almost unbounded influence, and were thus enabled to give direction to her thoughts and actions. Mr. Rush also stood towards her in a fiduciary relation; and the fourth trustee, Mr. Roberts, was brought into the business by Mr. Howell, under a recommendation well calculated to command her utmost trust. For a considerable time before the conveyance, it is proved she was improvident, if not extravagant, in the expendi-

ture of her fortune, and, in reference to it, singularly open to solicitation and importunity. In the language used at *Nisi Prius*, she was generous to a fault, and seems to have been haunted by a passion for giving. While indulging this inclination for expenditure, the deeds in question were made. By these is reserved to the trustees the sum of \$40,000, being \$10,000 to each, professedly as compensation for assuming the burden of a trust which might have been terminated in a year; and, according to every probability, would not endure for a very long period. As a reward for the future management of an estate worth, at the utmost, only five times as much, the sum named has been designated as inordinate. Yet this fact will by no means justify a charge of actual fraud against the parties who principally managed this transaction. As already intimated, there is no proof in the cause to warrant so grave an accusation, especially of individuals enjoying the eminent reputation which all accord to these trustees. I can very well imagine how, without a violation of conscience, they might conceive themselves entitled to a princely remuneration, under the circumstances then surrounding the donor. But in spite of this concession, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to forbid an allowance of the claim. In this feature, the case presents what is called a constructive fraud, springing from the

confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. As it has often been said, the principle stands independently of such elements of active mischief. It is founded upon a motive of general policy, and is designed to protect a party, so far as may be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament. It has been beneficially applied to those confidences which owe their birth to the relation of parent and child, guardian and ward, trustee and *cestui que trust*, and, above all, attorney and client. To guard against the strong influences which these connections are so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void, which, between other parties, would be open to no exception. This is emphatically true of the relation of client and attorney, and to persons standing in a situation as *quasi* guardians or confidential advisers. Many of the cases establish the doctrine that, while these connections exist in full vigor, the adviser shall take

no benefit to himself, from contracts or other negotiations with the advised; *Hatch v. Hatch*, 9 Vesey, 297; *Wood v. Downes*, 18 Vesey, 126; *De Montmorency v. Devereux*, 7 Clark & Finnelly, 188; a doctrine intended to supercede the necessity of any inquiry into the means used or the exertion of influence in any particular case, which is often difficult, if not impossible from the very nature of things; *Welles v. Middleton*, 1 Cox, R. 125; *Wright v. Proud*, 13 Vesey, 137. Other authorities, where the transaction is one of contract and sale, conceding that it may not be absolutely void *ipso facto*, throw upon the agent the burden of establishing its perfect fairness and adequacy, and that it was the deliberate act of the confiding party, after being fully informed of his rights, interests, and duties, and put upon his guard against even the suggestions of his own inclinations. It must appear affirmatively that no advantage has been taken of the client; and if this be not absolutely established *uberrima fide*, equity will treat the case as one of constructive fraud. An attorney, or other confidential adviser, is not permitted to avail himself either of the necessities of his client, or of his good nature, liberality, or credulity, to obtain undue advantages, bargains, or gratuities; and it has been said, there would be no bounds to the crushing influence of the power of an attorney who, has the affairs of a man in his hand, if it were not so; *Gibson v. Joyes*, 6 Vesey, 278; *Montesquieu*

v. Sandys, 18 Vesey, 313; *Jones v. Thomas*, 3 Y. & Coll. 498. A judicious writer on this subject has observed, that equity 'does not so much consider the bearing and hardship of this doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny, from the dangerous influence arising from the confidential relation of the parties; 1 Story Eq. § 311.' "

Where the question agitated is of a gift, the rule would seem to be more stringent than where the advantage flows from a contract or mutual arrangement. In *Wright v. Proud*, Lord Eldon said, an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a *dictum* which, Lord Brougham observed, was afterward reduced in *Hatch v. Hatch* to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that everything was voluntary and fair, and with full warning and perfect knowledge; *Hunter v. Aikens*, 3 M. & Keen, 113; and see *Edwards v. Meyrick*, 2 Hare R. 60-68.

This well-considered and well-settled doctrine is to be applied here. Under its operation it is impossible the declaration in favor of the trustees should stand. At the date of the transaction the creator of the trust was a very old

woman, in a great measure dependent for advice and direction in her pecuniary affairs upon those in whom she placed her confidence. Unacquainted with legal forms, and unused to the transaction of legal business, it is highly improbable she could have made herself acquainted, without assistance, with the long, dry, and tedious details of the two deeds, though they might have been left with her for several days, as the answers aver. No one of those who constantly surrounded her ever saw her perusing them, or in any way attempting to master the contents; and there is no shadow of independent proof that any one offered to assist her in this irksome task. To be sure, two of the answers allege, in substance, that the deeds were read to her by Mr. Bouvier, and that at the time of their execution, either Judge Baldwin or Alderman Pettit explained to her the nature of them. On the other hand, Mr. Rush, in his answer, positively avers the papers were neither read nor explained to her, Judge Baldwin having expressly declined to do so. But were we, after a general replication, at liberty to accept the two first answers as proof, they do not go far enough. I think it may be said, without hazard of error, that to uphold such a claim as is made here by these trustees, it is not enough to show, generally, that the instruments were read to the party, or to aver broadly that the contents were explained to her, or that she admitted her knowledge of them. Under the wholesome rules I have

brought to view, at the very least it ought to be proved that the attention of the party was called to the very provision, with full and candid explanations of its character and effect; and that, after taking it into her "fair, serious, and well-informed consideration," she assented to it, uninfluenced by those who are to be benefited by it. In saying this, I have borrowed the idea of Lord Eldon, and quoted some of his language in *Hatch v. Hatch*, when speaking of a gratuity, by way of remuneration, offered by an emancipated ward to his late guardian, for the care and labor exerted in the management of his estate, and he added: "But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice; that, instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced oppression, etc. And therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of instances it will lend its assistance to fraud."

These remarks are full to our purpose. Looking to the whole case, as it is presented by both proofs and pleading, the questions may be asked, was Mrs. Greenfield aware that, by the terms of the declaration, her estate was to be burdened with the payment of

\$40,000 as compensation to the trustees? Did she know that this sum was payable, though each of the trustees might decline the burden of the trust within a year after its creation? She might have been acquainted with the first provision, without being cognizant of the last, for they are widely separated in the deed. Who shall say it was not so? And yet to sustain them, I repeat, it must be clearly established not only she knew of, but comprehended both thoroughly. The answers, at most, aver that she suggested the amount of compensation herself; but was she made aware of the clause under which it might be reduced to a mere gift? It is extremely difficult to believe she understood, and deliberately assented to this. The doubt is sufficient to invalidate the provision. It was said, on the argument, that all the cases in which donations and gratuities were disallowed, are either cases where no service was rendered, or of past services, which, it is thought, differ in principle from those where the services are prospective. I am not aware of any instance in which this distinction is taken. But, as in our case, the declension of all service and responsibility was optional with the trustees. I am disposed to regard the sums dedicated to them rather in the light of a gift than as payment, and to submit it to the rigidity of inquisition to which such gifts are always exposed. Under such a scrutiny, it must necessarily fail.

The trustees acting in this matter through Bouvier, as their representative, who himself was the attorney of the donor, they all stand in the category of confidential advisers, who have attempted to secure a benefit to themselves, through the influence appertaining to their confidential positions. It is impossible to discriminate between them. Each is so intimately dependent on the others, that the fall of one necessarily drags down all.

Before concluding this part of the case, I ought, perhaps, to notice that something was said, on the argument about a subsequent confirmation. But *Morse v. Royal*, 12 Vesey, 373, shows, that in these cases, an asserted confirmation is regarded with the same spirit of jealousy as attaches upon the original transaction, and that it is required to stand upon the clearest evidence. Of confirmation, in the particular under consideration, we have not the slightest testimony. Indeed, it is not asserted the old lady ever saw the papers after they were executed."

It is not essential to the application of the rule, that the attorney should have been admitted to practice as a member of the bar. The material point is not whether he was competent as a professional adviser, but that he was so considered, and obtained a corresponding share of confidence; *Trulove v. Cole*, 41 Barb. 318; *Todd v. Grove*, 33 Maryland, 183; *Buffalow v. Buffalow*, 2 Dev. and Bat. 249. In the case last cited,

one who was accused of an illegal traffic with slaves, confessed to his nephew, John Buffalow, that he had committed the offence, and asked his advice and aid in preparing his defence, and presenting it to the magistrates, and the nephew took advantage of the opportunity to obtain a conveyance of his uncle's property, in consideration of an agreement to support him during the remainder of his life. The court held that such a transfer considered in itself, and aside from the donor's perturbed state of mind, or any confidential relation between him and the donee was liable to animadversion, and unexplained, imported undue influence. It followed that the heirs of the donor were entitled to a reconveyance, on refunding the amount which the donee had actually advanced. Ruffin, C. J., said: "The confession was made to John Buffalow, as a competent and confidential friend, that he might understand the whole case, and be the better qualified to advise a defence or settlement. A confidence thus gained, and for such purposes brings the case within the reason of the rule alluded to. It is true these persons did not literally bear the names of attorney and client, but they did substantially. The cases were triable before a justice of the peace, before whom attorneys do not appear. But, services to be rendered there, similar to those of a professional man in court, invest the person from whom the services are to come with the character of solicitor, for the purpose of the

rule. This man had influence to gain the secret of his uncle, and thus held him in subjugation, and the secret must have been imparted with a view to the more advantageous conducting of the business. There was then, in fact, a relation of employer and agent between these parties, under circumstances in which much confidence would probably be placed, and entire confidence was placed by the former in the latter. The rule under which the court interferes between attorney and client, would be a lifeless skeleton, unless animated by a principle which will enable it to embrace all cases of the abuse of the like confidence. Had an attorney drawn a client into the agreement during the continuance of the relation between them, or as a condition of undertaking his case, there could be no hesitation to annul it. We think it would be equally mischievous to allow this defendant to retain the advantage he has attempted to gain."

Whatever the rule may be under other circumstances, it is clear that an attorney cannot purchase the subject matter of the suit from his client, *pendente lite*, and that such a contract should be set aside, notwithstanding any evidence that may be adduced to show that the transaction was in all respects, fair and equal; see *Wist v. Raymond*, 21 Indiana, 303; *Berrien v. McLean*, 1 Hoffman Ch. 424; *Arden v. Patterson*, 5 Johnson Ch. 44. For a like reason, a mortgage or voluntary deed executed during the continuance

of the suit, will only be allowed to stand as a security for the amount actually due; *Berrien v. McLean*; *Mott v. Harrington*, 12 Vermont, 199. But it is held in some of the States, that this is consistent with the right to stipulate beforehand, that if the attorney brings the suit to a successful termination, he shall receive part of the demand or claim as a compensation for his services; see *Ryan v. Martin*, 18 Wisconsin, 672, post, notes to *Ryall v. Rowles*.

The rule is founded not on the professional relation between the attorney and client, but on the influence which that relation implies, and will therefore operate as long as the influence exists, although the party may not be acting as an attorney at the time; *Mason v. Ring*, 3 Abbott's Appeal, 210; *Zeigler v. Hughes*, 55 Illinois, 288; *Rhodes v. Bate*, 1 L. R. Ch. Appeal, 252. In *Mason v. Ring*, land was conveyed as a compensation for the services which the grantee had rendered as the grantor's attorney during a long period of years, and it was contended that inasmuch as the suits in which he had been professionally engaged for the grantor, terminated more than a twelve-month before the execution of the deed, it was not within the rule. Selden, J., said, that there could be no doubt, that where the relation had completely ceased, and the circumstances were such that it could reasonably be supposed that the influence had also ceased, a client might be as generous to his

attorney or counsel as to any other person; *Wood v. Downes*, 18 Vesey, 119. The character and situation of the parties might show that the attorney had no ascendancy over the mind of his client, and that the action of the latter was purely voluntary. The presumption nevertheless was the other way, and that the confidence of the client and his dependence on the attorney were unchanged. The conveyance must consequently be regarded as invalid, but would stand as security for the attorney's disbursements, and for the amount justly due to him for his advice and services.

In *Rhodes v. Bate*, 1 Ch. Appeals, 252, the complainant lived with her brother-in-law, the Rev. Henry Codrington, to whom she was much attached. The defendant Bate, was a certificated conveyancer, practicing in the neighborhood, and she consulted him with reference to the accounts of her father's trustees. He referred her to a solicitor in London, who undertook the task, but Bate actively intervened on her behalf while the investigation was going on, and in this way became acquainted with the extent and nature of her means. The business was concluded in July, 1857, and in October of the same year, the plaintiff called with her brother-in-law at Bate's office and there executed writings, which operated as a pledge or mortgage of her estate for an antecedent loan from Bate to Codrington—amounting to nearly all that she possessed. Codrington was insolvent at the

time, and Bate testified that he mentioned this to the complainant, and warned her that she would probably be called on to pay the debt. Sir J. G. Turner said, that it appeared from the evidence that the complainant was perfectly competent to understand what she did; that she signed the bonds and deeds voluntarily, without pressure or solicitation on the part of the defendant; and that their contents were fully explained to her, and that she perfectly understood their nature, purport and effect, and the consequences that would result from her signing and executing them. It was however a well-established principle, that persons standing in a confidential relation towards others, cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits were conferred had competent and independent advice in conferring them. The age or capacity of the person conferring the benefit, or the nature of the benefit conferred did not affect the principle. Age and capacity were considerations which might be of great importance in cases in which the principle did not apply; but they were but of little, if any, importance in cases to which the principle was applicable. They might afford a sufficient protection in ordinary cases, but they could afford but little protection in cases of influence founded upon confidence.

It had been contended that at

the date of the transactions which the complainant sought to vacate, the relation of confidence between her and the defendant had ceased; the examination into the accounts of the trustees of her father's will having been closed some months previously. Where however such a relation was once established, it would be presumed to continue, unless it was shown to have been discontinued or abandoned. The defendant must therefore be considered as having held a confidential relation to the plaintiff, when the transactions occurred, by which he took to himself the benefit of the plaintiff's suretyship, to an extent involving nearly the whole of her estate, with knowledge that the principal debtor could not pay the debt, and that she must be resorted to for the payment of it. It was true that he told the plaintiff this, and cautioned her as to it, but it did not appear that he pressed the subject upon her as an independent and disinterested adviser would have done, or that he recommended her to employ an independent solicitor. Under these circumstances the transaction could not stand consistently with the principles of a court of equity.

The principle was laid down broadly in this instance, as pervading the whole sphere of confidential relations, but the point actually determined was that where a conveyancer, attorney, or other legal adviser, deals in a matter affecting his own interests, with one who stand towards him as a client, and the result is beneficial

to him and detrimental to the client, the transaction will be set aside, unless it appears not only that the consequences were explained to the client and understood by him, but that all the considerations which should operate against his doing the act or incurring the liability, were laid before the client and enforced with the earnestness of a man who was only anxious for his good. In other words it must appear that the client is not worse off than he would have been if he had consulted an adviser who had no selfish end in view.

The rule enunciated by Sir J. G. Turner is measurably sustained by the language held in *Boyd v. Boyd*, 16 P. F. Smith, 283, 295, *post*, and it was adverted to in *Todd v. Grove*, 33 Maryland, 188, 193, as being generally received in England, but the court did not go beyond the doctrine of *Ballage v. Southee*, 9 Hare, 540, "that the jurisdiction is founded on the principle of correcting abuses of confidence, and ought to be applied whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. This principle is one of universal application, and the cases in which the jurisdiction has been exercised, those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient, are merely instances of the application of the principle." Wherever a gift is alleged between parties standing in a confidential relation, the *onus* of establishing the fairness of the transaction rests upon the party who receives the

gift. *Long v. Mulford*, 17 Ohio, N. S. 484, 505.

Where the relation is not a confidential one, except in the sense in which confidence may always be presumed to exist between persons who are connected by the ties of blood or friendship, it is for the benefactor, and not for the beneficiary to consider whether his liberality is well advised, and the latter may justifiably receive whatever the former thinks fit to bestow. Hence, the donee need not caution the donor against the natural or probable consequences of the gift, although it may still be incumbent on him to show that the donor understood what he was doing, and that the step once taken could not be called. If this does not appear with sufficient clearness, the transaction will be invalid, although there is no ground for imputing fraud or undue influence; *Cook v. Lamotte*, 15 Beavan, 243. It is wise, as the decision in this case indicates, to call in some one whose motives are beyond dispute, and failure to observe this precaution may frustrate a gift that would otherwise have been upheld; but it does not afford the hostile presumption which arises where one who is interested to mislead, assumes the part of counsellor. The intervention of a third person, said Sir John Romilly, in *Cook v. Lamotte*, acting solely on behalf of the donor, is the best security that can be given, that he accurately understood what took place, but if the court receives that evidence from other sources, it will not

hold that the non-introduction of a third person is fatal to the transaction. See *Boyd v. Boyd*, 16 P. F. Smith, 283, 295.

The rule does not apply to gifts which are trivial as compared with the donor's means, and mark his good will without impairing his estate; see *Rhodes v. Bate*, 1 L. R. Ch. App. 252, 258. Such donations do not ordinarily require explanation, or afford ground for inferring undue influence. And it may be said in general that the presumption against a grant to one who holds a confidential relation, augments in the ratio in which it is detrimental to the grantor, or limits him in the control of his estate; see *Rhodes v. Bate*; *Coutts v. Ackworth*, L. R. 8 Eq. 558.

The employment of an attorney in a single transaction—as, for instance, to draw a deed or will—does not ordinarily or necessarily give rise to a confidential relation that will invalidate a subsequent and distinct transaction between the attorney and the client, after the temporary relation has ceased; see *Rhodes v. Bate*, 1 L. R. Ch. App. 252, 262.

An attorney's clerk does not necessarily hold such a relation to his master's clients, as to preclude him from accepting any gift which they may understandingly and deliberately think proper to bestow; *Nisbet v. Lockman*, 34 New York, 167, but if it appears that the clients relied upon or consulted the clerk, and were misled, or that he took advantage of the information acquired in the course

of his employment, to their injury, relief will be afforded as in other cases of abuse of confidence; *Poillon v. Martin*, 1 Sanford Ch. 569; *Hobday v. Peters*, 28 Beavan, 349; vol. 1, 229.

PRINCIPAL AND AGENT.—The relation of principal and agent is akin to that of attorney and client, and like it, implies the existence of a confidence which renders it incumbent on the agent to show that this power was not abused; *Brook v. Berry*, 2 Gill, 83, 103; *Condit v. Blackwell*, 7 C. E. Green, 481; *Brown v. Post*, 1 Hun. 304; *Todd v. Grove*, 33 Maryland, 183; *Persh v. Quigley*, 7 P. F. Smith, 247, 273; *Comstock v. Comstock*, 57 Barb. 473; *Uhrick v. Muhlke*, 60 Illinois, 230.

There is, nevertheless, this difference; that while an attorney has a professional knowledge which his client cannot be supposed to possess, a principal ordinarily stands on an equal footing with his agent, except that the latter is presumably better acquainted with the value of the property which has been confided to his care. A contract between parties who are thus placed may consequently stand, if the agent can succeed in showing that he did all that he could to enlighten the principal, and there is no inadequacy, or undue advantage to raise a presumption of fraud; vol. 1, 260. The burden of establishing the entire fairness of the transaction is nevertheless on the agent, and if the evidence adduced by him for this purpose is not suf-

ficient a court of equity will vacate the deed; *Condit v. Blackwell*; *Brook v. Berry*, 2 Gill. 83; *Todd v. Grove*, 33 Maryland; *Butler v. Haskell*, 4 Dessausure, 651, 705. In the case last cited, the complainants who were illiterate and necessitous, employed the respondent to ascertain and perpetuate the evidence of their title, as the heirs apparent of an idiot, whose estate was in the hands of a committee. The respondent subsequently entered into a written agreement with the complainants, for the purchase of their interest in the estate, at about one-fourth its ultimate value. The idiot died, and the respondent instituted proceedings in the name of the complainants, which resulted in a decree in their favor, and they then gave him a conveyance in pursuance of the agreement. The court inclined to the opinion that the defendant was legally incapacitated from purchasing the estate which was the subject of the agency, while the relation of confidence continued, and held that if that was at all doubtful, the burden of proof was on him to show that he had not abused the confidence of his principals.

The chancellor said, "If the agent in the case under consideration was at liberty to become a purchaser from his *cestui que use*, under any circumstances, however fair, it is incumbent on him to show demonstratively that he had not abused the trust reposed in him; that he had given all possible information to his employers;

that he had enlightened them as to their interest; and had advised them as he would have done against a third person, offering to become the purchaser at such an enormously inadequate price; and some of the authorities say the connection should have been entirely dissolved; and that he had given a fair price for the property. Instead of this the contract was made while the agency subsisted. It is not made out in proof that the agency was at an end at the time of the contract; or that he advised the principals as he would have done a stranger; or that he gave anything like a full price for the property in question. It does appear to me, therefore, that the contracts cannot be sustained, and that this court is bound to give relief against them."

TRUSTEE AND CESTUI QUI TRUST. —Although a trustee is not precluded from purchasing the property which has been confided to his care, from the *cestui que trust*, such transactions are rigorously scrutinized, and will be set aside, unless they are shown to be entirely fair, and for a full and adequate consideration; see *M' Cant v. Bee*, 1 M'Cord Ch. 383; *Crocker v. Pierce*, 61 Maine, 58; *Dennis v. McCagg*, 32 Illinois, 429; *Buell v. Buckingham*, 16 Iowa, 284; *Coffee v. Ruffin*, 4 Coldwell, 427; *Pairo v. Vickey*, 37 Maryland, 467; *Smith v. Townsend*, 27 Id. 388. It is accordingly well settled that "to support a purchase of the trust estate by a trustee from the *cestui que trust*, it must appear that the trustee

thoroughly divested himself of that character in the transaction, and entered into a new and distinct contract with the *cestui que trust*, that person having the fullest information on every subject." There must be no fraud, no concealment, no advantage taken by the trustee of information acquired by him in that character; *Smith v. Townsend*, 27 Maryland, 388. For like reasons, the court will not suffer a settlement or compromise between a trustee and *cestui que trust*, to stand, unless it appears to be fair and adequate; *M'Cant v. Bee*; *Crocker v. Pierce*, 57 Maine, 68.

The rule applies not only to trustees in the strict and technical sense of the term, but to assignees and commissioners in bankruptcy, executors, &c., in short, to every one who holds the property of another, or property in which another is interested, and is under an obligation to manage it for him, or apply it for his use; vol. 1, 226; see *M'Cant v. Bee*.

It is immaterial as it regards the principle, whether the conveyance is absolute, or by way of mortgage; and hence, where a *feme covert* gave a mortgage, as a security for a debt due from her husband, to the trustee to whom the property had been conveyed for her separate use, the court held that the transaction was invalid, and set it aside at the instance of her heirs; *Pairo v. Vickery*.

Where the *cestui qui trust* is *juris*, and of capacity to protect himself, and it appears, after a

scrupulous examination of all the circumstances, that there was no misrepresentation, no concealment, and no advantage taken, by the trustee of information acquired by him in the character of trustee, the court will not set the sale aside; *Coles v. Trecothick*, 9 Vesey, 234, 247; *Marshall v. Stephens*, 8 Humphrey, 159; *Coffee v. Ruffin*, 4 Coldwell, 487, 514; *Jones v. Smith*, 33 Mississippi; *Buell v. Buckingham*, 16 Iowa, 274; and in *Hadley v. Latimer*, 3 Yerger, 537, the court upheld a gift of the *cestui qui trust's* entire estate, on such proof, although he had passed his seventieth year, and the effect was to disinherit his children.

In like manner, a purchase by a trustee at his own sale, in pursuance of a prior and well understood arrangement with the *cestui que trust*, may confer an indefeasible title on the trustee; see *Coles v. Trecothick*; *Fields v. Arrowsmith*, 3 Humphrey, 442; *Henricks v. Robinson*, 2 Johnson's Ch. 311.

This is in accordance with the decisions which establish that such a purchase cannot be set aside, after it has been deliberately confirmed by the *cestui qui trust*, because ratification necessarily presupposes the existence of a power to authorize.

The relation of *cestui que trust* and trustee differs from that of parent and child, and from that of guardian and ward, in not implying the existence of a personal and controlling influence. It should not, therefore, disable the trustee

from purchasing property, which, though belonging to the *cestui que trust*, &c., has not been entrusted to his care, and as to which he has no information that is not accessible to all the world. Such transactions should nevertheless be scrutinized, in order that they may not be used indirectly as a means of enabling the trustee to reap an undue advantage. 4 P. F. Smith, 60.

CLERGYMAN AND PARISHIONER, PHYSICIAN AND PATIENT.—The mere circumstance that the donor is a member of the donee's congregation, does not afford a presumption of undue influence, or render it incumbent on the donee to show that he was not instrumental in procuring the gift; *Greenfield's Estate*, 12 Harris, 232. But the case is materially different where, from the donor's weakness, and his reliance on the donee as his spiritual adviser, there is reason to believe that the latter had a controlling power; and it will then be incumbent on him to prove that the opportunity was not abused; *ante*, 1174; *Nachtrieb v. The Harmony Settlement*, 3 Wallace, 266. A confessor who receives any considerable part of his penitent's estate as a gift, or buys it for an inadequate consideration, must consequently show that he did not influence the result; *ante*, 1186. See *Parfit v. Lawless*, 2 L. R., Probate and Divorce, 462; where this doctrine seems to have been conceded as to gifts *inter vivos*, though it was held to be inapplicable to wills.

A physician is within the circle of confidential relations, while at-

tending on his patients, and until the influence arising from this source has ceased to operate; but in his case, as in that of one who has the cure of souls, the presumption is not a fixed quantity, and depends to a great extent on the circumstances; see *Ashwell v. Loma*, 2 L. R., Probate and Divorce, 477, 478; *Bellage v. Southee*, 9 Hare, 540; *Daggitt v. Lane*, 12 Missouri, 215; *Brock v. Barnes*, 40 Barb.; *Whitehorn v. Hines*, 1 Munford, 559. In *Allen v. Davis*, 4 De Gex. & Smale, 133, an aged naval officer gave a check for £262 10s. to his dentist, in consideration of the latter's agreeing to attend to his teeth, and furnish him with new sets, as often as occasion might require; and the court directed the check to be delivered up and cancelled.

UNDUE ADVANTAGE.—The passions are an obvious means of undue influence. A man whose mind is agitated by grief, by desire, by aversion, or by the apprehension of old age and want, may be an almost passive instrument in the hands of one who knows how to play on his hopes and fears; *Eadie v. Slimmon*, 26 P. F. Smith, 9. "It is the familiar rule of a court of equity that a deed obtained without sufficient consideration from a man of greatly weakened intellect, by a person having influence with him, practising upon his passions, shall be set aside;" *Kreitzer v. Woodson*, 19 Missouri, 357. On the devolution of an estate at death, it not unfrequently occurs to one of the heirs to purchase the interest of the

widow of the deceased, or of another heir, and such bargains have sometimes been concluded while the corpse was unburied, or immediately after the funeral, see *Eyre v. Potter*, 15 Howard, 42; *Dean v. Fuller*, 4 Wright, 474; *Stewart v. Stewart*, 7 J. J. Marshall, 183. Such indecent haste does not speak well for either party, but appears worst in him who conceives and makes the offer. No form of family intrigue is more obnoxious than this, or should be viewed with greater jealousy; and the transaction ought not to be allowed to stand without clear proof, not only that no undue advantage was intended, but that no undue advantage was obtained; *Stewart v. Stewart*, *Doughty v. Doughty*, 3 Halstead Ch. 227; *ante*. Some natures are peculiarly open under such circumstances, to the suggestions of those whom they suppose to be suffering from the same cause; and even when there is reason to suppose that both parties were equally interested or selfish, it is still incumbent on him who is active in procuring such a grant, or agreement, to show that the opposite party was informed of the value of the newly acquired right which he resigned. Such proof should be rigorously exacted when the contract is between the widow or daughter of the deceased, and his son, and there is reason to suppose that the man did not have that provident care for the women, which it was his duty to exercise towards one so placed; *Sears v. Shafer*, 2 Selden, 272; *Boney v. Hollingsworth*, 23 Alabama, 690;

In such instances the disparity of age or sex heightens an obligation, which would exist if the parties stood on an equal footing. Joint heirs stand in a confidential relation, as regards the common property, which though strongest where children are settling the estate of a deceased parent, extends to all who inherit from the same ancestors; *Dunn v. Chambers*, 4 Barb. 376; *Long v. Mulford*, 17 Ohio, N. S. 506; vol. 1, 69.

In *Rogers v. Higgins*, 57 Illinois, 245, a *feme covert*, Mrs. Wright, sold and conveyed certain land to the complainant, Rogers, by a deed which did not pass the title, in consequence of a technical defect in the acknowledgment. The defendant, Higgins, discovered the flaw, went to her and told her that if she would convey the premises to him, he would reconvey one-third of the land to her, after he had succeeded in establishing her title. She refused on the ground of the injury to the complainant, but the defendant overcame her scruples by "very persistent importunity." The next morning she repented, said that she had done wrong, and begged the defendant to return the deed; but he quieted her conscience with a gift of \$100, and by saying that "Rogers was rich and could stand it." This false allegation was accompanied by another, that the "loss of this lot would not injure Roger's adjoining property." Two verdicts were subsequently rendered against Higgins, in a proceeding instituted by him to recover the land, and Mrs. Wright

then agreed to take \$100 and release Higgins from the obligation to reconvey one-third, in the event of his ultimately obtaining judgment. It also appeared in evidence, that her mind was impaired by age and disease, although she retained sufficient capacity to make a valid contract; and it also appeared that the land was worth not less than \$4,000. She subsequently confirmed the original grant to the complainant, and he filed a bill to set aside the deed from herto Higgins, as having been procured by fraud and undue influence. Sheldon, J., said, that Mrs. Wright had executed the deed not of her own free will, but from her mental and physical inability to resist the pressure to which she was subjected. This aspect of the case might be left out of view, because she had deliberately confirmed the transaction after the pressure was removed. The false representation with regard to the effect which her act would have on Rogers was immaterial, because he had no legal or equitable title to the premises, and a court of equity does not, any more than a court of law, sit for the purpose of enforcing moral obligations which are followed by no loss or damage; 1 Story's Equity Jur., section 213.

It is difficult to coincide with this decision. In making the conveyance to Higgins, Mrs. Wright acted under a pressure which invalidated the deed. Nor can it justly be said that his misrepresentations were immaterial, because they did not touch any point in which her interests were involved.

To induce one to violate the moral law is not less fraudulent, because the loss falls on a third person, and not on him who is misled. The grant from Mrs. Wright to the complainant was voidable, not void. She and those claiming under her were the only persons who could take advantage of the defect in the acknowledgment, and it might have been cured retroactively by the legislature. And it did not sufficiently appear that Mrs. Wright was freed from the false impressions which Higgins had instilled, before entering into the agreement which was alleged to have operated as a confirmation, or that she knew that she could rescind the deed to him, and regain her original position.

Persons who are engaged to be married hold a relation to each other, which may not always be free from mercenary motives, but should not be used for mercenary ends. Hence if either party leads the other to make a gift, which is excessive in amount, or to enter into a disadvantageous contract, a court of equity may intervene to correct the abuse, *ante*, 1185; *Kline v. Kline*, 7 P. F. Smith, 120; *Rockafellow v. Newcomb*, 57 Illinois, 186. In the case last cited, a woman induced her accepted suitor to exchange land valued at \$7,000, for property which was not worth more than a tenth part of that sum, by declaring that it was "in vain to talk of marriage, if he refused;" and having obtained her object, broke off the match. The court held that if marriage formed any part of the consideration, it

had failed; if it did not, influence had manifestly been exerted to the injury of one who reposed a confidence, which ought to have been observed. It mattered not how the influence was acquired, if it existed and was misused.

Another and not unfrequent form of undue influence, is where one whose mind has been enfeebled by age or disease, or who truly or erroneously considers himself unfit for the transaction of business, enters into a negotiation with a friend or relative, which results in a transfer of his property, subject to a trust, or in consideration of an agreement, to provide for his support; *Whithorn v. Harris*, 1 Mumford, 557; *Greenfield's Estate*, 2 Harris, 489; *Dean v. Walker*, 4 Wright, 474. From the very nature of such a transaction, confidence is reposed by one party, and accepted by the other, and the conveyance will not be allowed to stand, unless the grantor proceeds understandingly, deliberately and of his own accord, nor if it appears that the grantee gained an undue advantage at the expense of the donor, or of those on whom the property would have devolved in the ordinary course of events; *Cruise v. Christopher*, 5 Dana, 181, 184. Such was in effect the case of *Huguenin v. Baseley*, and the tenor of the judgment indicates that an irrevocable grant of the bulk, or of a material part of the donor's estate, with a reservation of the rents and profits during his life, is marked by the inadequacy, which is a badge of fraud or undue influence, and will

be set aside by a court of equity, unless the circumstances afford an explanation of that which is on its face suspicious; see *Case v. Case*, 26 Michigan, 49; *Brogden v. Walker*, 2 Harris & Johnson, 283; *Harding v. Handy*, 11 Wharton, 125. The question is nevertheless one of fact, not law, and the conveyance will not be set aside, if it is shown to have been the deliberate and well understood act of the grantor; *Nace v. Boyer*, 6 Casey, 99. When moreover the grantee enters into an absolute undertaking to maintain the grantor, and the deed is so conditioned, the grantor obtains a new security, and the transaction cannot be impeached for inadequacy if valid in other respects; *Harrison v. Guest*, 6 De Gex, M. G. 424.

ABUSE OF CONFIDENCE.—For the most part when a court is asked to set aside a grant on account of undue influence, the question is complicated with another consideration, which is nowhere better stated than by the Vice Chancellor in *Billage v. Southee*, 9 Hare, 540; *ante*.

"No part of the jurisdiction of the court is more useful, than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidences, and I can have no hesi-

tation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised, those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient, to be merely instances of the application of the principle;" *Long v. Mulford*, 17 Ohio, N. S. 484, 505; *Todd v Grove*, 33 Maryland, 183; vol. 1, 233.

This principle belongs to the doctrine of constructive fraud, as distinguished from undue influence, which consists in substituting another's will for the grantor's, and thus preventing the voluntary assent which is essential to a contract. Both principles may and do concur; but the one may apply where there is no ground for the application of the other. An agent is not chargeable with undue influence for buying at his own sale, or for passively accepting a gift from his principal, although he may be guilty of a breach of confidence in not taking measures to obtain the best price, or in omitting to state the considerations which should deter the principal from making the gift. The same remark applies when an agent accepts an offer which though coming from his principal, is disadvantageous to him, and consequently should not have been entertained by one whom he had entrusted with the management of his affairs, and who was conse-

quently bound to advise him as he would have done in regard to a stranger; *Butler v. Haskell*, 4 Dessausure, 651, 685, 705.

The doctrine that one who is consulted confidentially, must decline to speak or respond with entire good faith, and will not be permitted to retain an advantage gained at the expense of the party who relied upon him, was applied in *Wheeler v. Smith*, 9 Howard, 58.

An uncle who had been on good terms with his nephew and heir at law, but had broken with him in consequence of his dissipated and irregular life, bequeathed the greater part of a large estate to his executors, for a charitable use which was too uncertain to be good in point of law. One of the executors was a lawyer, and all were men of standing and repute. The nephew who was comparatively young and inexperienced, and but little versed in business, called on the executors, and an interview took place, in the course of which they assured him, that in their opinion and that of eminent counsel whom they had consulted, there could be no reasonable doubt of the validity of the devise. The uncertainty and delay incident to litigation, were also urged. The result was a release of all his right in the estate, for a consideration which was grossly inadequate to the value of the property in dispute. The bill also averred the complainant's ignorance of such matters, and that in executing the release he had relied exclusively on the information given by the executors. A demurrer

having been filed, the court held that although there was no reason for imputing fraud, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors, and they must have discerned that he was a man easily misled, especially by those for whose abilities and character he entertained a profound respect. If their confidence in the validity of the devise had been as entire as their declarations to him implied, they would hardly have felt themselves authorized to pay the complainant \$25,000 for the relinquishment of a pretended right. Nor on the supposition that his right was good, could they with propriety have suffered him to part with a large and valuable estate for a comparatively small consideration. Knowing that the question was in doubt, they should have declined to suggest such a compromise, until he had duly advised with counsel, and ascertained the real state of the case. It was obvious that the influences operating on the complainant's mind had induced him to make a sacrifice, which would have been avoided if he had acted freely, and after having been duly informed as to the law. Taking the allegations of the bill as admitted, the demurrer must be overruled.

There is no case in which the observance of this principle is more requisite, than where a parent proposes to bestow his estate on a child, as the best means of obtaining security and repose for his declining years. For as the confi-

dence reposed is unlimited, so there is a corresponding obligation to be as careful for the grantor's interest and for that of the other members of his family, as if the grantee were not personally concerned; see *Whelan v. Whelan*, 3 Cowen, 571; *Brice v. Brice*, 5 Barb. 540; *Comstock v. Comstock*, 57 Id. 473; *Harding v. Handy*, 11 Wheaton, 103; *ante*, 1206.

If one who is laboring under a false impression, relies on another for information or advice, and the latter, instead of disabusing his mind, takes advantage of the error to obtain a grant or transfer, it will be set aside. Under these circumstances there is a *suppressio veri*, which amounts to fraud, especially if the injured party is, from weakness of mind, old age, or other disability, unable to ascertain the real state of the case.

The principle has been applied in numerous instances, for the relief of persons who fancying that they were reduced to poverty, or that their property would be levied on and sold, have sought refuge from a more or less imaginary pressure, in an assignment to a relative, or agent, on the faith of an undertaking on his part to compound with their creditors, or afford them a support and maintenance; see *Buffalow v. Buffalow*, 2 Dev. & Bat. Eq. 249; *Austin v. Winston*, 1 Hening & Munford; *Whelan v. Whelan*, 3 Cowen, 571.

In the case last cited, such a misapprehension was one of the grounds for vacating a deed from an aged father to a son, who had

encouraged the delusion; and when a similar point arose in *Buffalow v. Buffalow*, it was determined in like manner.

It is not a sufficient answer under these circumstances, that the defendant accepted the grant at the instance of the complainant, with a view of guarding the property against his folly and extravagance, or of putting it beyond the reach of his creditors. The latter object is an illegal one, and shows that the defendant's influence was used to effect a wrongful and fraudulent end, and the former should obviously be declared in writing, and not left to the uncertainty of oral testimony; *Brodgen v. Walker*, 2 Har. & J. 285; *Kennedy v. Kennedy*, 2 Alabama, 571.

In these instances the conveyance was induced by a false or mistaken view of the state of the grantor's affairs; and where one who is really oppressed by debt, transfers his estate for the purpose of evading the claims of his creditors, the case is *prima facie* within the rule, that a fraudulent or illegal transaction will not be set aside at the instance of one who is *particeps criminis*; *Smith v. Elliott*, 1 Patton & Heath, 307; *Creath v. Sims*, 5 Howard, 192; *Wilson v. Watts*, 9 Maryland, 461; *Freeman v. Sedgwick*, 6 Gill. 28; *Jones v. Gorman*, 7 Iredell Eq. 21; *Mosey v. Forsyth*, 1 Walker Ch. 355; *Murphy v. Hubert*, 4 Harris, 54; *Jackson v. Dutton*, 3 Harrington, 98; 1 Smith's Lea. Cases, 699, 7 ed.; *Strike v. Lithpage*, 4 Randolph, 368; *James v. Bird*, 8 Leigh, 510; *Robinson v.*

Robinson, 17 Ohio, N. S. 480. But it may still be shown, that the parties did not stand on equal ground, and that one of them took advantage of his greater knowledge or intelligence, and of the fears and distress of the other, to obtain a conveyance for the professed object of screening the property from levy, but with the preconceived design of appropriating it to his own use. The complainant and defendant are then both in fault, but not in *pari delicto*, and a chancellor may afford relief to the weaker party, *Ford v. Harrington*, 16 New York, 285; *Miller v. Peirce*, 6 W. & S. 97; *Long v. Long*, 9 Maryland, 348; *Cook v. Colyer*, 2 B. Monroe, 71; see *Porter v. Jones*, 6 Caldwell, 313.

In *Trulove v. Cole*, 41 Barh. 318, a suit which had been instituted to set aside a conveyance, as having been procured by undue influence, and with a fraudulent design, was resisted on the ground, that the grantor was himself a party to the fraud. It appeared from the pleadings and evidence, that he was a man of infirm mind and incompetent for the transaction of business, while the grantee was his son-in-law, legal adviser and confidential agent, and had been consulted in the preparation of the deed. The court held that, although the grantor's object in making the conveyance was to place the property beyond the reach of his creditors, and he had manifestly been concerned in a fraud on them, he was excusable as compared with the grantee, whose greater knowledge and in-

telligence, justified the impression that the scheme was contrived by him and carried into effect through his influence. Although not a member of the bar, and only practicing in justices' courts, he was still, clearly within the reason of the rule which forbids an attorney to reap an advantage at the expense of his client. The plaintiff was, therefore, entitled to a reconveyance of the premises.

The principle will not be applied for the relief of one who, although of less than the average strength of mind, or with an intellect weakened by habitual intoxication, has yet sufficient capacity to understand what he is doing, and discern the boundary between right and wrong, unless it distinctly appears that he was thrown off his guard by fraud, or under a moral coercion which relieved him from moral responsibility, by substituting the will of another for his own; *Wilson v. Watts*, 9 Maryland, 356; *Smith v. Elliott*, 1 Patton & Heath, 307.

The language of Lord Hardwicke, in *Chesterfield v. Jansen*, 2 Vesey, 125, vol. 1, 804, shows that there are four heads from which a court of equity may infer undue influence, or more accurately imposition, although there be no direct proof; *Conant v. Jackson*, 16 Vermont, 335, 350. These are gross inadequacy of consideration, weakness of mind, ignorance, and the need which precludes choice and constitutes a species of equitable duress. These topics like that of the abuse of confidence, are so interwoven with the doc-

trine of undue influence, that it can seldom be applied without considering them. And it generally happens that one who complains that he has been unduly influenced, might equally well allege that he was overreached; *Parfitt v. Lawless*, 2 L. R. 2 Probate & Divorce, 462, 465.

INADEQUACY OF CONSIDERATION.—It is well settled that inadequacy of consideration is not of itself, and aside from the inferences to which it gives rise, a sufficient ground for setting aside a deed or contract; *Eyre v. Potter*, 15 Howard, 42; *Edwin v. Parham*, 12 Id. 197; *Black v. Cord*, 2 Harris & Gill. 100; *Stewart v. The State*, Ib. 114; *Young v. Frost*, 5 Gill. 288; *Davidson v. Little*, 10 Harris, 245, 252; *M'Artee v. Engart*, 13 Illinois, 242, 248; *Osgood v. Franklin*, 2 Johnson Ch. 11; *Juzan v. Toulmin*, 9 Alabama, 662; *ante*, 1032; *Mann v. Betterley*, 21 Vermont, 365. But there is a manifest difference between inadequacy as a distinct ground of relief, and inadequacy as evidence; see vol. 1, 234, *Heathcoat v. Paignon*, 2 Brown, C. C. 167; *Butler v. Haskell*, 4 Dessaussure, 651, 693; *Louther v. Louther*, 13 Vesey, 95, 103. If, said Lord Eldon, in *Underhill v. Horwood*, 10 Vesey, 209, 219, "the terms of the contract are so extremely inadequate, to satisfy the conscience of the court by the amount of the inadequacy, that there must have been an imposition, or that species of pressure upon distress, which in the view of this court amounts to oppres-

sion, this court would order the instruments to be delivered up, though the courts of law might hold that judgment not within the sphere of their powers." Or as the principle is sometimes stated, gross inadequacy is a badge of fraud, which has more or less significance, according to the circumstances; see *Davidson v. Little*, 10 Harris, 255, 252. One who causelessly denudes himself, may fairly be presumed to have been *non compos mentis*, or subject to the operation of some cause preventing the effectual exercise of his judgment. So much may be inferred from the English decisions, and it is sustained by the main current of authority in the United States. The inadequacy may simply shift the burden of proof, and render it incumbent on the purchaser to show that the vendor was not misled, nor unduly influenced, nor unfit for the transaction of business; see *Heathcoat v. Paignon*; *Gartside v. Isherwood*, 1 Brown, C. C. 558, 564; *Pickett v. Loggon*, 14 Vesey, 214; *Purcell v. Macnamara*, 14 Vesey, 91, 110; *Dunn v. Chambers*, 4 Barb. 376; *Butler v. Haskett*, 4 Dessausure, 652, 697, or it may be so extreme as to afford conclusive proof that the transaction ought not to stand; *Burch v. Burch*, 3 Dessausure, 273, 293; *Brogden v. Walker*, 2 Harris & Johnson, 285, 292. Such at least should be the rule, where the evidence shows not merely that the grantor parted with his property without receiving an equivalent, but that in

so doing he deprived himself of what was essential to his well being, or that of those for whom it was his duty to provide; *Tally v. Smith*, 1 Coldwell, 290.

If a grant which exceeds all just measure as a gift, and is without an equivalent as a contract, be not due to fraud or undue influence, it affords ground for inferring that the grantor's reason has ceased to be a safe guide for his actions. One who exchanges affluence for poverty, or a competency for dependence, may justly be supposed to stand in need of the protecting arm of a chancellor; *Cruise v. Christopher*, 5 Dana, 181. Nor can the party against whom relief is granted on such grounds, complain of losing the fruits of an unconscientious bargain, which no man in his senses and not under a delusion would make on the one hand, and no honest and fair man accept on the other; for as the chancellor pointedly remarked in *Torrey v. Burk*, 3 Green Ch. 367, the folly of the vendor does not excuse imposition on the part of the vendee; see *Hall v. Perkins*, 3 Wend. 626, 631; *Conant v. Jackson*, 16 Vermont, 335, 349; *Hale v. Brown*, 16 Alabama, 87; *Juzan v. Toulmin*, 9 Id. 682; *Burnett v. Spratt*, 4 Iredell, Eq. 171, vol. 1, 804, 828.

In *Kelley v. McGuire*, 15 Arkansas, 555, the court held, in accordance with these principles, that where a man in extreme old age and want, assigned a valuable interest in another State, without reserving the slightest provision for himself, it was not requisite to in-

investigate the state of his mind, or define the exact degree of imbecility which would invalidate a contract, because the nature of the act indicated that he could not have acted understandingly, and if he did, the grantee should not have consented to accept a benefit so conferred.

The presumption is nevertheless one of fact, not law, and may be rebutted by proof that the grantor was in the full possession of his faculties, and acted from some motive which is not so abnormal as to indicate that the mind which nurtured it was diseased. see *Davidson v. Little*, 10 Harris, 245, 252; *Hadley v. Latimer*, 3 Yerger, 537; *Howe v. Howe*, 99 Mass. 88, 101; *Eyre v. Potter*, 15 Howard, 42. Thompson, J., intimated in *Eyre v. Potter*, that a complainant who seeks to set aside his own grant on the ground of incapacity, stultifies himself, and ought to apply for a commission of lunacy and proceed through his committee; but this is carrying the argument very far, because temporary aberration may consist with general soundness. In determining whether an act was the deliberate resolve of one in his sound mind, the nature of the act should obviously be taken into view, and if that is one which could only proceed from folly or ignorance, or from the pressure of a necessity which left no room for choice, no amount of evidence should be allowed to weigh against the fact; see *Brogden v. Walker*, 2 Harris & J. 285; *Case v. Case*, 26 Michigan; *Doughty v.*

Doughty, 3 Halsted Ch. 227, 292; *Hough v. Hunt*, 2 Ohio, 495, 501. Vol. 1, 821.

The result of the authorities is accurately given in *Dunn v. Chambers*, 4 Barb. 376. Harris, J., said, "there are cases where the inequality of the bargain is so gross, that the mind cannot resist the inference, that though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained. In such case a court of equity will avoid the bargain not merely on account of its gross inequality; but because that inequality furnishes "the most vehement presumption of fraud." The cases of such interference are, however, very few. In most of the instances in which a party has been relieved from his own improvident bargain, there have been some circumstances of a suspicious character connected with the transaction, or there has been something in the relation which the parties sustained to each other, which rendered it inequitable that the party, against whom relief was sought, should retain the advantage he had acquired.

It results from a like principle, that the nature of a grant or will, as tending to an unequal distribution of the donor's estate, or to vest the whole in the donee to the exclusion of others who have an equal or paramount claim as heirs or next of kin, may be a circumstance of much weight in connection with other circumstances tending to show undue influence, although it would not be admissible or sufficient to invalidate the

gift if standing alone; *Todd v. Grove*, 33 Maryland, 188, 196; *Howe v. Howe*, 99 Mass. 88; *Fuller v. Fuller*, 40 Alabama, 304. In *Howe v. Howe*, Wills, J., said, "the objection to the deeds rests upon the proposition that they are not the acts of a free will and sound mind. Upon such issues, the character and effect of the instruments themselves, and the nature of the transaction, would have an important bearing. If it was in the nature of a final settlement of the estate of Stephen Howe, dividing it among his children, and entirely excluding the son of a deceased child from all participation, that circumstance would be competent for consideration. It would be stronger or weaker according to the relations that existed between them. Such evidence is constantly resorted to in cases upon wills; and the proof is the same in kind, whether the issues relate to wills or deeds. The proposition that the instrument expresses a purpose different from the real purpose of the party when in sound mind, involves an inquiry into what that real purpose was. The presumption, based upon natural impulses, that a man would not disappoint the just expectations of one who has claims of blood, affection, or dependence upon him, without some strong motive or influence operating on his mind or will, may properly be urged against an instrument which disregards such claims. It may be met by explanations, showing what the real purpose or motive was, or by proof that the instrument

actually accords with the declared purposes of the party. So also it may undoubtedly be strengthened by proof that it is contrary to the purposes previously declared by him. The competency of such declarations stands upon the same footing with the presumptions which render the unnatural provisions of the instrument itself, proper for consideration in determining such issues."

Whether the position of the grantee as the grantor's friend or relative, aggravates or explains the hostile presumption arising from inadequacy of consideration, is a question of fact, depending on whether it is more reasonable to suppose in view of all the circumstances, that the grantor was misled, or that he parted with the property for less than its value from motives of affection or benevolence; *ante*, 1034; *Dunn v. Chambers*; *Gifford v. Thorn*, 1 Stockton, Ch. 702, 715; *Clearwater v. Keinber*; 43 Illinois, 272; *Michael v. Michael*, 4 Iredell Eq. 349; and in the cases last cited, the court drew the latter and more favorable inference.

In *Eyre v. Potter*, 15 Howard, 42, the complainant disposed of her interest in the estate of her deceased husband, for a consideration, which was admitted to be grossly inadequate. The negotiation which led to the execution of the deed was commenced before the funeral, and concluded immediately afterwards. Her share of the estate would have yielded \$1,000 annually, and was valued at \$14,000, and she exchanged this for \$1,000, and an annuity of \$600.

The other party to the deed was her husband's son by his first wife, and was married to the complainant's granddaughter by a former marriage; and the hope of living with them was one of the motives which prompted the conveyance. It did not appear that the complainant was incompetent for the transaction of business, although she was advanced in years, and had less than the average strength of mind. She soon became dissatisfied with what she had done, and instituted a suit to set the grant aside. It was contended on her behalf, that the manifest inequality of the contract, and the precipitancy with which it had been concluded, plainly indicated a "catching bargain." The complainant's husband died on Saturday, was buried on Sunday, and the contract was completed, and the instrument signed on Monday morning. It embraced all the complainant's property, and was made to one who having been entrusted with the management of the estate during his father's life, had the information which she lacked. The court held that the inferences of fraud and undue influence which arose on the face of the transaction, were repelled by the answer, which being responsive to the bill, must stand until disproved. It averred that the complainant executed the deed deliberately, with a full knowledge that she was giving much more than she received. If this was true, and if, as the answer also averred, the suggestion came from her, and she was not influenced or deceived, a court of equity would not set aside

the transfer in the absence of proof that the grantor was of unsound mind, or wanting in the capacity to understand the consequences of her act.

In *Graham v. Pancoast*, 6 Casey, 89, it was held in like manner, that the extreme old age of the contracting party, the suddenness with which the proposal was presented, the brief period taken for consideration, his ignorance of the quantity of land which he was about to sell, coupled with very considerable proof of mental weakness, and great inadequacy of price, were not a sufficient ground for inferring undue influence, or for a decree that the contract should be cancelled or surrendered. It may be observed in regard to these decisions, that while the principle is unquestionable, it does not appear to have been correctly applied. Inadequacy of consideration is a ground which a chancellor should approach with caution, and even when gross only shifts the burden of proof. If it is clear from the evidence taken as a whole, that the parties were dealing at arm's length, and that the grantor possessed the modicum of capacity which the law deems sufficient, the hardship of the bargain is not a reason for setting it aside. But where a hard and oppressive contract is made with one who has less than the average strength of mind, under circumstances which leave him no time for reflection, it may fairly be inferred that an undue advantage was taken of his weakness. It is immaterial that the offer is made by him, if it is

one which the opposite party ought not to have accepted; *Doughty v. Doughty*, 1 Halsted, 227-229; *Torey v. Buck*, 1 Green Ch. 380. It was justly said, in *Torey v. Buck*, that the vendor's folly is not an excuse for depriving him of his property. This should clearly be the rule when the parties stand in a relation of confidence as members of the same family, and are dealing with an estate which they have received and hold in common.

WEAKNESS OF MIND.—All the authorities agree that weakness of mind, not amounting to unsoundness or imbecility, is not a sufficient ground for setting aside a deed or will; *Graham v. Pancoast*, 6 Casey, 89; *Nace v. Boyer*, Id. 99; *Aiman v. Stout*, 6 Wright, 114; *Smith v. Elliott*, 1 Patton & Heath, 307; *Jackson v. King*, 4 Cowan, 207; *Stewart v. Lispenard*, 26 Wend. 255; *Blanchard v. Nestle*, 3 Denio, 70; see *Delafield v. Parrish*, 25 New York, 9, 70; *Grers v. Grers*, 9 Grattan, 330; *Farnam v. Brooks*, 12 Pick. 212, 220; *Smith v. Beatty*, 2 Iredell Eq. 456; *Mann v. Betterley*, 21 Vermont, 326; *Darnell v. Rowland*, 30 Indiana, 342; *Somers v. Ranphrey*, 24 Id. 231; *Miller v. Craig*, 36 Illinois, 109; *Lindsey v. Lindsey*, 50 Id. 767; *Rogers v. Higgins*, 57 Id. 244; *Harrison v. Guest*, 6 De Gex. M. & G. 421. A different rule would require the appointment of a committee, to take charge of the property of every one who is not possessed of the average strength of intellect. Experience shows that such per-

sons may ordinarily be trusted to manage their own affairs, which necessarily implies that the contracts which they make are to stand. They are, notwithstanding, peculiarly entitled to the protection, which a court of equity habitually affords against imposition and undue influence.

"Mental weakness," said Strong, J., in *Graham v. Pancoast*, "not amounting to inability to comprehend a contract, when unaccompanied by evidence of undue influence or imposition, furnishes no ground for equitable interference." Or, as the principle was stated in *Nace v. Boyer*, "the mere fact that a person is of weak understanding, whether from age, accident or disease, if there be no fraud or imposition, is not an adequate cause of relief." But, while as these remarks indicate, weakness of mind resembles inadequacy of consideration, in not being of itself a ground for the rescission of a contract, yet when both these elements exist, the case is essentially different, and a chancellor will infer the existence of that form of imposition which consists in taking advantage of one who is unable to protect himself; *Conant v. Jackson*, 16 Vermont, 335, 351; *Cruik v. Christopher*, 5 Dana, 181; *M'Artee v. Engart*, 13 Illinois, 242, 249; *Nelson v. Oldham*, 12 B. Monroe, 55; *Hale v. Brown*, 11 Alabama, 87; *Tracey v. Sackett*, 1 Ohio, N. S. 54; *Rutherford v. Ruff*, 4 Dessausure, 250.

In *Craddock v. Cabiness*, 1 Swan, 474, the complainant, a woman of advanced age and impaired in

mind, although not devoid of understanding, executed a bill of sale of all her property to a married sister, in consideration of the husband's undertaking to provide for her support. The court held that where a rash, improvident, or hard bargain is made with a person of weak understanding, there is a natural inference that it is obtained by fraud, circumvention, or undue influence. There was, moreover, some evidence that the defendants had encouraged, if they did not suggest the idea that the complainant's property might be taken for the debts of a third person, with whom she had previously resided. The complainant was, therefore, clearly entitled to the relief for which she prayed. It was held in like manner in *Gass v. Mason*, 4 Sneed, 498, on the authority of 1st Story's Eq. sec. 237, that "the contract of one who is of weak understanding, and, therefore, liable to imposition, should be held invalid by a court of equity if the nature of the contract is such as justifies the conclusion that the party did not exercise a deliberate judgment, but was imposed upon, misled, or overcome by cunning artifice or undue influence." In these instances, however, there was direct proof of the exercise of undue influence, and not a little that indicated fraud. So, where a gift to the donor's brother and confidential agent, amounted to three-fourths of his estate, and was much in excess of any claim which the donee could justly make, either for his services, or on the affections of the donor, who had a wife and

other relatives for whom it was incumbent on him to provide, the court held that the circumstances raised a presumption of undue influence which invalidated the gift; *Todd v. Grove*, 33 Maryland, 188.

The only answer to a bill filed on such grounds, is that the complainant was fully aware of the unequal or disadvantageous nature of the contract, as such, and persisted in it from a deliberate purpose, that the defendant should profit by the excess of what he received above what he agreed to give. In other words, the transaction will fail if considered merely as a contract, and must stand if at all as a gift. Whether it can be sustained in the latter aspect, depends on whether the defendant could justifiably, accept and profit by the benefaction, in view of all the circumstances; see *Eyre v. Potter*, *ante*.

It is equally clear that mental incapacity may be a ground of relief, although the grant or contract is not marked by inadequacy, if it appears that the defendant practiced on the plaintiff's hopes or fears, or made representations which would have been disregarded by a person of strong mind, but which had a controlling influence on the complainant. It is not essential to a decree on such grounds, that the consideration should be inadequate. One who is artfully induced to convert a homestead which is dear to him, or a farm which is his means of livelihood, into money, which he does not know how to use, or may lose by a bad investment, is en-

titled to the aid of a chancellor, although the purchaser gave as much as could be obtained from any other person; See *Campbell v. Spencer*, 2 Binney, 133. "When," said Bartley, J., in *Tracy v. Sackett*, "there is imbecility, or weakness of mind arising from old age, weakness, intemperance, or other causes, and plain inadequacy of consideration, or when there is weakness of mind, and circumstances of undue influence and advantage, in either case a contract may be set aside in equity."

In determining whether a contract with a person of weak mind is harsh or oppressive, the court should look to the situation and prospects at the time, rather than to the result, and a conveyance of all the grantor's property in consideration of an agreement to provide for his support, was sustained on this ground in *Harrison v. Guest*, 6 De Gex. M. G. 424.

Intoxication does not necessarily invalidate a deed or contract, unless it is so entire as to preclude the exercise of the grantor's will and judgment; *ante*, 1036; *Wigglesworth v. Steer*, 1 Har. & Munf. 70; *Smith v. Elliott*, 1 Patton & Heath, 307; *Hutchinson v. Tindall*, 2 Green Ch. 357; *Pettinger v. Pettinger*, Id. 56; but like other mental weakness may render it incumbent on the grantee, to show that the grantor knew and understood what he was doing, and that the consideration was full and adequate; *Reynolds v. Noble*, 1 Washington, 164; *Crane v. Conklin*, Saxton, 346; *White v. Cox*, 3

Hayward, 79; *Conant v. Jackson*, 16 Vermont, 335. And there can be no doubt that one whose mind has been enfeebled by excess is as much entitled to the protection of a chancellor, as if the disability arose from natural causes; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Truman v. Diggins*, 2 Jones Eq. 162; *Marshall v. Billingsly*, 7 Indiana, 250; *Conant v. Jackson*, 16 Vermont, 335; *Horne Keenan*, 27 Illinois, 445. Moreover, where it appears that the grantee induced the grantor to drink, in order to take advantage of him while under the influence of liquor, the transaction is stamped as fraudulent, and should be so treated by a chancellor; *M'Artee v. Englehart*, 15 Illinois, 242; *Hotchkiss v. Farson*, 7 Yerger, 67; *Harvey v. Pecks*, 1 Munford, 518.

IGNORANCE.—There is little difference as it regards the right to relief between one whose mind is weak, and one who from ignorance, youth or inexperience, is unable to exercise his mind effectually as it regards the subject matter, and hence the gift or contract of a person thus situated may be set aside, if it appears that he was laboring under a misapprehension, which the opposite party promoted, or which he did not remove. *McCormick v. Malin*, 5 Blackford, 509; *Wheeler v. Smith*, 9 Howard, 55; *Hallett v. Collins*, 10 Howard, 174, 186; *Pickett v. Loggan*, 14 Vesey 215, 243; *Butler v. Haskell*, 4 Dessausure, 651, 687.

The ignorance which invalidates a contract, must nevertheless, be

such as disqualifies the party from exercising an enlightened judgment, as distinguished from a want of full or accurate information as to particular facts which might be ascertained by inquiry, and it can seldom be a ground for equitable relief, unless there is some relation of confidence, or a manifest disparity of age, education, or experience, which imposes an obligation that does not ordinarily exist between persons who are dealing at arm's length. *Juzan v. Toulmon*, 9 Alabama, 622, *Wheeler v. Smith*, 9 Howard, 55; *Hallett v. Collins*; *Long v. Mulford*, 17 Ohio, N. S. 484, 504. Still a contract for an inadequate consideration, with one who is too ill-informed to have any just idea of the value of that which he is about to part with, presents a case for relief, which cannot be overcome without proof that the purchaser said and did nothing to mislead or unduly influence the vendor; see *Pickett v. Loggon*; *McCormick v. Malin*, 5 Blackford, 509. The mere circumstance that the grantor is illiterate, does not warrant a presumption of fraud; *Selden v. Myers*, 20 Howard, 506; *Michael v. Michael* 4 Iredell Eq. 349, although it may be requisite to show that the deed was read to him, or that he was acquainted with the contents in some other way; *Selden v. Myers*; *ante*, 951.

NEED AND DURESS.—Duress is a constraint of another's goods or person, which compels the sufferer to give a seeming assent to that which his judgement disapproves, and would reject if it were free to

act, see *Harmony v. Bingham*, 1 Duer. 227; *White v. Heylman*, 10 Casey, 142; *Foshay v. Ferguson*, 5 Hill, 158, *Sosatas v. Jennings*, 1 Bay. 470; *Collins v. Westbury*, 2 Id. 211. It cannot, therefore, arise from a levy or arrest under process issued in due course of law; *Stauffer v. Latshaw*, 2 Watts, 165; and for a still stronger reason a threat of litigation does not constitute duress; *Mahew v. The Phoenix Insurance Co.*, 23 Michigan 105; *Dixon v. Dixon*, 7 C. E. Green, 99; *Miller v. Miller*, 18 P. F. Smith, 486. If one who has been taken into custody and imprisoned by virtue of a *capias ad respondendum*, gives a note or bond by way of compromise or settlement, he cannot ask to be discharged from the obligation; *Stauffer v. Latshaw*; *Fullton v. Hood*, 10 Casey, 365.

Duress is a defence at law; although a bill may be filed to have the instrument given up or cancelled; *Thurman v. Bart*, 53 Illinois, 129. And it has been said that a chancellor will not set aside an obligation for duress, on grounds which would be insufficient in a merely legal tribunal; *Stauffer v. Latshaw*. This is no doubt true where the allegation is simply that the complainant's assent was obtained by threats or violence; *Miller v. Miller*, 18 P. F. Smith, 486. An instrument procured through duress is void, although given for a just debt or other full and valuable consideration. But a hard and oppressive contract may be declared invalid, for much less than

the pressure which would be requisite to constitute duress in a court of law; and it is a general rule that an undue advantage shall not be taken of persons who are from any cause unable to protect themselves. It is accordingly well settled that when want, pecuniary embarrassment, or extreme need of any kind weighs so heavily on the sufferer, that he cannot exercise an unbiassed judgment, and is prepared to make any sacrifice for temporary relief, there is an equitable duress, which authorizes the intervention of a chancellor, if the terms of the contract are so inadequate as to show that the opportunity was abused; see *Underhill v. Harwood*, 10 Vesey, 211; *Pickett v. Loggon*, 14 Id. 214, 242; *Hough v. Hough*, 2 Ohio, 495; *Butler v. Haskell*, 4 Dessausure, 687; *McDonald v. Nelson*, 6 Johnson Ch. 201; 2 Cowen, 139, 171; *Kenney v. Udall*, 5 Id. 464, 474; *Cruise v. Christopher*, 5 Dana, 181, 184; *Austin v. Winston*, 1 Harris & Munf. 33; *Gest v. Frazier*, 2 Littell, 118; *Eadie v. Slimmon*, 26 New York, 9; *Brown v. McGaffney*, 28 Illinois, 149; *McCants v. Bell*, 1 M'Cord, Ch. 385.

"The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold

on the slightest circumstances of oppression or advantage, to rescind the contract. So, when a person borrowing money to relieve his necessities, is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment, by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, are sufficient evidence of unfair advantages to justify the interference of the court. We consider this a case of great exorbitancy of price, where the purchaser was deeply embarrassed, and where the vendor availed himself of that embarrassment to exact the bargain;" *Hough v. Hough*, 2 Ohio, 495, 505. A similar view was taken in *Haskell v. Butler*, where the complainants, uneducated and ignorant men, in very necessitous circumstances, "dealing in business beyond their depth, with a very intelligent and experienced man, in whom they had great confidence," were finally led to part with their property for much less than it was worth, and the chancellor said that he "was not aware of any case presenting this combination of circumstances in which the court had not relieved. Such relief had been most frequently applied to young and inexperienced heirs, who had disposed of their expectancies on disadvantageous terms, but the principle applied whenever an unconscientious and offensive advantage was taken of the ignorance, the weakness or the necessity of another."

These circumstances, were also, present in *Cruise v. Christopher*, with same result.

The case is still stronger, when complainant is in confinement, although for a good and legal cause, and unable to consult with his friends, or have legal advice, especially if the arrest was at the suit of the defendant, and the latter uses his power to obtain an undue advantage in matters which are foreign to the suit. "Though a man is arrested by due process of law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance which was not under consideration before, equity will construe it as duress, and relieve against a conveyance executed under such circumstances." See *Nichols v. Nichols*, 1 Atkyns, 409; *Kelley v. Hobbs*, 16 Peters, 269; *Thurman v. Bart*, 63 Illinois, 129. In *McDonald v. Neilson*, 6 Johnson Ch. 201; 2 Cowen, 139; the chancellor gave relief on like grounds to one who was constrained to give a mortgage for his son's debt, to save his own property from being sacrificed under an execution which was suddenly and oppressively enforced, and although the Court of Errors reversed the decree it did not impugn the principle.

In *Kelsey v. Hobbs*, 16 Peters, 269, the complainant and defendant had been engaged in business as co-partners. The firm was dissolved, and the complainant filed a bill in the state of Georgia, where he resided, to have a settlement of the partnership accounts.

He subsequently went to New York, and was arrested while there, in an action brought on a covenant in the deed by which the dissolution was effected. Being unable to find bail, he remained for some in confinement, and until he executed an instrument admitting the correctness of a statement of the partnership accounts, which was prepared and presented to him by the defendant, and gave the latter a release of all demands arising out of their transactions as co-partners. Taney, Ch. J., said that as the settlement was made in good faith under the advice of counsel, if it had been confined to the claim for which the *capias* issued, the burden of proof would have been on the party who sought to set it aside. But the release covered matters not embraced in that suit, and of much more importance, which Hobby had been litigating for many years. It was executed without inquiry or examination, as a means of purchasing the complainant's freedom. An instrument obtained by such means was not entitled to the favorable consideration of a court of equity, and could not be allowed to stand in the way of a just demand.

It is universally conceded that a deed executed through fear of the loss of life, produced by the threats of the grantee, may be avoided for duress; *Brown v. Pierce*, 7 Wallace, 205; *Baker v. Morton*, 12 Id. 250; and the weight of authority is "that a menace of battery to the person, or of trespass to lands, or of destruction of goods, may be suffi-

cient to overcome the mind and will of a person who is entirely competent in all other respects to contract; and a contract, made under such circumstances, is as utterly without the voluntary consent of the party menaced, as if he were induced to sign it by actual violence;" *The United States v. Hickabee*, 16 Wallace, 414, 432; *The Central Bank v. Copeland*, 18 Maryland, 317; *White v. Heylman*, 10 Casey, 142; *Miller v. Miller*, 18 P. F. Smith, 486, 493; *Evans v. Huey*, 1 Bay. 13; *Foshay v. Ferguson*, 5 Hill, 153. "If," said Bronson, in the case last cited, "the defendant arrested the plaintiff under pretence that he had a warrant when in fact he had none, or if he arrested the plaintiff under a warrant issued by a justice of the peace in the county of Herkimer, which had not been endorsed in Schoharie, the imprisonment was in either case unlawful, and a contract procured by such means cannot be supported. It wants the essential ingredient of the free assent of the contracting party. No right can be acquired by such an act of violence. All the books agree that a man may avoid his deed for duress of imprisonment. Some of the cases hold that the deed may be avoided although the imprisonment was under legal process. In *Watkins v. Baird* (6 Mass. R. 506), Parsons, Ch. J., said: "It is a sound and correct principle of law, that when a man shall falsely, maliciously, and without probable cause, sue out a process in form regular and legal,

to arrest and imprison another, and shall obtain a deed from a party thus arrested to obtain his deliverance, such deed may be avoided by duress of imprisonment; for such imprisonment is tortious and unlawful as to the party procuring it, and he is answerable in damages for the tort in an action for a malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud." And so the matter was adjudged by the whole court. The case before Chief Justice Bridgman, at Guild Hall (1 Lev. 68, 9), where a different doctrine was laid down, was entirely disregarded, and the authority of that case was also denied in *Richardson v. Duncan* (3 N. Hamp. 508), where it was held, that an arrest for a just cause and under lawful authority, if it be made for unlawful purposes, may be construed a duress so as to avoid a contract which the party made for his deliverance. And to the same effect is Buller's N. P. 172; 2 Inst. 482; Com. Dig. Pleader (2 W. 19); Vin. Ab. Duress, (B.) pl. 25; *Inhab. of Whitefield v. Longfellow* (13 Maine. R. 146). But in the view we are now taking of the case, the imprisonment was unlawful; and there never was a doubt that a contract obtained by such means might be avoided. As the evidence left it doubtful whether the plaintiff was actually imprisoned, the judge also, instructed the jury as to what would constitute a case of duress *per minas*; and here it is strenuously insisted that he fell into an

error. It is said there must be a threat of life or limb, or of mayhem, and that a man cannot avoid his contract on the ground that it was procured through the fear of illegal imprisonment. But Lord Coke says, the fear of imprisonment is enough (2 Inst. 483; Co. Litt. 253; b). And so the rule has been understood ever since that time (Vin. Ab. Duress, (B.) pl. 23; Com. Dig. Pleader), (2 W. 20) Bac. Ab. Duress (A.); Chitty on Contr. 168, ed. of '39; *Inhab. of Whitefield v. Longfellow*, 13 Maine R. 146; *Eddy v. Herrin*, 17 Id. 338; 1 Cowen's Tr. 264). It is true that Blackstone, in speaking of duress *per minas*, (1 Com. 130, 1), does not mention the fear of imprisonment; but he was only stating the general doctrine, and he says nothing either way upon this point. I do not find that the rule as laid down by Coke has ever been denied.

"If a deed might be avoided nearly three centuries ago on the ground that it was procured by threats and the fear of illegal imprisonment, there can be no room for doubt upon the question at the present day. As civilization has advanced, the law has tended much more strongly than it formerly did to overthrow everything which is built upon violence or fraud. In the time of Coke, it was said that a man could not avoid his act, on the ground that it was procured by the fear of battery, burning his house, taking away or destroying his goods, or the like; for there he may have satisfaction by the recovery of damages (2 Inst. 483).

VOL. II.—79

But Mr. Chitty very justly doubts whether such be the rule at the present day, especially in regard to so serious an injury as a threat to burn a man's house (Chit. on Contr. 169, ed. of '39). In *Sumner v. Ferryman* (11 Mod. 201), Powell, J., said, a man cannot avoid his bond by duress to his goods, but only to his person. (And see *Astley v. Reynolds*, 2 Str. 915). But in South Carolina it has been held that duress of goods will, under some circumstances, avoid a man's contract; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Id. 211; and see *Nelson v. Suddarts*, 1 Hen. & Munf. 350. I do not intend to say that a man can avoid his bond on the ground that it was procured by an illegal distress of goods; but I entertain no doubt that a contract procured by threats, and the fear of battery, or of the destruction of property, may be avoided on the grounds of duress; there is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrongdoer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction."

In *The United States v. Hickabee*, 16 Wallace, 416, the military occupation of the complainant's "iron works," followed by a threat that if he did not sell the property to the "Confederate States" it would be "impressed," was held not to be such a duress, as would entitle him to relief against one claiming as a purchaser

from the Government of the United States, which had taken possession of the premises, under a decree of forfeiture, after the suppression of the rebellion.

In *Eadie v. Sleeman*, 26 New York, 9, a *feme covert* was induced to join in an assignment of a policy of life insurance, which had been effected for her benefit, in payment of a demand against her husband, by threats that "if she did not, he should be prosecuted for embezzlement," and the court vacated the transfer as having been procured by undue influence. Smith, J., said, that the assignment was most clearly extorted by a moral coercion which overcame free agency, and compelled an unwilling assent through the operation of fear. If the husband was guilty, such a compromise of the felony was unjustifiable; if he was not, a gross imposition had been practised on the wife.

"The constraint which takes away free agency and destroys the power of withholding assent to a contract, must be one which is imminent, and without immediate means of prevention; and be such as would operate on the mind of a person of a reasonable firmness of purpose. A threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may at once be redressed by legal proceeding, will not amount to duress *per minas*," *Miller v. Miller*, 18 P. F. Smith, 486. Such is no doubt the rule when the parties stand on an equal footing, but it does not necessarily

hold good where one of them has a paramount or controlling influence. Relief might seemingly have been afforded on this ground in *The United States v. Huckabee*, and perhaps in *Miller v. Miller*; see *Eadie v. Sleeman*, 26 New York, 9, 12.

VOLUNTARY DEEDS AND INSTRUMENTS OF GIFT.—Where a deed is executed for a valuable consideration, the question is not what the grantor intended, but what intention was expressed by him and assented to by the grantee; and the court cannot rectify a mistake which is not mutual, or, in other words, which is not a deviation from some purpose or agreement which was common to both parties; *ante*, 981. In a voluntary deed or instrument of gift, the donor's intention is ordinarily the only one that need be regarded, and if the writing goes beyond, or falls short of what he designed, it may be reformed. Hence a voluntary deed will not be sustained unless it appears that the grantor "knew and understood what he was doing," *ante*, 1175; which will not necessarily be inferred because the instrument of gift was read by or to him, unless it was fully explained by some competent and disinterested adviser, and the remote consequences pointed out. The burden of proof is consequently on the donee to show that the donor not only comprehended the immediate operation of the instrument, but the effect which it would produce in the coming time; see *Houghton v. Houghton*, 15 Beavan; *Greenfield's*

Estate, 2 Harris, 419, 507; *Russell's Appeal*, 25 P. F. Smith, 229.

It has accordingly been held in Pennsylvania, in accordance with the English decisions, that where the primary object of a voluntary deed is not to benefit a third person, but to make such a settlement or disposition as shall be beneficial to the grantor, the absence of a power of revocation will be ascribed *prima facie* to an omission to effectuate a purpose which the grantor presumably had, or, if he had it not, would have entertained if he had been duly informed; see *Russell's Appeal*, 25 P. F. Smith, 269; *Case v. Case*, 26 Michigan, 49; *Wollaston v. Tribe*, 9 L. R. Eq. 44; *Hall v. Hall*, 14 Id. 465.

In *Russell's Appeal*, a woman acting in contemplation of marriage, and with the advice of counsel, made an absolute conveyance of her estate, with the consent of her intended husband, in trust for her separate use during life, with a testamentary power of appointment among her children. In default of such appointment, the estate was to be conveyed to them, or if she died childless, "to and among her brothers and sisters and their issue, as she should limit and appoint by any writing in the nature of a will. In the event of her death without issue, and without a will, the trustees were to distribute the estate among the next of kin." She did not consult her counsel as to the propriety of inserting a power of revocation, nor was any suggestion of the kind made by him, but after the instrument had been pre-

pared and left with her for execution, she asked Mr. Russel, who had consented to act as her trustee, whether "she could make her will as she pleased," and received an affirmative reply. Her husband died without leaving issue, and she then filed a bill to set the deed aside. The case was referred to a master, who reported, *inter alia*, "The marriage was the only consideration for this settlement, and there having been no children of the marriage, and the husband being dead, the only part of the settlement now subsisting is purely voluntary, and not within the consideration of the deed. The deed, then, as to present interests involved, is to be treated as a voluntary deed, and the question is, upon what principles do courts of equity proceed in reforming or setting aside voluntary instruments? The only purpose of the settlement was to secure to the plaintiff, after marriage, and during marriage, the enjoyment and disposal of her estate, free from the influence and control of her husband. The suggestion of the settlement originated with him, not with her, and there is not even a pretence that it was inspired by a wish to procure for himself a corresponding independence as to his own private estate, or that it was prompted by any motive other than such as concerned the plaintiff and himself alone. The only intelligible explanation of his motive would seem to refer it to a desire on his part to testify his disinterested affection for the plaintiff.

"Now, conceding, as is contended for the defendants, that a mistake of law cannot be corrected in equity, the decisions show that equity has considered the kind of mistake here sought to be corrected, not a mistake of law, but a mistake of fact, or of mixed law and fact, or something similarly relievable, or the rule invoked has not been held applicable to cases of this description.

"Instruments as solemn as the deed in this case, and executed as freely and deliberately as this deed was executed, have been reformed or set aside for just the very sort of mistake here disclosed. No case precisely in point, in our own courts, was cited in the argument, and none, it is believed, can be found; but in the English Chancery the cases have not been unfrequent, and the descisions have been rested on a broad basis, and relief, under circumstances such as have been exhibited by the proofs in this case, has seldom, if ever, been refused. The first thing which the court seeks to discover is the intention of the settlor, and the deed is accepted as expressive or conclusive of that intention, only when it is shown that it was executed not only freely and deliberately, but with full knowledge, and the *onus probandi* is on the party seeking to uphold it. The general rule is, that 'in every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliber-

ately, knowing what he was doing; and if this be not done, the transaction cannot stand;' *Cooke v. Lamotte*, 15 Beav. 234.

"According to Lord Eldon, in *Huguenin v. Basely*, 14 Vesey, 293, the question is, whether the deed is the 'pure, voluntary, well understood act' of the settlor's mind, and whether the settlor executed it with full knowledge of all its 'effects, nature and consequences;' or as the Master of the Rolls, Sir John Romilly, puts it in *Phillipson v. Kerry*, 32 Beav. 628, 'whether the deed fully expresses the nature of the arrangement she (the settlor) wished to make, and whether its full import and effect were clearly and distinctly made known to her.' It is not enough to show that the settlor read the deed, or that it was read to him, or that he understood it as well as any unprofessional man could be supposed to do; but it must be established that it was so explained to him that he might understand it, *Nanney v. Williams*, 22 Beav. 452, especially if any of the usual clauses are omitted; *Wollaston v. Tribe*, Law Rep. 9 Eq. 44—or any unusual clauses are inserted—*Phillips v. Mullings*, Law Rep. Ch. Ap. 246.

"Nowhere is it authoritatively laid down just what clauses every deed of voluntary settlement should or should not contain; each case must be judged by its own circumstances; but there are certain clauses, the absence of which almost always arrests the attention of equity, and satisfactory proof is required that

they were omitted intelligently and intentionally. Under circumstances where the insertion of them would not defeat the purpose of the settlement, or that purpose could be effectively accomplished without their omission, the absence of a general testamentary power has been held to be a serious defect, and the absence of a power of revocation has been held to be almost, if not quite sufficient of itself, to warrant the interposition of the court to reform, or even set aside the deed, at the instance of the settlor. Not that the reservation of both or either of these powers is absolutely indispensable to the validity of a voluntary settlement even under such circumstances, but only that the settlor's attention should be called to them, and he should be advised about them, and made to understand them, and their absence should be satisfactorily explained by proof that the settlor declined to reserve them, or in some affirmative way signified his intention that they should not be reserved; otherwise the inference will be more or less conclusive that he did not execute the deed with that full knowledge which he ought to have possessed. In *Huguenin v. Basely*, *ut supra*,

- Lord Eldon regards the absence of a power of revocation as a *circumstance* to be considered, and refers approvingly to Lord Hardwicke's opinion that the absence of such a power was to be looked upon as '*strong evidence* that the party did not understand the transaction.' In *Nanney v. Williams*, *ut supra*, the Master of the Rolls

thought the want of such a power was a *strong circumstance* tending to establish want of competent knowledge; and he was of opinion that a party purposing to make a voluntary settlement should be asked, in the first place, whether he meant it to be revocable or irrevocable, and if revocable, in what way he intended the deed should be revocable. In *Forshaw v. Welsby*, 20 Beav. 243, the want of this power was declared a *serious consideration* as affecting the settlor's knowledge; and in *Coutts v. Acworth*, Law Rep. 8 Eq. 558, it was held that 'the party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a *distinct intention* on the part of the donor to make the gift irrevocable. And where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will, in general, be fatal to the deed.' * * *

"In *Hall v. Hall*, Law Rep. 14 Eq. 365, the last English case, decided June 4th, 1872, it is held as the established rule that 'where in a voluntary settlement of real estate, a revocable deed would have answered the settlor's purpose as well as an irrevocable one, the absence of a power of revocation is *prima facie* evidence of mistake, and that evidence can only be rebutted by showing that the settlor had his attention pointedly called to the fact that the in-

strument was irrevocable, and that he could have equally effected his purpose by a revocable one.'

"In *Wollaston v. Tribe* (*ut supra*) it was held that a 'person taking a benefit under a voluntary gift, which is not subject to a power of revocation, has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable,' and 'that a voluntary gift, not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor.' "

Agnew, C. J., said "From the facts found, it is evident Mrs. Evans, then Miss Fotterall, had no motive to fulfil in executing the marriage settlement with William Elbert Evans, except to provide for the control and disposition of her property during their joint lives and Mr. Evans' survivorship, and to regulate its succession after *his* death. A provision for her own survivorship, and especially without issue by him, seems not to have been in her own thought, and was not presented to her mind by her counsel or any one else. The nearest approach toward the subject was when after reading the deed of settlement alone, and unaided by the suggestions of counsel, the question arose in her mind, whether she could dispose of her property by will as she pleased; and on inquiring of Mr. Russell, her intended trustee, whether she could, he answered, "Yes." When her mind was thus nearing the important question of her personal control, it was led away from its pursuit by an answer that set in-

quiry at rest. Thus she executed the settlement without the usual and all important clause of revocation, or even a power to will or appoint the uses, in the event of her survival, and after the settlement had performed the entire purpose which called it into existence. It does not appear that she had any reason or motive, either for disabling herself, or for benefiting her brother or sisters, by tying up her hands in case she survived her intended husband. The provision for them was evidently to furnish a channel of descent only for her property when she, and her husband after her, needed it no longer, and she should have no issue to take it. The conclusion of the master, in which we fully concur, is, that these collateral depositaries of her estate were mere volunteers in the fullest sense of the term. There was not a spark of consideration, and not a motive to provide for them, further than to specify persons into whose lap the estate should fall, after her husband's death surviving her.

The single question then is, whether equity will not set aside an act which thus strips an owner of property, and vests it in others without motive or reason, against the interests and desire of one who has ignorantly, and without intention, done this unwise and evidently mistaken thing. To support the settlement in favor of such mere volunteers, would be to convert a merely accidental formality into an act of substance and will, and to override justice,

intention, and the welfare of the true owner. That the law of the land permits any one to dispose of his property gratuitously, if he please, when not prejudicial to the interests of creditors, and that his voluntary gifts, made with full intention and knowledge of the act, are irrevocable in equity as well as in law, when the power to revoke is not reserved, may be conceded. It may be admitted, also, that the mere omission of counsel to advise the insertion of a power to revoke, will not alone be a ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight when joined to other circumstances tending to show that the act was not done with a deliberate will. Therefore, when the facts show that the instrument was executed without advice or reflection, and without an intention to bind the party after the reasons and motives for executing it have passed away, and the party is again *sui juris*, a Court of Equity will and ought to relieve as against mere volunteers, claiming without consideration or a reasonable motive for continuing the donor's disability. There may be reasons for continuing the disability, intended by the grantor or settlor, which would influence the chancellor to maintain it, as where a settlement is made for self-protection against improvidence, or the urgent importunities of others, which the circumstances show it is difficult for the grantor or settlor to resist. But in such exceptional

cases the deliberate intention of the party to tie up his own hands should clearly appear.

The cases cited by the master show very distinctly that the actual intent of the donor is necessary; and in the absence of a certain intent to make the gifts irrevocable, the omission of a power to revoke is *prima facie* evidence of a mistake, and casts the burden of supporting the settlement upon him who, without consideration or a motive to benefit him or protect the donor, claims a mere gratuity against one who is *sui juris* and capable of taking care of his own estate.

This mistake is not one simply of law. That would be so if the settlor, in full view of all the clauses and provisions in the deed, would interpret them for himself as being in law adequate to confer a power of revocation upon him, when in truth the law would not so expound the instrument. But in a case such as this the mistake is one of fact, so mixed with the legal effect of the writing, that equity will use the mistake of fact as a means of relief. The mistake here was in not perceiving and being conscious that a case was left unprovided for which might happen, and in which event the settlor, Miss Fotherall, would desire to make a provision agreeably to her wishes and will. The settlement provided for the marriage and the survivorship of her intended husband, with and without issue by her, and for the results of these contingencies, but it failed to provide for the case of Mr. Evans

dying first without issue by her. This was a state of facts not presented to her mind, and therefore she did not see that the legal operation of the deed upon the happening of this contingency, became different from what she would have provided had the fact occurred to her. It was therefore not a mistake merely of the legal operation of the instrument, but a mistake flowing from the want of conception, or a misconception of facts, which might occur and were not provided for. There was a complication of contingencies presented to an unpractised mind, unaided by the counsel of her legal adviser, in the very particular in which her mind ought to have been instructed, involving the occurrence of future facts, to which her attention ought to have been directed. The effect evidently was that her mind gave no assent to the legal operation of the instrument upon the happening of the unforeseen contingency. It is therefore precisely the case where equitable relief comes in as against mere volunteers, for whom no provision was intended in that contingency. The master fully appreciated this principle, and has cited abundant English authorities to sustain it. There are at least two Pennsylvania cases which maintain this principle of equitable relief. It is fully discussed, and American authorities cited to sustain it, in *Gross v. Leber*, 11 Wright, 520, where the obligors in a bond, gave it under a mistake of their position and duties. The other case is *Wheeler's Appeal*, 20 P. F. Smith, 410."

It is obvious that the failure of the complainant to consider and provide "for the case of Mr. Evans dying first without issue by her," would not have been a ground for relief, but for the voluntary nature of the deed. Such at least would seem to be the necessary inference from *Hunt v. Roussmanier*, 8 Wheaton, 174; 1 Peters, 1; where the court refused to rectify a similar mistake in a contract *inter partes*, and for a valuable consideration, *ante*, 983.

It might be inferred from the language held in some of the decisions, that there is a presumption against an absolute voluntary deed, which cannot be overcome by proof that the instrument was drawn by a competent and independent solicitor, who pointed out the defect, and gave all the information and advice which the occasion required; *Wollaston v. Tribe*, 9 L. R. Eq. 44; *Everett v. Everett*, 10 Id. 405. What the authorities establish seems to be, that when the primary object is to insure the grantor's repose and security, and that the property shall go as he desires after his death, the want of a revocatory clause gives rise to an inference that he was unduly influenced, or did not understand what he was doing, which can only be repelled by showing that he had a full and free consultation with some disinterested third person, who explained the consequences of the act, and that it would preclude him from disposing of his property by will, or providing for the

events that might occur in the unknown future; *Forshaw v. Welsby*, 30 Beavan, 243; *Cooke v. Lamotte*, 15 Id. 234; *Coutts v. Ackworth*, 8 L. R. Eq. 538, *ante*, 1186. If the grantor persists, in the face of such representations, or if the case be one where from his character and habits it is wise for him to tie his hands, the court will not cancel the instrument merely because the self imposed restraint proves irksome; see *Toker v. Toker*, 31 Beavan, 629; *Phillips v. Mullings*, 7 L. R. Ch. App. 244; *Greenfield's Estate*, 2 Harris; *Nace v. Boyer*, 6 Casey, 99, 104; *Falk v. Turn*, 101 Mass. 494; *Hadley v. Latimer*, 3 Yerger, 537.

In *Falk v. Turn*, a widow having children by a former marriage, and being then about to take a second husband, conveyed all her estate, real and personal, to one who was her confidential adviser, to hold and manage it for her exclusive benefit during her life, and after her death in trust for such uses as she should appoint, or in default of such appointment to be distributed among her children. The bill contained allegations of fraud and misrepresentation, which were denied in the answer, but it did not appear that the propriety of inserting a clause of revocation was suggested to the complainant, or that she was referred to any disinterested third person for advice. The court held that there was no sufficient ground for granting the prayer of the bill. The defendant was a confidential adviser of

the plaintiff, but she manifestly thought, and acted for herself. This might be inferred from her having wholly disregarded the opinion which he expressed against her second marriage. Where such independence existed, and the grantee did not obtain any undue advantage from the deed, it would not be set aside merely on account of the confidential relation between him and the grantor.

This judgment is not irreconcilable with that in *Russell's Appeal*, because the bill was filed during the second husband's lifetime, and while the circumstances which prompted the complainant to make the trust irrevocable still endured. Moreover the grantor took merely as a trustee, and there was consequently no sufficient reason for impugning his motives, or alleging that the complainant was not disinterestedly advised; *ante*, 1194.

In *Hildreth v. Elliott*, 8 Pick. 293, a woman who was about to be married, conveyed her real and personal property to her father, in trust for her separate use, the income to be paid her during her life, and the estate to be conveyed to such child or children, as she might leave. Having survived her first husband she took a second, and they applied to have the settlement vacated. Wilde, J., said, "The principal question raised by the bill and answer is, whether a voluntary settlement fairly made, and without power of revocation reserved in the deed of

settlement can be set aside by the settlor, or by a court of equity on his application.

"The affirmative is maintained in Lord Ormond's case cited in 1 Ver. 101, but all the subsequent authorities are the other way. In the case of *Villers v. Beaumont et al.*, 1 Ver. 100, the chancellor says, 'if a man will improvidently tie himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must subsequently establish the proposition, viz., that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd.' In the case of *Boughton v. Boughton*, 1 Atk. 625, the same doctrine is laid down. So also in the case of *Clavering v. Claveriny*, 2 Vern. 475, where it was said, that if a prior deed could be discharged because voluntary, by a subsequent deed voluntary also, then there would not be any necessity of inserting powers of revocation, according to the established mode or conveyancing.

"In the case of *Worrall v. Jacob*, 3 Mer. 270, where the cases are reviewed, it was decided, that a voluntary deed or settlement, once perfected, could not be revoked at pleasure, even though the maker had retained it in his own possession. And the same decision was made in the case of *Clavering v. Clavering* before

cited, and in the case of *Brookbank v. Brookbank*, 1 Eq. Ca. Abr. 168, and the same doctrine has been frequently recognized in other cases. And Sir Joseph Jekyl was so clear in the opinion, that a voluntary deed once perfected could not be revoked at pleasure, that he established the the copy or counterpart of the first deed, though the original had been destroyed by the maker. Indeed courts have gone so far as to refuse to relieve against a voluntary settlement, under such strong circumstances as where the settlement was made upon a mere stranger, and the settler afterwards married, and had children, and thereupon made a new settlement on himself, his wife and their issue; *Allen v. Arme*, 1 Vern. 365; *Myddleton v. Kenyon*, 2 Ves. Jun. 391." The bill was accordingly dismissed.

The inference that the omission of a power of revocation is due to mistake or fraud, is founded on the assumption that the grantor does not mean to relinquish the power to make a will, or part with the control over his estate; *Falk v. Turn*, 101 Mass. 194; *Greenfield's Estate*, 2 Casey, 489, 503. It does not therefore arise, where the object which he has in view cannot be attained without placing the property entirely beyond his reach. Accordingly, where a woman in her eighty-seventh year "to escape from solicitation and annoyance, and by way of precaution against herself," desired to make a settlement which should be as "unalterable as the laws of the Medes

and Persians," and executed an instrument which was drawn in pursuance of her request, the court held that she and her executors were impotent to destroy the trust which she had deliberately created; *Greenfield's Estate*, 489; *ante*, 1217. In *Nace v. Boyer*, 6 Casey, 99, a conveyance in trust to apply the rents and profits to support the grantor during his life, and distribute the property equally among his children on his decease, was upheld on a like ground, although the grantor's mind was enfeebled by age at the execution of the deed, and he subsequently became dissatisfied with it, and filed a bill to set it aside. The case of *Philips v. Mullings*, 7 L. R. Ch. Appeals, 244, is substantially to the same effect, although the motive of the grantor was to guard against his improvident and reckless habits.

In these instances, it distinctly appeared from the evidence that the grantor was informed of the nature of the instrument, and that if he tied his hands they could not be unloosed. But there are cases where the nature of the act implies that it cannot be recalled, and the donor need not then be told what he must be presumed to know. Such is the case where one makes a donation for the purpose of establishing a friend or relative in life, or enabling him to marry. It is not therefore, incumbent on the solicitor who is called in to prepare the instrument, to advise the insertion of a power of revocation, which would frustrate the giver's purpose by leaving the bene-

ficiary not less dependent than he was before. A gift which can be revoked is virtually none, and does not pass the right of property as against creditors. Still, if the instrument of gift is a bond or covenant, and not a present transfer, it may be incumbent on the donee to show that the donor knew that the obligation was absolute, and would preclude him from making a testamentary disposition, and in *Cooke v. Lamotte*, 15 Beavan, 239. a post obit bond from an aunt to her nephew, was set aside because it did not sufficiently appear that she was aware of the nature of the act, and that it would be irrevocable notwithstanding any change that might occur in her mind or circumstances.

In general, where fraud or undue influence is shown to have been the moving cause for any part of a will, grant, or contract, the court will set the whole aside, because it cannot be known with certainty what or how much the grantor would have done, if he had been left to the free and unbiased exercise of his judgment; *Houghton*, 15 Beavan, 250; *Lamotte*, *ib.* 234; *Flanagan*, 24 Alabama, 241; *Irwin*, 3 Wharton, 347; and where the court will not set aside an act which is the part of a contract of the donor, because it is found to be a deed with a change of mind, and will not be set aside on the objection that it was made the result of a change of mind. *Harriet*, 1 Bign.

has obtained a gift by means which render it invalid, is not a sufficient ground for withholding another and distinct gift from B., although both are made simultaneously, and by one instrument. In *Greenfield's Estate*, a deed of trust was accordingly upheld, although containing a provision for the trustees, which was set aside as exceeding a just measure of compensation for their services. Bell, J., said, "that a decree declaring the benefaction to the trustees invalid, ought not to affect innocent third persons, whose interests, under the deed, are distinct from, and independent of, those claimed by the trustees as beneficiaries. As we have seen, very different considerations are applicable to these several interests, and the rights flowing from them are to be measured by very different rules. Each may stand without the other, and thus the declaration of trust may be established in respect of those dispositions not obnoxious to an avoiding principle, while those entitled to a less favorable construction may be declared void. This power of discrimination is entirely within the province of a court of equity, where a trust is divisible into distinct parts. In the exercise of a sound discretion, regarding distinct individuals as independent parties, it may uphold all of a transaction free of the taint of fraud, actual or constructive, while it decrees the destruction of those portions of it open to such an impeachment." The principle is clear, but we may doubt whether it was correctly ap-

plied, because the attorney who drew the will was one of the trustees, and therefore interested in procuring the creation of the trust.

A vendor who would rescind a sale for fraud or undue influence, must be ready and willing to refund the purchase money, vol. 1, 839; *Smith v. Townsend*, 27 Maryland, 368, 388; *M'Cant v. Bee*, 1 M'Cord Ch. 383; *Harding v. Handy*, 11 Wheaton, 103, although one who is unable to comply with this requisition, may ask that the property shall be sold, and the proceeds awarded to him after reimbursing the purchaser; vol. 1, 235, 259.

A creditor who takes advantage of his position as a confidential agent or adviser, or of the dependence or mental weakness of the debtor, to obtain a conveyance which is more than a just equivalent for the debt, is not within this principle, because he does not part with anything on the faith of the instrument, and a decree that it shall be surrendered for cancellation restores the parties to the position which they held before the commission of the fraud. See *Pairo v. Vickery*, 37 Maryland, 461. But the court may still, in the exercise of a sound discretion, direct that the instrument shall stand as a security for the amount actually due; vol. 1, 824, 836; *Kennedy v. Kennedy*, 2 Alabama, 571; *Boyd v. Dunlap*, 1 Johnson Ch. 478; *Hunt v. Hunt*, 2 Beasely, 161; and such is the well settled rule where advances are made on the faith of such a deed; *McDonald v. Neilson*, 6 Johnson, 201, 2 Cowen, 139;

Harding v. Harding, 11 Wheaton, 103.

A grant or contract obtained by fraud or undue influence is invalid, not only between the parties, but as it regards third persons. One who knowingly profits by a wrong becomes *particeps criminis*, however innocent he may have been in the first instance. If A, by any of the forms of imposition, induces B to bestow his property on C, the latter cannot enforce the gift, although he took no part in the means by which it was procured. *Whelan v. Whelan*, 3 Cowen, 537; *Irwin v. Keen*, 3 Wharton, 347; *Gordon v. McCarty*, *Ib.* 407. In *Gordon v. McCarty*, a surety was not allowed to set up a release that had been procured by a fraud to which he was not privy; and where an assignment for the benefit of creditors, contained a fraudulent provision, that the fund should be appropriated in the first instance, to the payment of an alleged debt to one who had no claim against the assignor, the court set the whole aside; *Irwin v. Keen*. And it may be said in general that no one, be he near or remote, can justly found a claim of title on a voluntary instrument which is not the well understood act of the donor's mind; *Cook v. Lamotte*, Russell's Appeal, 25 P. F. Smith, 265; *ante*, 1189.

In *Whelan v. Whelan*, Woodworth, J., said "the next question is whether the fraud of William in procuring the deed renders it void as to Joseph, the other respondent. It is a general rule that, in ordinary cases of fraud, equity undoes

the whole transaction, and replaces the parties in their former situation; *Daubney v. Cockburn*, 1 Mer. 644.

The case of *Bennet v. Wade*, 1 Dickens, 84, is very much in point. The facts were briefly these: Sir John Leigh was seized of a large real estate; his mind was so weak that he was easy to be imposed upon; the defendant was a surgeon and apothecary, who attended him, took advantage of this weakness, and prevailed on him, then aged sixty, to marry Wade's daughter, aged sixteen, and to execute a settlement in favor of his daughter. The daughter dying soon after, Wade obtained a will from Sir John in his favor, and also indentures of lease and release, as he alleged, in consideration of the will. After the testator's death, Wade set up the deeds, under which the defendants claimed beneficially, and they entered on the estates. A part of the estate was conveyed to Wade in fee; a bill was filed to set aside the deeds, and a cross-bill to establish them. It was argued on the part of the plaintiffs that whatever fraud or imposition had been practised on Sir John Leigh by the defendant Wade, they were not privy to, or concerned in it; that it would be hard to involve the innocent with the guilty, and punish them by setting aside the deeds *in toto*. But Lord Hardwicke was of opinion that the deeds were founded in fraud, and being so, it vitiated the whole; that they were obtained from Sir John Leigh by fraud, imposition and circum-

vention, by means of the undue influence of the defendant Wade over his weakness; and that the same ought to be set aside. This case fully establishes the principle that the respondent, Joseph, cannot be protected. So, also, in *Davidson v. Russell*, 2 Dickens, 751, the question was, whether a deed could be set aside in part for fraud, and the rest established. Lord Thurlow was decidedly of opinion it could not. He directed the contract to be set aside, and observed there could be no hesitation, though it appeared that innocent persons were interested under it. This cause was afterwards reheard, and affirmed by Lord Loughborough in 1794. In *Huguenin v. Basely*, 14 Ves. Jun. 289, where the same doctrine is recognized. Lord Eldon observed, "I should regret that any doubt should be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition or undue influence of others." The case of *Bridgeman v. Green*, 2 Ves. 627, was considered by his Lordship as an express authority that it is within the reach of the principle of this court to declare that interests so gained by third persons cannot possibly be held by them. This last cause afterward came before the Lords Commissioners, and Lord Chief Justice Wilmut expresses himself thus:

"There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over

the plaintiff; but, does it follow from thence, that they must keep the money? No. Whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet it comes through a polluted channel, the obligation of restitution will follow it." Wilm. 64, 14 Ves. 289.

It is unnecessary to pursue this doctrine through all the cases to be found in the books. It is believed that the rule is firmly established. If it were otherwise—that a person could evade the principle, by giving interests to third persons, instead of reserving them to himself—it would be almost impossible ever to reach a case of fraud. The deed, then, is bad *in toto*, and must be set aside as to both the respondents." The same principle was laid down in *Gordon v. McCarty*, 3 Wharton, 497, 411.

For like reasons, where the testator appears to have been unduly influenced, it is not a sufficient answer that one or more of the legatees were strangers to the means employed, and the whole will be set aside, unless it is possible to distinguish the provisions which are the genuine expression of the testator's mind, from those which he was constrained to execute; *Davis v. Calvert*, 5 Gill & Johnson, 269, 302; *Floreys v. Florey*, 24 Alabama, 241.

CONFIRMATION AND ACQUIESCENCE.—If one who has been unduly influenced, deliberately confirms the deed or contract, a chancellor will not set that aside which the party has knowingly approved; see *Rogers v. Higgins*, 57 Illinois, 245; *Eyre v. Potter*, 15 Howard, 15; vol. 1, 824; *Moore v. Reid*, 2 Iredell Eq. 584. It is, nevertheless, essential to the validity of such a ratification, that the undue influence should have ceased, and that the complainant should be cognizant of his rights, and that he might avoid the act which he adopts; *Bergen v. Udall*, 31 Barb. 9, 33; *Boyd v. Hawkins*, 2 Dev. Eq. 215; *McCormick v. Malins*, 5 Blackford, 509; *Fish v. Miller*, 1 Hoffman Ch. 267, 281; *Long v. Mulford*, 17 Ohio, N. S. 484, 500. In the absence of proof, the presumption is that the relations of the parties are unchanged, and that the confirmation is due to the causes that induced the original transaction. It should not, moreover, be taken for granted, that one who has executed a formal instrument knows that the doors of a court of equity stand open for his relief, and it is on the contrary more reasonable to suppose, that he regarded the original contract as constituting an obligation from which there was no escape; see *Butler v. Haskell*, 4 Dessausure, 651, 696. In this case, the chancellor cited and relied on the English authorities as establishing, that to render the confirmation valid, it must appear that the complainant was free from

the necessity, overbearing influence, or blind confidence which induced the original agreement; that he was aware that he was not bound by it, but might be relieved; and nevertheless chose deliberately to abide by what he had done in the first instance; see *Murray v. Palmer*, 2 Schoales & Lefroy, 474; *Ardglass v. Muschamp*, 1 Vernon, 117; *Deloraine v. Brown*, Ib. 633; *M'Cants v. Bee*, 1 M'Cord Ch. 483; *Crow v. Ballard*, 3 Beavan, 237. Or as the principle has been elsewhere stated, he must not only be acquainted with the facts, but aware how those facts would be dealt with, if brought before a court of equity; *The Hoffman Steam Coal Co. v. The Cumberland Coal Co.*, 16 Maryland, 456; *The Cumberland Co. v. Sherman*, 20 Id. 117; *Pairo v. Vickery*, 37 Id. 469, 687, vol. 1, 237.

Long continued acquiescence is evidence of confirmation, and may, moreover, give rise to a distinct head of equity, arising from the presumption that the evidence which might have sustained the transaction has been lost through the lapse of time; *Jenkins v. Pye*, 12 Wharton, 241, 236, 258; *Morse v. Royall*, 12 Vesey, 355, 378, and in the case last cited Lord Erskine said, that the complainant had although "unintentionally put it out of the power of the court, to see the wrong with the distinctness that is requisite for judicial action;" *Villines v. Northfleet*, 2 Devereux Ch. 167. A chancellor will not therefore set aside a grant on the ground of un-

due influence, after an interval of many years, though short of the period fixed by the statute of limitations, unless the case is a clear one, and there are circumstances which sufficiently account for the delay; vol. 1, 825, *ante*, 1137; *Farnam v. Brooks*, 9 Pick. 245; *Jenkins v. Pye*, 12 Wheaton, 241; *Barnett v. Spratt*, 4 Iredell Eq. 171; *Michael v. Michael*, *Ib.* 369. But the bar is not an inflexible one, like that arising from the statute of limitations; and where the party is not emancipated from the undue influence during his life, or has not sufficient time to institute legal proceedings, and the right descends at his death on his infant heirs, the court may in the exercise of a just discretion afford relief after twenty-one years, or a greater lapse of time; *Sears v. Shafer*, 2 Selden, 268, 275; *Long v. Mulford*, 17 Ohio, N. S. 484, 508. And it is not less true of acquiescence than it is of confirmation, that the defence will not avail, unless the party knew that he was injured, and, that he might have a remedy; *Sears v. Shafer*; *Fish v. Miller*, 1 Hoffman Ch. 267, 281; *Long v. Mulford*; *Pairo v. Vickery*, 37 Maryland, 447, 489.

The question is to some extent one of circumstances, and in *Jones v. Smith*, 33 Mississippi, the acquiescence of the *cestui que trust* in the sale which he had made to the trustee, for nearly four years, and until the latter had parted with the property, was held to be a sufficient cause for the dismissal of the bill, there being no allega-

tions of actual fraud, although the consideration was inadequate.

In *Price's Appeal*, 4 P. F. Smith, 472, Jordan assigned his interest in certain real and personal property, in which his mother had a life estate, to his stepfather, Taylor. Jordan was then just of age, necessitous, and of intemperate habits, and the consideration for the transfer was grossly inadequate. This occurred in 1839, and Taylor died in 1857, leaving his wife, Jordan's mother, still in life, and having made a will by which he bequeathed all his estate to his own children. Jordan then alleged that the assignment was invalid, and claimed the fund as his own. The court was of opinion that if the transfer had been impeached within a reasonable time, it must have been set aside on the ground of undue influence and constructive fraud, but held, on the authority of *Jenkins v. Pye*, 12 Wheaton, 241, *ante*, 1204, that such relief could not be afforded after the lapse of twenty years, and when the opposite party had been removed by death. There was another aspect of the case which should not be overlooked. Putting a favorable construction on Taylor's motives, he must be presumed to have taken the property in trust for Jordan, to be administered for his benefit, when the circumstances should admit of it. There was no repudiation or denial of the trust on Taylor's part, before the appearance of his will, and Jordan was not chargeable with laches, for not making a claim that

could not be effectually enforced during his mother's life, nor until his residuary interest became vested in possession. It followed that the sum which had been paid by Taylor in the first instance, and his subsequent outlay and expenditures, should be deducted from the fund and the balance paid to Jordan.

The appropriate remedy for undue influence and constructive fraud, is in equity, and a legal tribunal cannot afford relief unless it has a two-fold jurisdiction, and can apply equitable principles through the forms of law; *Truman v. Love*, 14 Ohio, N. S. 144; vol. 1, 827.

A deed will not be set aside on the ground of fraud or undue influence, as against a *bona fide* purchaser from the grantee; *Somes v. Beaver*, 2 Pick. 184; *White v. Graves*, 107 Mass. 325; *ante*, 34, 1191, and for a like reason a *feme covert*, whose seals and acknowledges a deed, and suffers it to be delivered to the grantee, cannot afterwards avoid it on the ground that she was induced to execute it by fraud, or the undue influence of her husband, or of another co-grantor, unless the grantee knew of or participated in the fraud; *White v. Graves*; *Jamison v. Jamison*, 3 Wharton, 457. But this rule does not apply where the purchaser has actual notice that undue means are employed to constrain the wife; see *Williams v. Baker*, 21 P. F. Smith, 482; *Hall v. Patterson*, 1 Id. 289; *Souden v. Blythe*, 4 Harris, 532; *Schrader v. Dicker*, 7 Barr, 14.

WILLS.—It is not easy to define undue influence as applied to wills, but it may be said in general, that it must be such as to overcome the will, or control the judgment of the testator; *Floyd v. Floyd*, 3 Strobhart, 44; *Den v. Gibbons*, 2 Zabriskie, 117, 159; *Dunlap v. Robinson*, 28 Alabama, 100; *Gilbert v. Gilbert*, 22 Id. 529, 533; *Gardner v. Gardner*, 22 Wend. 526; *Tyson v. Tyson*, 27 Maryland, 568, although any influence which he is not strong enough to resist, and which, in effect, substitutes the will of another for his own, should be regarded as undue; *Davis v. Calvert*, 5 Gill & Johnson, 269, 302; *Baldwin v. Phillips*, 99 Mass. 79, 85; *Gardiner v. Gardiner*, 34 New York, 155, 162; *Gilbert v. Gilbert*, 22 Alabama, 529, 533. The question is, therefore relative, depending on the testator's mental and physical condition at the time; *Baldwin v. Phillips*, 99 Mass. 79, 86; *Shailor v. Bumstead*, 1b. 112, 121; *Waterman v. Whitney*, 1 Kernan, 157, 159. And the better opinion seems to be, that wherever influence is successfully employed to induce a testator to make a grossly unequal disposition of his property, or disregard the ties of blood without sufficient cause, it should be viewed as illegitimate, and may be treated as undue; *Davis v. Calvert*; *Newhouse v. Goodwin*, 17 Barb. 236; *Dean v. Negley*, 5 Wright, 312; *Boyd v. Boyd*, 16, P. F. Smith, 283, 293; *Clark v. Fisher*, 1 Paige, 171, 176; *Marvin v. Marvin*, 3 Abbott App. 193;

Roberts v. Trawick, 3 Alabama, 68, 85; 17 Id. 55.

It is not a sufficient ground for setting aside a will, that the testator has been led to make an inequitable disposition of his estate, by an inordinate partiality resulting from the kind and devoted attentions of the legatee; *Gardiner v. Gardiner*, 34 New York, 155, 162; *Van Alst v. Hunter*, 5 Johnson Ch. 148, 160; *Davis v. Calvert*, 5 Gill. 269, 301; *Brown v. Torrey*, 24 Barb. 583; *Small v. Small*, 4 Maine, 426; *Miller v. Miller*, 3 S. & R. 267, 270; *Brown v. Torrey*, 24 Barb. 283; *Wampler v. Wampler*, 9 Maryland, 540; *Higgins v. Carlton*, 28 Id. 118.

If a son or daughter, engrosses the affections of the parent, and thus induces him to disinherit his other children, a court may regret, but cannot rectify the result; *Clapp v. Fullerton*, 34 New York, 190; *Gardiner v. Gardiner*. It may not have been contemplated or desired by the legatee, and as his motives may have been sincere, so they should not be presumed to have been corrupt or interested; *Van Alst v. Hunter*; but where a child who has artfully prepared the way, obtains an unjust preference by solicitation or entreaty, it may fairly be inferred that the testator's judgment was designedly biassed, although he may not have been morally coerced. Under these circumstances there is at once a breach of confidence as it regards him, and a want of the fidelity which should be observed by persons of the same blood, in all that concerns the common

interest, and the will should be set aside as having been procured by undue influence; *Marvin v. Marvin*, 3 Abbott App. 195; *Harrell v. Harrell*, 1 Duvall, 103; *ante*, 1214.

In *Marvin v. Marvin*, 3 Abbott App. 193, a testatrix, eighty-one years of age, but of sound disposing mind, having two sons, one of whom had five children, after going to reside with the other son, revoked a previous will, by which she had divided her estate equally between her sons, and executed a new will, drawn by the one with whom she was living, and giving her estate to him to the exclusion of her other son and of her grandchildren. The court held that in the absence of any other sufficient or existing cause, for the substitution of an arbitrary and unequal disposition, for the equitable provisions of the former testament, it must be attributed to the suggestions of those who surrounded the testatrix, and were gainers by the change. This conclusion was strengthened by their refusal to permit the disinherited son to have a private interview with his mother. The will was accordingly set aside.

Threats of personal estrangement, or that if the testator does not make or alter his will in the way required, it shall be contested after he is gone, are clearly such a morally coercive force, as may, when applied to an aged or dependent parent, vitiate a testament which he is thereby induced to execute; *Moore v. Blauvelt*, 2 McCarter, 367.

The silent influence of the affections does not vitiate a will, although the effect is to confer a benefit on the person who is the object of the testator's preference, which would more justly have been bestowed elsewhere; *Small v. Small*, 4 Maine, 263; *Lowe v. Williamson*, 1 Green Ch. 82; *Floyd v. Floyd*, 3 Strobhart, 44; nor should a bequest be set aside, because the testator deferred in making it, to one whose intellect was superior or knowledge greater than his own; *Martin v. Teague*, 2 Sear, 260: and it was pointedly observed in *Small v. Small*, 4 Maine, 229, that a wife should not be denied the place accorded to her in her husband's will, because it was due to the ascendancy which she acquired by her virtues during his life. But this principle is not always a safe guide, where the party charged with having exercised his power unduly, obtains a disproportionate benefit under the will; see *Boyd v. Boyd*, 16 P. F. Smith, 283.

A bequest will not be set aside, because it is the result of an undue fondness for some of the members of the testator's family, or of a causeless dislike to others; *Clapp v. Fullerton*, 43 New York, 190; *Den v. Gibbons*, 2 Zabriskie, 117, 153; *Small v. Small*, 4 Maine, 220; *Floyd v. Floyd*, 3 Strobhart, 44; or because he passes them by, and bestows his property on a stranger, who though not of kin is nearer to his heart; *Farr v. Thompson*, Cheves, 37; *Lowe v. Williamson*, 1 Green Ch. 830. It is not the

province of a court to determine which of a man's friends or relatives, is best entitled to his regard, or should be preferred in his will. Within the circle of legitimate relations, the law does not measure the strength of the affections, or determine how much may justly be accorded to their demands; *Wampler v. Wampler*, 9 Maryland, 540; *Higgins v. Carlton*, 28 Id. 118; *Small v. Small*, 4 Maine, 220. But the influence of an unlawful relation is a very different thing, and may be a sufficient cause for the vacation of a will; *Denton v. Franklin*, 9 B. Monroe, 28. A bequest to the offspring of an adulterous intercourse, was set aside on this ground in *Dean v. Negley*, 5 Wright, 311; and a similar decision may be found in *Davis v. Calvert*, 5 Gill & Johnson, 269.

It was said, on the other hand, in *Monroe v. Barclay*, 17 Ohio, N. S. 302, that "no matter by what influence a testator may be exercised, so long as it does not overpower his inclinations and judgment, and induce a disposition of his property contrary to his own wishes and desires, his will cannot be invalidated by undue influence." And it was held to follow, that where no such constraint is imposed, it is immaterial whether the influence is a lawful one, or unlawful, as arising from an adulterous connection. A will by which a woman disinherited her sister, and bequeathed all her estate to a man with whom she was living in adul-

tery, was accordingly sustained, although the judgment of the testatrix had been impaired by drunkenness and excess of every kind. Similar language was held in *Farr v. Thompson*, Cheves, 37.

It would seem to follow from these judgments, that the only "undue" influence, is an influence which constrains the volition of the testator, and that if by ministering to his appetites and passions, or exciting his desires, he can be induced by will to make an unjust and inofficious will, the court must blindly give effect to the purpose so declared. There appears to be no sufficient ground for such a radical distinction between the law of undue influence, as applied to wills and deeds. In both cases the question should be not merely what was the donor's intention, but how that intention was produced, and if it appears to have arisen from the arts, intrigues, or inducements of one who was actuated by an interested or wrongful purpose, there is a sufficient ground for setting aside the will, *ante*, 1194.

The rule laid down in *Dean v. Negley*, does not preclude a father from making a reasonable testamentary provision for his natural children, at all events where he has no legitimate descendants; *Dunlap v. Robinson*, 28 Alabama, 100; *Rudy v. Ulrich*, 19 P. F. Smith, 177. And this seems to be all that can justly be inferred from *Farr v. Thompson*; where one who had no wife or lawful children, and was not on good terms with his relatives, left his

property to a woman with whom he cohabited, as a means of providing for the support of their offspring, and the court sustained the bequest.

In *Parfitt v. Lawless*, 2 L. R. P. & D. 462, the testatrix devised a large estate, charged with some inconsiderable legacies, to the plaintiff, a priest of the Roman Catholic Church, who had resided with the deceased and her late husband as domestic chaplain, and was her confessor during the greater portion of that time, and when the will was executed. She had no children, nor was there any one to whom she stood in *loco parentis*, but she was surrounded by relatives and friends whom she regarded with affection. The plaintiff knew, from what she told him, that she probably had power to dispose of the estate, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney, and he told her. This attorney was the person who afterwards made the will. She told the plaintiff at some time, that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time, legacies that she wished

paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will, which was made after two of them at least, had been thus noted by the plaintiff. The jury were directed to find a verdict for the plaintiff, and the defendant moved for a new trial, which was refused, on the ground that there was no evidence of undue influence. The facts were quite as consistent with the testatrix having told the plaintiff what she had done, after she had done it, as with the plaintiff's having had any hand in doing it; and there was no one of them from which a "reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will. Still less did it appear, that the plaintiff not only advised that the estate should be left to him, but forced this disposition upon the unwilling testatrix? Yet this was what the defendant must prove to maintain the issue on his part. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside the will, so long as the free volition of the testatrix to accept or reject that advice was not invaded."

A rule having been granted in order to consider a suggestion that the rules adopted in the courts of equity in relation to gifts *inter vivos*, ought to be applied to the making of wills. Lord Pensance said, "In equity persons standing

in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions, when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the *onus* was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth in *Boyse v. Rossborough*, 6 H. L. 49, that where once it has been proved, that a will has been executed with due solemnities by a person of com-

petent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos*, there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in, or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burthen of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos*, it is considered by the courts of equity, that the natural influence which such relations as those in question

involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it, are, therefore, set aside, unless the party benefited by it can shew affirmatively, that the other party to the transaction was placed "in such a position, as would enable him to form an absolutely free and unfettered judgment;" *Archer v. Hudson*, 7 Beavan, 551.

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion, destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that

the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear;" *Williams' Executors*, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will or legacy, is all-important when a question arises of making presumptions, or adjusting the burthen of proof. For it may be reasonable enough to presume, that a person who has obtained a gift or contract to his own advantage, and the detriment of another by way of personal advice or persuasion, availed himself of the natural influence which his position gave him. And in casting upon him the burthen of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated, has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust, to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence."

* * * * In testamentary cases

"undue influence is always defined as coercion or fraud, but *inter vivos* no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, as tutor and pupil, guardian and ward, &c., the courts of equity hold that the weaker party shall be protected; and they set aside his gifts if he had not proper advice independently of the other. It is assumed he may have overreached; that is far short of being coerced."

It was declared in like manner in *Zimmerman v. Zimmerman*, 11 Harris, 375, that "when a will duly executed is offered for probate, the law presumes competency in the testator, and that the instrument expresses his free and unconstrained wishes in regard to the disposition of his property. This presumption may be rebutted by showing to the satisfaction of a jury, that the will was obtained by fraud and imposition practised on the testator, or by duress, or by undue influence. What constitutes undue influence, is a question which must depend very much on the circumstances of each case. It is in its nature one of those inquiries which cannot be referred to any general rule. Yet many principles have been settled by judicial decision, which properly applied, afford in most cases an adequate guide to a right decision of the question. Thus one has a right by a fair argument and persuasion to induce a testator to make a will in his favor; *Miller v. Miller*, 3 S. & R. 367. And it

is not sufficient to set aside a will to show declarations of the testator that he intended to make a different one, but that his wife had a high temper and interfered: *Moritz v. Brough*, 16 S. & R. 403. If a wife by her virtues has gained such an ascendancy over her husband, that her pleasure is the law of his conduct, such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of her family; though if that influence was specially exerted to procure the will in question, it might be sufficient to impeach it; *Small v. Small*, 4 Greenleaf, 220. Threats and flattery, which induce and coerce a testator to subscribe and execute the will, furnish sufficient ground for setting it aside; *Denslow v. Moore*, 2 Day, 12. A degree of importunity which deprives a testator of his free agency, which he is too weak to resist, and which renders the instrument not his free and unconstrained act, will invalidate a will; *Davis v. Calvert*, 5 Gill & Johns. 269. But the influence exercised must be such as to destroy free agency. Unless the jury are satisfied that such mental force has been exercised as prevented free agency, the influence exerted is not to be considered improper; *Browne v. Molliston*, 3 Wh. 138. To the same effect is the rule as laid down in Greenleaf Ev., vol. 2, sec. 688, where it is said that undue influence is not that which is obtained by modest persuasion, or by arguments addressed to the under-

standing, or by mere appeals to the affections; it must be an influence obtained either by flattery, excessive importunity, or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his free will, what he is unable to refuse."

In *Miller v. Miller*, 3 S. & R. 267, 269, it was said by Tilghman, C. J., and Duncan, J., "that procuring a will to be made, unless by foul means, is nothing against its validity." * * * "A will procured by circumvention will be set aside, but a will procured by honest means, by acts of kindness, attention, and by importunate persuasion which delicate minds would shrink from, would not be set aside on this ground alone."

Similar language was held in *Sequigne v. Sequigne*, 4 Abbott's App. 191. "Undue influence must be an influence exercised by coercion, or imposition, or fraud. It must not be such as arises from the influence of gratitude, affection, or esteem, but it must be the ascendancy of another will over that of a testator, whose faculties have been so impaired, as to subject him to the controlling influence of force, imposition or fraud; *Gardiner v. Gardiner*, 34 N. Y. 162; *Dean v. Negley*, 41 Penn. 312; *Small v. Small*, 4 Greenl. 220; *Trumbull v. Gibbons*, 2 Zab. 117. Moreover, the exertion of the influence upon the very act must be proved, and it will not be inferred from opportunity and interest;

Carroll v. Norton, 3 Bradf. 291, 320; *Clapp v. Fullerton*, 34 N. Y. 190."

It is accordingly not a sufficient objection to a will, that it was procured by persistent argument, persuasion, or entreaty; *Floyd v. Floyd*; *Rudy v. Ulrich*, 19 P. F. Smith, 177, 181. And it might be inferred from the language held in some instances, that constant and unceasing importunity is not proof, or as it would seem, evidence of undue influence, unless it also appears affirmatively, that the testator had not sufficient strength of purpose to silence the solicitations with which he was besieged; *ante*, 1209, *Tawney v. Long*, 26 P. F. Smith, 101; *Thompson v. Kyner*, 15 Id. 268. This can hardly be maintained as a universal proposition, and is clearly out of place, when such means are successfully employed to induce a weak or infirm man, to make a partial and unjust disposition of his estate; *Harrell v. Harrell*, 1 Duval.

Where a legatee obtains a preference, by a false statement concerning one who has a legal or paramount claim on the testator's bounty, there is a palpable fraud which avoids the bequest; *Deitrick v. Deitrick*, 5 S. & R. 207; but it was held in *Monroe v. Barclay*, 17 Ohio, N. S. 302, that relief ought not to be afforded on such grounds, unless the false representation was an immediate and efficient cause for the execution of the will.

From the language held in these instances, which accords with the main current of American deci-

sion, we may deduce the following inferences: 1st, that influence which would be undue in the case of a gift *inter vivos*, is not necessarily undue in that of a will; 2d, that influence is not ordinarily undue in the case of a will, unless it amounts to a moral coercion, suspending the free exercise of the testator's judgment, or substituting another's will for his own; 3d, that one may use the influence arising from a confidential relation, like that of attorney, parent, or guardian, to procure the execution of a will in his favor; 4th, that the existence of a confidential relation between the legatee and the testator, does not shift the burden of proof or render it incumbent on the legatee to prove that he did not unduly influence the testator; *Redfield on Wills*, 524 Ch. 10, sect. 38; *Gardiner v. Gardiner*, 34 New York, 155, 161; *Means v. Means*, 5 Strobhart Law, 167; *Tawney v. Long*, 26 P. F. Smith, 106, 115; *Brown v. Molliston*, 3 Wharton, 129, 138; *Tyson v. Tyson*, 37 Maryland, 567; *Wittman v. Goodhand*, 26 Id. 95; *Roe v. Taylor*, 45 Illinois, 485; *Seguine v. Seguine*, 4 Abbott's Ch. Appeals, 191; *Leeper v. Taylor*, 47 Alabama, 221; *Hall v. Hall*, 38 Id. 131; *Eckert v. Flowry*, 7 Wright, 346; *Turner v. Cheeseman*, 2 McCarter, 243; *Moore v. Plummatt*, Ib. 367; *Clarke v. Davis*, 1 Redfield, 249; *Hoge's Estate*, 2 Brewster, 450; *Robb v. Graham*, 43 Indiana, 1; *Lee v. Lee*, 71 North Carolina, 139.

Within certain limits these propositions are just, but there is a

point where they cease to be applicable. In the case of a gift, the donor relinquishes what the donee receives, while one may acquire the consideration or regard of those who are to come after him, through the execution of a will, without parting with anything that it is possible for him to retain. Hence a parent may persuade his child to bequeath his whole estate, without incurring the censure to which he would be liable, if he were to induce him to make a deed of gift. It does not necessarily vary the case, that the bequest is in favor of the parent, if there is no one who has an equal claim on the bounty of the child; see *Parfitt v. Lawless*, L. R. 2 Probate & Divorce, 462, 469; *Gaither v. Gaither*, 20 Georgia, 709. And so of a bequest from a sister to a brother, from a husband to a wife, or from a penitent or client, to his confessor or attorney. It is always allowable to employ argument, persuasion, or even importunity, to induce one to do that from which no rule of law or morals bids him to refrain, and within this limit influence does not vitiate a will; *Roe v. Taylor*, 45 Illinois, 485, 491; *Chandler v. Ferris*, 1 Harrington, 454, 464; *Parfitt v. Lawless*, L. R. 2 Probate and Divorce, 462, 469. But an attorney who should, by advice, suggestion, or entreaty, induce his client to bequeath the bulk of his estate to him, to the exclusion of his wife and children, would be justly chargeable with undue influence, although it did not amount to a "coercion or

dominion exercised over the testator against his will," or a coercion or dominion so strong that it could not be resisted; *In re Welsh*, 1 Redfield, 238. Nay, more; such an adviser might well be regarded as within Lord Eldon's "great rule," that he who bargains in a matter of advantage with a person who places confidence in him, is bound to show that a reasonable use has been made of that confidence, which is confessedly broad enough to comprehend gifts *inter vivos*, and should seemingly include testamentary gifts, and donations *causa mortis*; see *Boyd v. Boyd*, 16 P. F. Smith, 283, 293. To induce one to make an "inofficious" will, is not less culpable than to induce him to denude himself by a voluntary gift; *Newhouse v. Goodwin*, 17 Barb. 236. In the latter case the injury is direct to the grantor; in the former through him to others; but the person who prompts the act is morally responsible in both. And where such advice is given from interested and selfish motives, by one on whom the testator habitually relies, or to whom he has recourse for information and advice, there is a flagrant breach of confidence which should not go unredressed; *Newhouse v. Goodwin*; *Harvey v. Sullens*, 46 Missouri, 147; *Harrell v. Harrell*, 1 Duvall, 203; *Denton v. Franklin*, 9 B. Monroe, 28; *Boyd v. Smith*, 16 P. F. Smith, 283.

The burden of proof is not so easily determined. Lord Penzance intimated, in *Parfitt v. Lawless*, that as there are two parties to a gift, and but one to a will, an

explanation may be demanded in the former case, which it would not be just to require in the latter; and a similar view was taken in *Lee v. Lee*, 71 North Carolina, 139; yet it is obvious that a legatee may, and not unfrequently does, take an active part in procuring the execution of a will, while a gift may be perfected by a transfer on the books of a corporation, or the execution and recording of a deed, without the knowledge of the donee, and his assent presumed afterwards as to an act done for his benefit. The question seems to be one of fact in both cases, and all that can ordinarily be asked of the beneficiary in either, is to show that he had no voice in the transaction, or, if he had, that his advice was free from taint or bias, or that the donor had the benefit of a full and free consultation with some disinterested third person. If any one of these heads appears with sufficient clearness, it will not be requisite for him to go further, unless there is some direct proof of undue influence. See *Ashwell v. Lomi*, 2 L. R. Probate & Divorce, 477; *Crispall v. Dubois*, 4 Barb. 393.

It has also been said, that the presumption against a voluntary deed is stronger than it can well be in the case of an inofficious will, because men are less careful for those who are to come after them than for themselves. The history of life insurance shows that this is not a universal rule, but if the remark were just, it would simply weaken the presumption, not exclude it. There are

few things in which mankind more generally agree, than in the wish that their property should devolve after death on their descendants, or in their default on some one who is of their lineage. That a will runs counter to this sentiment, is not a sufficient ground for ascribing it to undue influence. But when such a will is made in favor of one who is so placed as to have a controlling power over the testator's mind, it is not unreasonable to require him to show, that he did not bring about a result that would not have ensued in the normal course of events. *Boyd v. Boyd*, 16 P. F. Smith, 283, 293; *Newhouse v. Goodwin*, 17 Barb. 236.

In *Newhouse v. Goodwin*, the court said that the mere circumstance, that the parties stood in the relation of client and attorney, "called for great circumspection," and that as there was the super-added proof that the testator had left his wife destitute, and given all his estate to his attorney, there was a clear ground for vacating the devise.

The weight of authority accordingly is, that although the mere existence of a confidential relation does not shift the burden of proof, yet where the will is one which the testator could not make consistently with the claims of duty and affection, and therefore, presumably, would not have made if he had been left to the dictates of his own judgment, the bequest should be pronounced invalid, unless some evidence is adduced which overcomes the unfavorable influ-

ence arising on the face of the transaction; *Meek v. Perry*, 36 Mississippi, 196; *Harvey v. Sullens*, 46 Missouri, 146; *Garvin v. Williams*, 44 Id. 465; *Breed v. Pratt*, 18 Pick. 155; *Morris v. Stokes*, 21 Georgia, 552; *Conant v. Jackson*, 16 Vermont, 335, 363; *Tyler v. Gardiner*, 35 New York, 559, 554; *Kinne v. Johnson*, 60 Barb. 78; *Lake v. Renney*, 38 Id. 68; see *Nixsen v. Nixsen*, 3 Abbott App. 360, 373.

The question is nevertheless, whether the bequest was the voluntary and well understood act of the testator's mind; and an attorney is not precluded from accepting a testamentary gift, as he might be, if it were *inter vivos*, because in the latter case the donor denudes himself, while in the former he has the satisfaction of disposing of that which he can no longer use; see *Ingram v. Wyatt*, 1 Haggard, 348, 3 Id. 167; *Meek v. Thomas*, 36 Mississippi, 190, 257; *Parfitt v. Lawless*, 2 L. R. Probate and Divorce, 462, 465, 469; *Limburger v. Rauch*, 2 Abbott Pr., N. S. 279; *St. Leger's Appeal*, 34 Conn. 434. And it has been held in New York, that the naked fact of the testator's preferring the relatives or descendants with whom he resides, to others at a distance, does not render it incumbent on them to disprove undue influence; *Ramson v. Brinckerhoff*, 8 Paige, 491; 26 Wend. 327, 340; *Clapp v. Fullerton*, 34 New York, 190; *Nixsen v. Nixsen*, 3 Abbott App. 360.

Whatever may be thought on

this head, it is clear that where an arbitrary and unjust will, is made in favor of one, who, as child, attorney, nurse, or guardian, might have influenced the testator's mind, slight evidence that he exercised his power may suffice to invalidate the will; *Coleman v. Robertson*, 18 Alabama, 84; *Roberts v. Trawick*, 13 Id. 68, 85; 17 Id. 55; *Gilbert v. Gilbert*, 22 Id. 519; *Harvey v. Sullens*, 46 Missouri, 147; *Harrell v. Harrell*, 1 Duvall, 203; *Patterson v. Patterson*, 6 S. & R. 53; *Tyler v. Gardiner*, 35 New York, 559, 587; *Van Pelt v. Van Pelt*, 30 Barb. 134; *Lynch v. Clements*, 9 C. E. Green, 431; *O'Neil v. Murray*, 4 Bradford, 311; *Boyd v. Boyd*, 16 P. F. Smith, 283.

In *Boyd v. Boyd*, an aged man, "infirm of body, and certainly not of a strong mind, exceedingly illiterate, and during the latter years of his life, giving indications of folly or excentricity," requested David Longenecker, his constant business adviser, to draw his will. Longenecker accordingly prepared an instrument which the testator signed, bequeathing part of his estate to the testator's wife, part to his child, and the residue, amounting to nearly one-third of the whole, to the executors, of whom Longenecker was one. The will also contained a legacy to Longenecker's son. Longenecker released his interest under the will, which was propounded by the other executor, John Boyd. It was alleged on behalf of the contestants, that if the testator was not unduly influenced, he had

not been justly counselled, and that Longenecker did not sufficiently acquaint him with the amount which the executors would receive under the bequest to them. Agreeably to Longenecker's testimony, the will was drawn in accordance with the instructions of the testator, and the latter made an estimate of his estate, and knew the amount which the executors would take as residuary legatee.

The court held that it did not sufficiently appear that this estimate was full and accurate, and that Longenecker should have explained the case to the testator, and "placed before him a calculation showing what the residue left to the executors would probably be." The circumstances gave rise to a "presumption that he had taken advantage of the confidential position which he occupied as adviser and scrivener, to secure substantial benefits to himself and his family, and rendered it incumbent on the proponent to show that the provisions of the will were fully explained and understood by the testator, and fully assented to by him." Sharswood, J., said: "Undue influence is very nearly allied to fraud, yet it may be true that they are not identical, so that while undue influence comprehends fraud—fraud by no means embraces every species of undue influence; Redfield on Wills, 510, N. A person, for a very disinterested purpose, and because he sincerely believes that it is the duty of a testator to make a will of a particular character, may carry his persuasion and influence be-

yond that point which is legitimate. Yet it would hardly deserve so harsh a name as fraud. But where the end and purpose of the influence is the benefit of the party employing it, it is not easy to distinguish and save it from that imputation. Hence, when the party upon whom rests the charge, derives none, or a very inconsiderable benefit from the will, there must undoubtedly be evidence of direct influence exerted at the time of making the will; such as in effect to destroy the free agency of the testator; *Eckert v. Flowry*, 7 Wright, 46. But where, being an entire stranger—having no claims from lawful relationship—he derives a very considerable benefit from the act, such direct proof ought not to be, and is not required. Such was the case of *Dean v. Negley*, 5 Id. 312. General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption, which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefited stands in a confidential relation to the testator. "Where the party," says Mr. Redfield, "to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. Thus, where a will was written by

an attorney or solicitor, who was to be benefited by its provisions, it was considered that this circumstance should excite stricter scrutiny, and required clearer proof of capacity, and the free exercise of voluntary choice;" Redfield on Wills 515, citing *Duffield v. Robeson*, 2 Harring. 384. Undoubtedly if the counsel of an old man whose mental faculties are impaired, though not destroyed, by advanced age, should draw for him a will giving to himself the bulk of his estate, or a very considerable part of it, it would not be enough to show the formal execution of the paper in the presence of two subscribing witnesses called in for the purpose. He must go further, and rebut the presumption by some evidence that the disposition made was the exercise of the free will of the testator. "The existence of the fiduciary relation," says Mr. Redfield, "does not annul the testamentary act in favor of the attorney by his client; but such fact calls forth watchfulness, lest some improper influence may have been exercised. There should be very clear evidence of mental capacity and proof independent of the factum that the mind free and unbiassed accompanied the act;" Redfield on Wills, 529.

Some of the decisions indicate a different rule, under which any means may be used to induce a father to disinherit his child, or make an unequal disposition of his property, which fall short of fraud, and do not so completely subjugate the testator's mind, as to de-

stroy his free agency in making the will; see *Eckert v. Flowry*, 7 Wright. 46, 51; *Tawney v. Long*, 26 P. F. Smith, 106, 115; *Browne v. Molliston*, 3 Wharton, 129, 138; *Monroe v. Barclay*, 17 Ohio, N. S. 302; *Parfitt v. Lawless*, L. R. 2 Probate & Divorce, 462, 470; *Moritz v. Brough*, 16 S. & S. 403, 408; *Gilbert v. Gilbert*, 22 Alabama, 529, 532; *Tyson v. Tyson*, 27 Maryland, 568. And in *Eckert v. Flowry*, it was held to be a sufficient cause for reversing the judgment of the court below, "that the instructions given to the jury, might have led them to infer that inducing the testatrix to disinherit her daughter was an improper influence, which if it was exerted would avoid the will." We may doubt the wisdom of a course of decision, which permits the members of a family to vie with each in an effort to obtain the first place in their father's will, by bringing importunity and persuasion to bear on his mind. Where such means are legally admissible, and age or infirmity gives an opportunity for their use, confidence is necessarily impaired while the parent lives, and litigation may ensue after he is gone.

In *Clapp v. Fullerton*, 34 N. York, 190, the testator when in his seventy-eighth year, and with a mind debilitated by disease, revoked a former will which made an equal disposition of his property, and bequeathed the whole of it to his younger daughter, with whom he was then living. The explanation of this change of purpose, lay far back in some

words which had been uttered by his wife during the brain fever which terminated her existence, and which implied that their eldest child was not legitimate. They made so little impression on him at the time, that this child held a first place in his affections for more than forty years, and until in extreme old age, he began to suspect the fidelity of her mother. This occurred while he was residing in the house of his younger daughter, who took no means to remove the false impression, and seems to have encouraged it, until it resulted as above described. The court came reluctantly to the conclusion that there was not sufficient evidence of undue influence. Porter, J., said, "the mind is involuntarily predisposed against the will by its apparent inequality and injustice. Many of the circumstances surrounding the transaction cloud it with grave suspicion. The strong probability is, that the testator's false impression in regard to his wife, received encouragement from those who should have been the first to disabuse him of his error. It appears, from the testimony of his sister, Mrs. Wilson, that even after his death, the proponent affected to credit the scandalous imputation; though it would seem, from the nature of the case, that the only absolute assurance she could have, either of her own or her sister's legitimacy, was the purity of the mother whose honor she seemed ready to impugn. We do not think the proof of undue influence rises to a degree of strength which would justify the re-

jection of the will." This decision is questionable, because if "opportunity and interest" were not of themselves enough to shift the burden of proof, they should have had that effect, when coupled with the fact that the devisee had fostered the delusion which every filial sentiment should have prompted her to dispel. And such should clearly have been the judgment, in view of the antecedent will, which having been made two years previously, and when the circumstances were the same, afforded an unerring guide to the unbiassed intention of the testator.

A will should not be vacated on the ground of undue influence, unless it was an efficient cause, without which the devise would not have been made; *Shailer v. Bumsted*, 99 Mass. 112, 121. It is of little moment that the testator was solicited to do that, to which he would have inclined from duty and affection. For a like reason, the influence must be a present and controlling motive at the time, and it is not enough to show that the testator had been subjected to a moral pressure at a former period, if the constraint was removed and he was free to follow his own judgment; *Mahon v. Ryan*, 8 Harris, 329; *Monroe v. Bewley*, 17 Ohio, N. S. 302, 318; *Dean v. Negley*, 7 Wright, 312, 317; *Eckert v. Flowry*, 7 Wright, 46; *Shailer v. Bumstead*, 99 Mass. 112; *Thompson v. Ryner*, 15 P. F. Smith, 366; *Tawney v. Long*, 26 Id. 106, 115. It is essential, said Woodward, J., in *Mahon v. Ryan*, "to a good testament that the mind of the testa-

tor in the making of it be free, and not moved by fear, fraud, or undue flattery; and, therefore, "if a man, by occasion of some present fear or violence, or threatening of future evils, do at the same time, or afterward, by the same motive (that is, when acting under that influence), make a testament, it is void, not only as to him that put him so in fear, but as to all others, albeit the testator confirm it with an oath;" *Touchstone*, 405. It must be a present constraint, operative on the mind of the testator in the very act of making the testament. Threats and violence, or any undue influence long past and gone, and in no way shown to be connected with the testamentary act, are not evidence to impeach a will."

It might be inferred from the language held in *Eckert v. Flowry*, that a perverse and officious use of persuasion or argument, by which a parent is induced to resolve on disinheriting his child, is not a sufficient ground for setting aside the will, if it is not made until a subsequent period when there is no immediate pressure. This is carrying the proposition very far, because the mind may be so effectually prepossessed or prejudiced, as to preclude the exercise of an unbiassed judgment. One who has been thus influenced may seem to be a free agent, but is really as much the tool or instrument of him whose advice he follows, as if the latter were over shadowing him at the time; see *Ream v. Parthemere*, 8 Barr, 460. There is some presumption that

what is proved to have existed, continues; and it was justly observed by Coulter, J., in *Ream v. Parthemere*, that an impression once made, may become rooted by the lapse of time.

The weight of authority accordingly seems to be, that it is immaterial when the undue influence was applied, if it continued to operate as a controlling cause at the making of the will; *Taylor v. Williams*, 20 Missouri, 306; *Davis v. Calvert*, 5 Gill & Johnson, 269.

The rule is not so stringent as to require that the proof of undue influence should be confined to the time of the execution of the will. It is sufficient that the will was executed afterwards, under the control of such influence, and that by reason of it, the testator was deprived of the free agency indispensable to the making of a valid testamentary disposition of his property; *Davis v. Calvert*, 5 Gill & J. 269; *Roberts' Ex'r v. Trawick*, 17 Ala. 58; *Bunyard v. McElroy*, 21 Id. 311, 316. So proof that a son imperiously told his father sometime prior to the execution of the will, to "shut up and not make so much noise," and that the father obeyed, may be admissible as showing that the son had both the power and the disposition to exercise a controlling influence over the father's mind; *Lewis v. Mason*, 109 Mass. 169.

BURDEN OF PROOF.—The burden of proof is, ordinarily, on him who alleges undue influence, and he must show why an instrument which has been executed with the forms required by law, should be

set aside; *Baldwin v. Phillips*, 99 Mass. 79; *Shailer v. Bumstead*, 1b. 112; *McKeon v. Barnes*, 108, Id. 344; *Zimmerman v. Zimmerman*, 11 Harris, 577. So the weight of authority is, that the testator should be presumed to have had a sound, disposing mind and memory, unless enough appears to warrant a different inference; *Den v. Gibbons*, 2 Zabriskie, 117, 155; *Sloan v. Maxwell*, 2 Green Ch. 581; *Tallow v. Tallow*, 4 P. F. Smith, 231; *Earn v. Snyder*, 46 Barb. 230; *Brown v. Middleton*, 3 Wharton 139; *Jackson v. King*, 4 Cowen, 207; *Brown v. Torrey*, 24 Barb. 583; *Delafield v. Parrish*, 25 New York, 9, 31, 66, 73, 97. *Brown v. Hutchison*, 26 Vermont, 38, 45; *Higgins v. Carlton*, 28 Maryland, 118, 141.

In Massachusetts, on the other hand, the testator's competency will not be taken for granted, and must be established by the party who propounds the will; *Crowningshield v. Crowningshield*, 2 Gray, 526; *Baldwin v. Phillips*, 99 Mass. 79; *Shailer v. Bumstead*, 1b. 112; *Nash v. Hunt*, 16, Id. 173; see *Delafield v. Parrish*, 25 New York, 9, 34.

The question was much considered in *Delafield v. Parrish*, where the majority of the court adhered to the rule as previously established in New York, but also seem to have agreed with Davies, J., that if upon "a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last

will of the deceased, the court is bound to conclude that the instrument is not entitled to probate." Thus considered, the presumption regulates the order of proof, while leaving the court free to decide according to the weight of the evidence. If the testimony for and against the testator's competency is equipoised, the heir or next of kin, should not be deprived of their common law and statutory right, by an instrument which may or may not be valid.

Although the unreasonableness, or injustice of a will, is not alone sufficient to render it invalid; see *Jackson v. Jackson*, 39 New York, *Gamble v. Gamble*, 37 Barb. 373; it may be taken into consideration in determining the testator's competency, and be one of several circumstances, which together prove that he was of unsound mind; see *Patterson v. Patterson*, 6 S. & R. 55, 57; or subject to some undue influence which prevented the exercise of an unbiassed judgment; *Neil v. Murray*, 4 Bradford, 311; *Clarke v. Fisher*, 1 Paige, 171, 177; *Lynch v. Clements*, 9 C. E. Greene, 431; ante, 1240.

"The court," said Chilton, J., in *Roberts v. Trawick*, 13 Alabama, 35; "should have admitted all testimony conducing to show the unnatural character of the will in controversy; that it deprived the most unfortunate of the testator's family from any participation in his bounty, is a circumstance, which, in connection with other circumstances, was proper to go to the jury. One question was,

whether the wife of the testator, had exercised such undue influence over his mind as to take away his freedom in the execution of his will. To establish this, it was competent for the contestants in connection with proof of facts or efforts on her part to induce its execution in a particular way, to show that the testator was old—was in feeble health—of weak mind—was unduly prejudiced by his wife against his children, and that his will was not such as a man influenced by the ordinary feelings which prompt us to provide for our offspring, would have made. On the other hand, it was competent to show that he had cause for rejecting the claims of his children, or that the influence exercised by the wife was but the ascendancy which her virtues gained over him. For to deny the legitimate exercise of such influence, would be to “rob virtue of her reward;” *Small v. Small*, 4 Green, 220.

The inquiry may take a wide range, and embrace every fact that is calculated to throw light on the provisions of the will, and show that they accorded with the testator's deliberate and long settled purpose; *Neel v. Potter*, 4 Wright, 483; *Norris v. Sheppard*, 80 Harris, 475; *Lewis v. Mason*, 109 Mass. 169, *Glover v. Hayden*, 4 Cushing, 580. Evidence that the will was made from deference to the wishes and request of the parent, from whom the property descended to the testator, is consequently admissible to disprove an allegation that the will was unduly

procured by the devisee; *G v. Hayden*, 4 Cushing, 580; a similar decision was made in *Neel v. Potter*.

WEAKNESS OF MIND.—There is no precise criterion of the mental capacity necessary for the execution of a will, although it has been said that the inquiry is—“whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged?” In other words, was he competent to recollect of what his property consisted, and determine who should possess it after his death? *Clarke v. Fisher*, 1 Paige, 37; *Nixsen v. Nixsen*, 3 Abbott's Rep. 370; *Den v. Vandeleur*, 10 Washington C. C. R. 267; *Lowe v. Gibbons*, 2 Zabriskie, 117, 118; *Lowe v. Williamson*, 1 Green, 82, 85. Some of the authorities assert, that less may suffice for a testamentary disposition, than would be requisite for the transaction of business, or to make a gift *inter vivos*; see *Stewart v. Lispenard*, 26 N. H. 255; *Blanchard v. Nestle*, 3 N. H. 37; *Clarke v. Sawyer*, 2 Conn. 498; *Harrison v. Rowan*, 3 Conn. 58. This question was gravely questioned in *Delafield v. Parrish*, 25 New York, 9, 28; and it would seem that one who has not sufficient capacity to execute a deed, is not competent to dispose of his property by will. The question is whether the act is testamentary *inter vivos*, but is it with full comprehension of the mind which it proceeds; *Green v. Grattan*, 330, 333. More

standing may no doubt be requisite for the negotiation of a contract of sale, than for the mere transmission of the title to real or personal estate, but this has no necessary connection with the difference between deeds and wills.

Weakness of mind is not less material in determining whether a will was procured by undue influence, than it is in the case of a deed, and if the bequest is unreasonable and disproportionate, and the testator was so placed that he might have been controlled by the legatee, it may be incumbent on the latter to prove that he did not exercise his power; *Bates v. Bates*, 27 Iowa, 110; *Delafield v. Parrish*, 25 New York, 9, 92; *Clarke v. Fisher*, 1 Paige, 171, 176; *Clarke v. Sawyer*, 3 Comstock, 498; *Rambler v. Tryon*, Sanford's Ch. 3, 51; 2 Barb. Ch. 411, 412; *Robinson v. Hutchinson*, 26 Vermont, 38, 46; *Ashwell v. Lomis*, L. R. 2 Probate and Divorce, 477. But this inference should not be drawn in the absence of direct proof, unless the legatee receives a disproportionate benefit under the will, or it is contrary to the testator's intentions as previously expressed; *Boyd v. Boyd*, 14 P. F. Smith, 283, 293.

DECLARATIONS OF TESTATOR.—

It has been held, that although the testator's declarations are a good, and, in some respects, the best criterion of his mental condition, they are not evidence of any other, or extrinsic fact; *Waterman v. Whitney*, 1 Kernan, 157; *Bates v. Bates*, 27 Iowa, 110; nor to prove that he was influenced or imposed upon in the making of the

will; *Irish v. Johnston*, 5 S. & R. 573; *Moritz v. Brough*, 16 Id. 403; *Robertson v. Hadlyme*, 8 Conn 254; *Waterman v. Whitney*; *Robinson v. Hutchinson*, 26 Vermont, 28; *Nelson v. McGiffin*, 3 Barb. Ch. 158; *McTaggart v. Thompson*, 2 Harris, 149, 154; unless they are made at the time, or so soon afterward as to be part of the *res gestæ*; *Smith v. Fenner*, 1 Gallison, 170; *Roberts v. Trawick*, 13 Alabama, 68. In *Smith v. Fenner*, the court said that such utterances want the sanction of an oath, and have no greater weight as proof of antecedent facts, than if they proceeded from a third person.

Agreeably to these authorities, the testator's allegations that the will was extorted by ill treatment or incessant importunity, may show that he was infirm of mind or purpose, but not that he was importuned or coerced. Thus, in *McTaggart v. Thompson*, 2 Harris, 149, 154, a declaration that "he had ruined his family, and that he was deceived and imposed upon by the persons who had induced him to make the will," were said to be admissible, because nothing could more clearly indicate fatuity, than to complain of that which could be remedied by simply burning the will; and a similar decision was made in *Bates v. Bates*.

The general rule that the declarations of one in possession of real or personal estate, are evidence against those who claim title under him, would nevertheless seem broad enough to include what is said either before or after the making of an instrument, which, like

a will, is ambulatory till death; 2 Smith's Leading Cases, 397, 7 Am. ed.; and see the dissenting opinion of Spencer, J., in *Jackson v. Kniffen*, 2 Johnson, 31, 36. The better opinion, consequently seems to be, that the testator's complaints that he was under moral or physical coercion, and could not do as he desired, or even of particular instances of importunity or ill treatment, may be received to show that the will was procured by fraud or undue influence; *Reel v. Reel*, 1 Hawks, 248; *Howell v. Borden*, 3 Devereux, 442; *Rambler v. Tryon*, 7 S. & R. 90, 93; *Bates v. Bates*, 27 Iowa, 110.

A charge of undue influence may be repelled by the testator subsequently declaring himself satisfied with the will, or that it was freely and voluntarily made; and when such evidence has been adduced, it may be counteracted by proof of subsequent expressions of a different kind; see *Nelson v. M'Giffin*, 3 Barb. Ch. 158; *Allen v. The Administrator*, 3 Bradford, 373; *O'Neale v. Murray*, 4 Id. 311; *Nixsen v. Nixsen*, 3 Abbott, App. 360.

It is generally conceded that any act or declaration of the testator, prior to the date of the will, which throws light on his intentions with regard to the disposition of his property, or indicates the state of his feelings and affections towards those who propound or contest the instrument, may be admissible when the question is one of fraud, undue influence, or weakness of mind; *Gilbert v. Gilbert*, 22 Alabama, 529;

O'Neale v. Murray, 4 Bradford, 311; *Dietrick v. Dietrick*, 5 S. & R. 207; *Iddings v. Iddings*, 7 Id. 111; *Neel v. Potter*, 4 Wright, 483; *Norris v. Sheppard*, 8 Harris, 475. In *Neel v. Potter*, the proponent was accordingly permitted to show that the testator had declared at intervals during a period of many years, that he intended to leave his farm in the name of Neel, as a means of showing that the will was not the result of undue influence, but had been made in pursuance of a long cherished resolve. So, in *Norris v. Sheppard*, proof that the testator lived on amicable terms with his sisters, and said, shortly before leaving home, that all that he possessed should go to them at his death, was held admissible to corroborate the presumption arising from the other evidence in the cause, that he was not of sound mind at the time of making the will, by which he subsequently bequeathed his property to a companion, who was with him during his last illness; *ante*, 1240.

Where the question is between a will as to which there is no doubt that it was a free and unbiassed expression of the testator's purpose, and one of later date which is executed under circumstances that are suggestive of undue influence, the burden of proof is on him who sets up the second instrument, and if the evidence is equipoised the former will should be sustained; *Delafield v. Parrish*, 25 N. Y. 959; *Tyler v. Gardiner*, 35 Id. 583; *Boyd v. Boyd*, 16 P. F. Smith, 283, 296; *Boyd v. Ely*, 8 Watts, 66, 72;

Marsh v. Tyrrell, 2 Haggard, 87, 110. In determining the question, the court may consider the nature of the first bequest, and whether there are any circumstances to explain or justify the testator's change of purpose. For a like reason, prior testamentary declarations are admissible to show what "the testator's intentions were when his understanding was clear, and before he was assailed by family intrigue;" *Irish v. Smith*, 8 S. & R. 573; *Norris v. Sheppard*, 8 Harris, 475; *Titlow v. Titlow*, 4 P. F. Smith, 216, 231; *Roberts v. Trawick*, 13 Alabama, 68; *Gilbert v. Gilbert*, 22 Id. 529, 533, *ante*.

WILL PREPARED BY LEGATEE.—

When a will is in the handwriting of one who derives a benefit under it, which exceeds his just pretension; *Newhouse v. Gardiner*, 17 Barb. 256; *Adair v. Adair*, 30 Georgia, 102; *Patton v. Allison*, 7 Humphreys, 320; *Harvey v. Sul-lins*, 4 Missouri, 147; *Boyd v. Boyd*, 16 P. F. Smith; or where he writes or dictates the instructions in accordance with which the will is drawn, it is incumbent on him to show that the purpose so expressed originated with the testator, and that his agency was limited to giving the testator's purpose shape and utterance, or transmitting it to the attorney or conveyancer by whom the paper was finally prepared for execution; *Ingram v. Wyatt*, 1 Haggard, 384; *Delafield v. Parrish*, 25 New York, 936; *Tyler v. Gardiner*, 35 Id. 559 596; *Newhouse v. Gardiner*, 17 Barb. 236; *Case v. Case*,

26 Mich. 484; *Davis v. Rogers*, 1 Houston, 44; *Brady's Appeal*, 16 P. F. Smith, 277, 280. This is not sufficiently established by evidence, that the will was read to the testator or perused by him, and that he affixed his signature, unless it also appears that he understood what he was doing, and was aware of the effect that it would produce; *Harvey v. Sul-lens*, 46 Missouri, 147; *Newhouse Gardiner*, 17 Barb. 236; *Boyd v. Boyd*, 16 P. F. Smith, 283, 295; *Lake v. Ranney*, 33 Barb. 49; *In re Welsh*, 1 Redfield, 238; *Tyler v. Gardiner*.

The presumption of undue influence is heightened, if the testator's family, or those members of it who are injuriously affected by the will, are not suffered to have access to him, or informed of what is taking place, and all the persons present are in the interest of the beneficiary, or careless of the result; *Tyler v. Gardiner*, 35 New York, 559, 593; *Crispell v. Dubois*, 4 Barb. 397.

It is not necessarily conclusive in favor of such a will, that the testator gave an intelligent assent to all the clauses and provisions, because this merely establishes that he was prepared to execute such an instrument, without showing how that intention was produced; *Tyler v. Gardiner*, 35 New York, 595; *Delafield v. Parrish*, 25 New York, 9; see *Case v. Case*, 26 Michigan, 484; *Brady's Appeal*, 16 P. F. Smith, 276, 280; *Newhouse v. Gardiner*. The case is not materially varied by proof that eminent counsel are called

in, who attest the testator's competency, and act as subscribing witnesses; and the only satisfactory answer is to prove that the testator had a full and free consultation with some professional or other adviser, who was concerned solely for him, and morally, if not legally, responsible for stating all the considerations that could enlighten his judgment, and enable him to arrive at a correct result; *Delafield v. Parrish*; *Tyler v. Gardiner*; *Boyd v. Boyd*, 16 P. F. Smith, 283, 295. These principles are not solely applicable to wills, but extend to voluntary deeds and instruments of gift, when the circumstances are such as to indicate that the donor was subject to the control or influence of the beneficiary, *ante*, 1193, 1225; *Case v. Case*; *Brady's Appeal*.

"Another significant and controlling feature of the case, in view of the helplessness and dying condition of Mrs. Gardiner," said Porter, J., in *Tyler v. Gardiner*, 35 N. Y. 559, 'is the fact that the written instructions for the will were prepared by the principal beneficiary. The rule of law on this subject is well settled. It has been repeatedly announced by this court, and perhaps nowhere with more precision and directness than by the present chief judge, in pronouncing judgment on the will of Henry Parrish. "The *maxim qui se scripsit haredem*," has imposed by law an additional burden on those claiming to establish a will, under circumstances which call for the application of that rule; and the

court, in such a case, justly requires proof of a more clear and satisfactory character. Such a condition is exhibited by the testimony in the present case. The two codicils under consideration were exclusively for the benefit of Mrs. Parrish, with the exception of the charitable gifts; and although they were not actually written by her, yet they were drawn up at her suggestion, upon her procurement, and by counsel employed by her. She prepared and gave the instructions for them, and, in judgment of law, they must be regarded as written by herself. '*Qui facit per alium, facit per se*;' " *Delafield v. Parrish*, 25 N. Y. 35.

In this case there is no proof or pretence that the instructions were either written or dictated by the testatrix. It appears, from the testimony of the draughtsman, that Mrs. Gardiner expected them to proceed from Mrs. Tyler and not from herself; and that she did not know, on the day the will was executed, whether such instructions were written or oral, though it is proved that they were written by the daughter two days before she transmitted them to the draughtsman. The use in the instructions of the mother's name is not evidence that they were dictated by her; and in the absence of such proof, upon the state of facts here shown, the legal presumption is that they were not so dictated, and that they were prepared by the party in whose handwriting they appear; *Ingram v. Wyatt*, 1 Haggard, 384, 439; *Croft v. Day*, 1 Curteis, 853, 856; *Baker v. Batt*,

Id. 125. In the case first cited, it was objected that the rule was severe in its operation, as the party who wrote the instructions could not testify; but the court said: "They are in the handwriting of Richard Wyatt, the father, a quarter as unfavorable, perhaps more so, as feeling a stronger interest than even Henry Wyatt himself. It has been said that Richard Wyatt was incapacitated by the state of his faculties from giving evidence; that he could not be examined; that he might have proved receiving these instructions from the deceased himself. That it is mere conjecture, which cannot compensate for proof. If the evidence is by accident defective, the misfortune, especially in such a case as the present, must fall upon the party upon whom the burden of proof lies;" 1 Haggard, 439. In the present case, even this consideration cannot be urged. Mrs. Tyler was at liberty to testify, but chose not to be examined, and to leave the matter as it stood.

Keeping in view, as we must, the dying condition of Mrs. Gardiner, at the time the transaction in question occurred, the force of the fact that the beneficiary wrote the instructions and originated the will is not necessarily overcome by the circumstance that they were afterwards accepted by the testatrix, and that she assented to the will in which they were embodied. The observations, in one of the opinions delivered in the Parrish case, are especially pertinent to this point. "The whole

evidence of the case," says the learned judge, "places him in a position, where an enfeebled intellect, though far from losing its intelligence and its capacity to do ordinary business, may well be presumed unequal to resisting reiterated importunities from one in her relative position. It would seem plain that she could have exercised an influence in regard to this codicil which would not leave him to the exercise of his own free will. Are there any circumstances in this case to show that she did so? Or, does it appear that, having the power, she gained a victory over her naturally excited feelings, and magnanimously forebore to use it? The whole burden of this codicil is for her benefit. Supposing that it was made under her control, *se scripsit hæredem*; nor, upon this supposition, would Mr. Lord's presence, and the fact that Mr. Parrish assented intelligently, and deliberately, and in detail, to the provisions of the instrument, relieve her from that position; for the influence was easily exercised, when once its subject had been brought to submit to it, and in a way not at all suspicious, a way not likely to be observed by one who had no idea of its existence." 25 N. Y. 92.

Thus Swinburne says, in commenting upon the effect of a testator's assent under similar circumstances: "It is to be presumed that the testator did answer yea, rather to deliver himself from the importunity of the defendant, than upon devotion or intent to make his will, because it is, for the

most part, painful and grievous to those that be in that extremity to speak or be demanded any question, and, therefore, as ready to answer any question almost, that they may be quiet; which advantage, crafty and covetous persons, knowing very well, are then most busy, and do labor with tooth and nail to procure the sick person to yield to their demands, when they perceive he cannot easily resist them, neither hath time to revoke the same afterward, being then passing to another world. And, therefore, worthily, and with great equity, is that to be deemed for no testament, when the sick person answereth yea, the interrogation being made by a suspected person, as well in respect of presumption of deceit in the one, as of defect of meaning of making a testament in the other. And this is true, especially when there is a former testament; for that is not to be revoked by a second testament, made at the interrogation of another in manner aforesaid." In a subsequent passage, he adds; "But, what if a will be brought to the sick man, which, being read over in his hearing, and he demanded whether the same shall stand for his will and testament, answereth yea, and it doth not appear whether the same was written and prepared by the direction of the sick man, or else of his kinsfolk and friends, whether it is to be presumed to have been prepared by his direction or by theirs? It seemeth, by the sick man, in favor of the testament; but, when it appeareth, indeed, to

have been made ready by others, then, albeit the testator, being interrogated, do answer as before, it is presumed that the question was made by the suggestion or onsetting of the executor, and so the testament is not good." Swinburne on Wills, part 2, § 25.

So far as the proof discloses, the first connection of the testatrix with this will was within eight hours of death. Its essential provisions are directly traceable to the written instructions, which were prepared three days before by the daughter, who thus secured to herself the bulk of the mother's estate.

When the principal beneficiary under a will, prepared for execution by a party worn down by disease and close upon the verge of death, assumes the responsibility of initiating it, of preparing formal instructions, of employing the draughtsman, of selecting the witnesses, of being present at every stage of the proceedings, and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is called upon, at such a time, to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator; *Delafield v. Parrish*, 25 N. Y. 35; *Lee v. Dill*, 11 Abb. 214; *Lake v. Rannev*, 33 Barb. 49; *Bergen v. Udall*, 31 Barb. 9, 25; *Crispell v. Dubois*,

4 Barb. 397; *Marsh v. Tyrrell*, 2 Haggard, 87, 110; *Barry v. Butlin*, 1 Curtis, 638.

The studied privacy attending the preparation and execution of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and the grandson of her mother's approach to death, are familiar and marked indicia of the exercise of undue influence, under circumstances like those developed by the evidence; *Crispell v. Dubois*, 4 Barb. 397; *Delafield v. Parrish*, 25 N. Y. 41, 42. Swinburne, with his usual quaint and pithy directness, speaks thus of the inferences deducible from this species of evidence: "If the wife, being made executrix, or any other person benefited by the testament, understanding that the testator is about to alter his will, will not suffer his friends to come unto him, pretending, peradventure, that he is fast asleep, or in a slumber, or the physician gave in charge that none should come to him, or pretending some other excuse, or else, all excuses set apart, do, for charity's sake, shut them forth of the doors; in these cases, the testament is void, in detestation of such odious shifts and practices." Swinbourne on Wills, part 7. § 18.

In the present case, all the controlling facts tend to one inevitable conclusion. When the antecedent and surrounding circumstances are grouped in their appropriate relations, they carry to the conscience and the understanding the clear conviction, that, when the

mother affixed her signature, she was executing the daughter's will. It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose, which the undue influence was employed to accomplish. That consideration was urged in the case of *Bridgman v. Green*; but Lord Chief Justice Wilmot very properly replied, that it only tended to show, more clearly, the deep-rooted influence obtained over the testator. He added: "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect with the deed or the will, are very material; but in cases of undue influence and imposition, they prove nothing, for the same power which produces one produces the other." Wilmot, 70. In the case of *Huguenin v. Baseley*, Lord Eldon said: "The question is, not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced." 14 Vesey, 299. In a case somewhat analogous to the present, where the relations of the parties were reversed, and the execution of a deed was obtained by undue influence of the parent over the child, Judge Emott said: "If the mind of the donor was brought to a purpose, preconceived by the parent for his own sole advantage, by an influence which she could not escape in the circumstances in

which she was placed, and which was deliberately used to effect such a purpose, then that influence, or its exercise, was undue and improper." 31 Barb. 25."

The question, nevertheless, is one of fact, and if it appears through any sufficient means of proof, that the instrument in question was the testator's will, it may be admitted to probate, although, it is in the handwriting of the principal legatee, or devisee, and it does not appear that the testator dictated the contents, or that it was read by him; *Coffin v. Coffin*, 23 New York, 9, 13; *Patton v. Allison*, 7 Humphrey, 320, 325; *Darling v. Loveland*, 2 Id. 225; *Barry v. Buller*, 1 Curteis, 6, 37; *Ingram v. Wyatt*, 1 Haggard, 384; 3 Id. 466; *Nixsen v. Nixsen*, 3 Abbott's App. 362; *Downing v. Murphy*, 1 Dev. & Bat. Law, 82, 92; *Crispell v. Dubois*, 4 Barb. 393. In the case last cited, the testatrix disinherited her brother, and devised all her property to her physician, charged with various charitable bequests. He prepared the will, and brought it to her for execution, and she signed it in his presence, and that of his wife, after every one else had left the room at his suggestion. She did not read the will, nor was there

any direct evidence that she knew what it contained. On the other hand, it was proved incontestably that the testatrix was in the full possession of her faculties, that she was not on good terms with her brother, and that she had repeatedly declared her intention to make such a will. The case was submitted to the jury who found in favor of the will, and the court refused to set aside the verdict, although, intimating that they would have been better satisfied if it had been the other way. Harris, J., cited, and relied on the language of Baron Parke, in *Bullin v. Barry*; "It cannot be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over, the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence. In some cases it might be impossible to establish a will without it, but it has no right in every case to require it."

*EARL OF OXFORD'S CASE.¹

[*601]

[REPORTED 1 CH. REP. 1.—13 JAC. 1.]

JURISDICTION OF EQUITY AS TO PROCEEDINGS AT LAW.]—*Principles on which equity restrains proceedings under a judgment obtained at law.*

MAGDALEN COLLEGE, 39 Hen. 8, seised in fee of the Rectory of Christ's Church, and the Covent Garden, without Aldgate, London, containing seven acres, demised them for seventy-two years, rendering 40*l.* per annum for the rectory, and 9*l.* for the Garden. And 17 Eliz. (fifty years of the said lease being expired), the Queen, at the suit of the said College, licensed them to alien, which they did, and then received for the rectory 25*l.* per annum, and 15*l.* for the garden. It being her Majesty's intent that the College should be advanced greatly in profit, by having the Rectory to them and their successors, discharged of the lease for years, which in present was worth to them but 50*l.* per annum, the utmost rent; the same was accordingly performed by a conveyance to her Majesty, and by her Majesty to Spinola and the Rectory, from Spinola to the College; after which, Spinola and the Earl of Oxford, his assignee, and his under tenants, have built upon the Garden one hundred and thirty houses, and therein bestowed 10,000*l.*, which assignee and his under tenants have bonds and security given for the enjoyment thereof, to the sum of 20,000*l.*

Note.—The College is hereby advanced 1,700*l.* more than they should have been if the former lease had continued, which is not yet expired.

This conveyance having been in peace forty years, and thus advanced by the purchasers from a thing of little value to a great and considerable one; and it being a *general case wherein persons of all degrees and callings have made purchases, [*602] they resting secure on its passing through the Crown, the greatest protection.

The present Master of the College having by undue means obtained the possession of one of the one hundred and thirty houses, whereof one Castillion was lessee, who, being secure of his title, both in law and equity, sealed a lease thereof for three years to one Warren, who thereupon brought an ejectment against one John Smith, for trial of the title in B. R. Wherein a special verdict was had; and while that depended in argument the lease ended, and so no possession could be awarded for the plaintiff, nor fruit had of his suit.

Yet he proceeded to have the opinion of the Judges to know the law (which was a voluntary act of his), to the intent, if the

¹ S. C. Toth. 126 (edit. 1828), nom Comes Oxon v. Neeth.

law were with him, he might begin a new suit at law, and spare to proceed in equity, and if the law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their opinions against his title, before any judgment entered upon the roll, the Earl and Mr. Wood, for themselves and their lessees, preferred their bill in Chancery; and then judgment was entered, *quod querens nil capiat per billam*.¹

To which bill in Chancery the defendant put in a plea and demurrer, alleging the conveyance to be void by the statute of 13 Eliz., and that they evicted one house, parcel of the premises, by judgment at law: which plea and demurrer were referred by order to Sir John Tindal and Mr. Woolridge, who reported that they thought it fit the cause should proceed to hearing, notwithstanding the plea and demurrer; and afterwards, in default of an answer, an attachment was awarded against the defendants, whereupon they were attached, and a *cepi corpus* returned, and by order of the 22nd of October, 13 Jac. 1, they were committed to the Fleet for their contempts in refusing to answer; and do now stand bound over to answer their contempts, they still refusing to answer.

And now this term it was argued, that the defendants
[*603] *thus standing in contempt, &c., may be sequestered until answer.

LORD CHANCELLOR ELLESMERE.—1. The law of God speaks for the plaintiff, Deut. xxviii.

2. And equity and good conscience speaks wholly for him.

3. Nor does the law of the land speak against him. But that and equity ought to join hand in hand in moderating and restraining all extremities and hardships.

By the law of God, he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof; and it was a curse upon the wicked, that they should build houses and not dwell in them, and plant vineyards and not gather the grapes thereof. Deut. xxviii. 30.

And yet here in this case, such is the conscience of the doctor, the defendant, that he would have the houses, gardens, and orchards, which he neither built nor planted; but the Chancellors have always corrected such corrupt consciences, and caused them to render *quid pro quo*; for the common law itself will admit no contract to be good without *quid pro quo*, or land to pass without a valuable consideration; and therefore equity must see that a proportionable satisfaction be made in this case.

As in the case of *Peterson v. Hickman*, the husband made a lease of the wife's land, and the leasee being ignorant of the defeasible title, built upon the land, and was at great charge therein; the husband died, and the wife avoided the lease at law, but was compelled in equity to yield a recompense for the building and better-

¹ See Magdalen College Case, 11 Co. 66.

ing of the land. For it was so much the more worth unto her : and wheresoever one hath a benefit, the law will compel him to give a recompense, as if cestui que use sell the land to one that hath no notice of the use, and dieth ; by reason that he had the benefit of the sale, his executors were ordered to answer the value of the land out of his estate, as appeareth by a judgment roll of 34 Hen. 6.

And his Lordship, the plaintiff in this case, only desires *to be satisfied of the true value of the new building and planting since the conveyance, and convenient allowance [*604] for the purchase.

And equity speaks as the law of God speaks ; but you would silence equity.

First. Because you have a judgment at law.

Secondly. Because that judgment is upon a statute law.

To which I answer,—

First. As a right of law cannot die, no more can equity in chancery die ; and therefore, nullus recedat a Cancellariâ sine remedio, 4 E. 4, 11 a. Therefore, the Chancery is always open ; and although the term be adjourned, the Chancery is not ; for conscience and equity is always ready to render to every one their due, 9 E. 4, 11 a. The Chancery is only removable at the will of the King and Chancellor ; and by 27 E. 3, 15, the Chancellor must give account to none, but only to the King and Parliament.

The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called summum jus.

And for the judgment, &c, law and equity are distinct, both in their courts, their judges, and the rules of justice ; and yet they both aim at one and the same end, which is *to do right* ; as Justice and Mercy differ in their effects and operations, yet both join in the manifestation of God's glory. But in this case, upon the matter there is no judgment, but only a discontinuance of the suit, which gives no possession ; and although to prosecute law and equity together be a vexation, yet voluntarily to attempt the law in a doubtful case, and after to resort to equity, is neither strange nor unreasonable.

*But take it as a judgment to all intents, then I answer, [*605] that in this case there is no opposition to the judgment, neither will the truth or justice of the judgment be examined in this Court, nor any circumstance depending thereupon, but the same is justified and approved ; and therefore a judgment is no let to examine it in equity, so as all the truth of the judgment, &c., be (not) examined.

No possession is established by the King's writ, after that any

judgment is sought to be impeached; for when the plaintiff, by his lessee seeking relief at the common law, is barred, then is his time so seek relief in Chancery when the common law is against him; Doctor and Student, fol. 15. A serjeant is sworn to give counsel according to law,—that is, according to the law of God, the law of reason, and the law of the land; and upon both the laws of God and reason is granted that rule, viz., *To do as one would be done unto*.

And, therefore, where one is bound in an obligation to pay money, payeth it, and takes no acquittance, by the common law he shall be compelled to pay the money again. But when it appeareth that the plaintiff will recover at law, the serjeant may advise the defendant to take a subpoena in Chancery, notwithstanding his oath.

So, 1 Hen. 7, 14, if he deliver an acquittance without seal, or the money is paid within a short time after the day, or if he lose the acquittance, if judgment be had in any of these cases, the party may resort to equity: 22 E. 4 & 7 Hen. 7, 11.

Also, after judgment in those cases, if the party have a release, the may have an *auditâ querelâ*, which is a latin bill in equity, if the other party's conscience be so large as to demand a double satisfaction. So, if the statute be entered into by duress or menace, though the party be in execution, yet he may avoid it by duress of imprisonment; 15 E. 4; Fitz. Nat. Brev. 104, L. 5, Ed. 4, *Auditâ Querelâ*, 27; and yet it is a judgment upon record; and so of a judgment by a confession and satisfaction, acknowledged by a letter of attorney, which is lost or cannot be produced.

*And in the case of *Harning v. Castor*, Mich., 3 Jac., in [*606] B. R., on an *auditâ querelâ*, brought per opinionem curiæ, if a judgment be given upon an usurious contract, and it is part of the agreement to have a judgment, the defendant may avoid such judgment by an *auditâ querelâ*, or by a *scire facias*, brought upon the same.

So, if a judgment be had against an infant by covin, as if an infant be inveigled to be bail for any one in any Court at Westminster, he may have an *auditâ querelâ* to avoid the same: Trin., 7 Jac., *Markham v. Turner*, and 8 Hen. 6, 10. So, if judgment be had by covin or collusion against an executor, to defraud the creditors, if it be pleaded in bar. The covin and collusion may be averred at law by replication, and the judgment frustrated thereby, 3 Hen. 6, 36; and *note*, every outlawry is a judgment, yet the party may have remedy in conscience against him that caused him to be outlawed without just cause: Doctor and Student, lib. 2, cap. 21; 21 Hen. 7, 7; 9 Hen. 6, 20.

So, if one neglect to enrol his deed of bargain and sale, being his only assurance, as in *Jakes and Huntley's case*, in this Court, 13^o Junij, 1599, and the bargainor brings an *ejectione firmæ* against him and hath judgment, the bargainee may resort to Chancery and there be relieved, if not for the land, yet for the money paid.

And in *Morgan and Parry's case*, Pasch., 27 Eliz., a woman had an estate in a house for her life, dipunishable of waste, and yet she was enjoined not to commit waste in the house, contrary to the case of *Lewis Bowles*;¹ (*quere*, if not because of the prejudice to him in remainder?)

By all which cases it appeareth, that *when a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party*; and that, in such cases, the Judges also play the Chancellors; and that these are not within the statute 4 Hen. 4, cap. 23; which is, that after a judgment given in the Court of our Sovereign Lord the King, the parties *and their heirs shall be in peace until the judgment be [607] undone by attainr or error.

But, *secondly*, It is objected, that this is a judgment upon a statute law.

To which I answer, It has ever been the endeavour of all Parliaments to meet with the corrupt consciences of men as much as might be, and to supply the defects of the law therein; and, if this cause were exhibited to the Parliament, it would soon be ordered and determined by equity; and the Lord Chancellor is, by his place, under his Majesty, to supply that power until it may be had, in all matters of meum and tuum, between party and party; and the Lord Chancellor doth not except to the statute or the law (judgment) upon the statute, but taketh himself bound to obey that statute, according to 8 Ed. 4; and the judgment thereupon may be just; and the College, in this case, may have a good title in law, and the judgment yet standeth in force.

It seemeth by the Lord Coke's report, in *Dr. Bonham's case*,² that statutes are not so sacred as that the equity of them may not be examined. For he saith, that in many cases the common law hath such a prerogative as that it can control Acts of Parliament, and adjudge them void; as, if they are against common right or reason, or repugnant or impossible to be performed; and for that he vouches, 8 E. 3, 30; 33 E. 3, Cessavit, 41, 42; Nat. Brev. 209; Plowd. 110; 27 Hen. 6, Annuity, 41; 21 Eliz. Rot. 303. And yet our books are, that the acts and statutes of Parliament ought to be reversed by Parliament, (only), and not otherwise, Bro. tit. "Error," 65, &c.; and 7 Hen. 6, 28; 21 E. 4, 46; 29 E. 3, 24: and, upon that reason, the Lord Chancellors, since the device of the action to be brought by Parsons upon the statute of 2 Ed. 6, have enjoined the stay thereof.

And the Judges themselves do play the Chancellors' parts upon statutes, making construction of them according to equity, varying from the rules and grounds of law, and enlarging them, pro bono publico, against the letter and intent of the makers, whereof our books have many *hundreds of cases: 15 Hen. 7, and 14 Hen. 7, 14; 42 E. 3, 6, &c. Will you, then, have equity [608]

¹ 11 Co. 79; 1 Roll Rep. 177; Raym. 284.

² 8 Co. 113.

suppressed in all cases wherein a judgment at law, or upon a statute, is had?

The use of the Chancery has been in all ages to examine equity in all cases, saving against the king's prerogative, as 35 Hen. 6, 27; 11 Hen. 4, 16; and Doctor & Student, lib. 2. cap. 5, 16; then you must have a special statute to except the Chancellor. For general statutes do extend to the particular usages of all the great Courts at Westminster, especially of the Chancery, and especially for matters of equity.

In Chancery upon a recognisance, a *capias* may be awarded, and the proceedings of that Court shall close up the mouths of the Judges of the common law, notwithstanding the statute of Magna Charta, chap. 29: "Quod nullus liber homo capiatur aut imprisonetur nisi per legale iudicium parium suorum vel per legem terræ." And so it was adjudged in *Clement Parson's case*, 21 Eliz., in the Exchequer, which you may see in 8 Co. 142; and 25 Eliz., in *Martin and Bye's case*, and in 7^o Jac. in Com. Banco, *Higham's case*, and *Kilway's case*, vouched to be adjudged, 9 Co. 29, vide Doctor and Student, 306 a; and every Court at Westminster ought to take notice of the usages and customs of the rest of the Courts at Westminster, which are as a law to those Courts, and of which the common law takes notice, 2 Co. 53, 65, 503-4; 11 E. 4, 2.

The statute of 5 Eliz., of perjury, directeth how perjury shall be punished, saving the authority of the Star Chamber; yet, for perjury committed in Chancery, either in an affidavit or an answer, &c., if such perjury appear to the Chancellor, the party may be punished according to his direction.

Also, no Exchequer man hath privilege against a subpoena, for matters between party and party, where the king's interest cometh not in question: 20 Eliz., *Cutts contra Peter Goodwin et al.*, and yet their privilege hath several statutes that give strength thereunto; but the use *and precedents of the Chancery are not [*609] altered by those laws.

And if a statute staple be extended, which by the statute is a judgment of itself, and the execution thereof is directed by the statute; yet it hath been usual in all ages to moderate the hard consciences of the conusees, and if they have been satisfied with their costs and damages, alter the rate of the full value of the land, the land hath been discharged by a decree of equity.

Thirdly, The law of the land speaks not against this.

For, by 9 Ed. 4, 15, the Chancellor sits in Chancery according to an absolute and uncontrollable power, and is to judge according to that which is alleged and proved; but the Judges of the common law are to judge according to a strict and ordinary (or limited) power.

As 7 Hen. 7, fo. 10: A. had lands extended to him in ancient demesne upon a statute merchant. B. purchased the lands and had a recovery by sufferance in the Court of ancient demesne, with voucher, and entered, and ousted A. A. brought a subpoena, and it was holden, that A. could not falsify the recovery at law, and

therefore he should be restored to the possession by the Chancery, for he had not any remedy by the common law. Where *note*, That notwithstanding a double judgment, yet the Judges directed them to the Chancery.

And the statute of 4 Hen. 4, chap. 23, was never made nor intended to restrain the power of the Chancery, in matters of equity, but to restrain the Chancellor and the Judges of the common law, only in matters merely determinable by law in legal proceedings, and not in equitable; and that they should be constant and certain in their own judgments, and not play fast and loose. For by 37 Hen. 6. 13, and divers other authorities, no writ of error or attaint lieth when the suit is by subpoena, and the party only seeks to equity for the equity of his cause.

And, therefore, judgments by default, confession, &c, and not by verdict, are not within this law, so as to bind the Judges on their legal proceedings; as 5 E. 4, 38. In debt, upon an obligation against A., B., C., and D., judgment by *default is had [610] against A. and B., C. demurs, and D. pleads to issue; and, by the opinion of the Judges, a supersedeas was awarded, et hoc causâ conscientiæ, for that the judgment was by default.

In the next place, it is considerable how far the statute of 27 E. 3, cap. 1, doth extend, to check the power of the Chancery in this case. Now, the proper exposition of this statute is from those statutes that were the foundation thereof, and whereupon the statute was built, it being not introductive of new law, but declarative antiqui juris.

The precedent statutes which do explain this statute are 35 E. 1, made at Carlisle; 4 Ed. 3, c. 6, in confirmation thereof; 25 E. 3, cap. 22, and 25 E. 3, cap. 6, "Of provisors of benefices;" these being in time before 27 E. 3, and 38 E. 3, which comes after, and recites the statute of 25 E. 3, and this statute of 27 E. 3, and confirms them, with additions for further remedies, they being all linked together in one chain; which is further apparent by the recitals in the law, and by the preamble thereof, which doth manifest the minds of the law makers, and do naturally explain the laws, that they do all extend to ecclesiastical jurisdiction and consueance, and not to temporal; and the same is more apparent by other subsequent laws in several kings' reigns following.

But for the temporal Courts, and the support of their judgments, there are only two statutes, viz., Westminster, 2 cap. 5, and 4 Hen. 4, cap. 23, which are already answered.

Vide, the argument, for the authority and jurisdiction of the Court of Chancery, at the end of this Vol. (1 Ch. Rep.) where these two statutes are explained.

In the principal case, Lord Ellesmere enters very fully into the examination of the principles upon which equity entertains jurisdiction to grant injunctions to stay proceedings at law. This subject was the cause of a warm contention between Lord Ellesmere and Lord Chief

Justice Coke, the former insisting that Courts of *equity had [*611] jurisdiction, not indeed to overrule the judgements of Courts of law, but to prevent a person who had obtained a judgment at law, contrary to equity, from making the Courts of law instruments of injustice: the latter contending, on the other hand, that an injunction to stay proceedings in Courts of common law was an encroachment upon their jurisdiction, and a violation of the statute law of the land. The following is the account given by Mr. Hallam, of the dispute between Lord Ellesmere and Lord Coke:—"It happened," he relates, "that an action was tried before Coke, the precise circumstances of which do not appear, wherein the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He had recourse to the Court of Chancery, filing a bill against the defendant to make him answer upon oath, which he refused to do, and was committed for contempt. Indictments were upon this preferred at Coke's instigation, against the parties who had filed the bill in Chancery, their counsel and solicitors, for suing in another Court after judgment obtained at law, which was alleged to be contrary to the Statute of Præmunire. But the Grand Jury, though pressed, it is said, by one of the judges, threw out these indictments. The king, already incensed with Coke, and stimulated by Bacon, thought this too great an insult upon his Chancellor to be passed over. He first directed Bacon and others to search for precedents of cases where relief had been given in Chancery after judgment at law. They reported, that there was a series of such precedents, from the time of Henry 8, and some, where the Chancellor had entered suits even after execution. The Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments: and as Coke had not been ostensibly implicated in the business, the king contented himself with making an order in the Council Book, declaring the Chancellor not to have exceeded his jurisdiction: Hall. Const. Hist. Vol. 1, p. 472; and see The Jurisdiction of the Court of Chancery vindicated, 1 Ch. Rep. Append. 1; Cary, 163.

The opposition of Lord Coke to the jurisdiction of the Court of Chancery, was as void of foundation as it was of success; for equity never affects to examine or overrule a judgment at law, but prevents a party from making an unjust use of it, such as Courts of law, could they have taken cognisance of the equitable circumstance, would not have permitted; for although, as observed by the Lord Chancellor, in the principal case, "law and equity are distinct, both in their courts, their judges, and the rules of justice, they yet both aim at one and the same end, *which is to do right." Again, with reference to the prin- [*612] cipal case, he adds, "that in that case there was no opposition to the judgment, neither would the truth or justice of the judgment be examined in Court, nor any circumstances depending thereupon, but the same was justified and approved; and therefore a judgment was no

let to examine it in equity, so as all the truth of the judgment be not examined." And again, after citing various cases, he concludes, "that, when a judgment is obtained by oppression, wrong, and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party." It may be observed here, that, where the Chancellor uses the expression as to frustrating and setting aside a judgment, he evidently means, only, that a party would be prevented from taking advantage of it, if it was inequitable that he should do so.

Moreover, as long as our Courts of equity and Courts of law are distinct, and may, according to the system of jurisprudence administered in each, come to different conclusions upon the same claim, in order that two such apparently opposite sentences may stand together, it is evident that some compromise or understanding must subsist between the two Courts; that, what is asserted by the one must be admitted in some sense at least, by the other; and that it must be ascertained to which of the two the right of qualifying the first decision, and of pronouncing the final decree, and enforcing it when pronounced, is to be ascribed. And, accordingly, we find that equity always admits and supposes the authority of the common law: but, on the other hand, whatever doubts and contests may have arisen formerly on these subjects, it is now fully settled that the clearest legal right is no answer to a preferable claim in equity; and that, whoever attempts to enforce the former to the detriment of the latter, though by strictly legal means, may be restrained by the injunction of a Court of equity, or punished for proceeding in contempt of it; *Burton's Compend.* 517, 4th edit.

Where a Court of law can do as full justice to the subject in dispute as can be done in equity, a Court of equity will not interfere to stay proceedings at law. (*Southampton Dock Company v. Southampton Harbour and Pier Board*, 11 L. R. Eq. 254); but when the completeness of the relief at law is doubtful, the Court of equity will grant an injunction to restrain proceedings at law. *Ib. Rathbone v. Murray*, 10 *Johnson*, 587; *King v. Baldwin*, *Johnson C.*, 1 *Johnson*.

It is true that equitable pleas and replications may now be made use of at law, under the Common Law Procedure Act, 1854, but, as we shall hereafter see, the narrow construction put upon that Act by the judges of the Courts of common law, still renders applications to Courts of equity necessary in many cases. [*613]

Lord Ellesmere in the principal case, has noticed certain instances in which the Court had interfered to stay proceedings at law, on account of some equity of which the plaintiff in equity could not take advantage at law; and Mr. Eden, in his work upon injunctions, has included under the different heads of Accident, Mistake, Fraud, Accounts, Illegal and Immoral Contracts, Penalties and Forfeitures, Breaches of Covenants, Administration of Assets, Marshalling of Securities and

Suretyship (most of which subjects are noticed in this work), the different cases in which a Court of equity will by injunction stay proceedings at law. Edén on Injunctions, 4; and see Joyce on Injunctions, 1053, 1257.

Where questions of account are of a complicated character, and the right to raise a case of wilful default, and of fiduciary relationship between the parties is involved, the Court will stay proceedings at law, and grant an injunction until the hearing (*Southampton Dock Company v. Southampton Harbour and Pier Board*, 11 L. R. Eq. 254), although it would refuse to do so where the accounts could be taken as well at law as in equity. See *Fluker v. Taylor*, 3 Drew. 183; *South-Eastern Railway Company v. Brogden*, 3 Mac. & G. 8; *Rathbone v. Murray*, 10 Johnson, 587, 596.

Instances of Injunctions to Restrain proceedings at law.—To illustrate the subject further, a few examples are here given of injunctions to stay proceedings at law; it may be premised, however, that such injunctions are granted either before or after the commencement of the action, or to stay the trial; or after verdict, to stay judgment; after judgment, to stay execution or proceedings under an execution; if execution has taken place, to stay the money in the hands of the sheriff; or if part only of a judgment has been levied by a fieri facias, to restrain the suing out of a capias ad satisfaciendum (Edén, Injunct. 44); and even after dismissal of the bill, pending an appeal from such dismissal; *Earl of Shrewsbury v. Trappes*, 2 De G. F. & Jo. 172.

A person who seeks the interference of a Court of equity is not bound, as the price of such interference, to bring the whole matter into equity. Thus, where a bill was filed to restrain a defendant from setting up a certain plea in an action at law, on equitable grounds, which the plaintiff might have equally availed himself of at law, it was held by Lord Westbury, C., that it was not demurrable merely because it did not go on to pray compensation or any other consequential relief in equity: *Stewart v. The Great Western Railway Company*, 2 De G. Jo. & Sm. 319.

*At common law, it seems that if an executor has once been [614] come fully responsible, by the actual receipt of a part of his testator's property, for the due administration thereof, he cannot found his discharge in respect thereof as against a creditor seeking satisfaction out of the testator's assets, either on the score of mistake, accident, or destruction by fire, loss, robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford an excuse to ordinary agents and bailees, in cases of loss without any negligence on their part: *Crosse v. Smith*, 7 East, 258, 259. In equity, however, the assets were lost by accident, and not through any default of the executor or administrator, the creditor would be restrained from proceeding at law. Thus in the case of *The Executors of Lady Croft*



v. *Lyndsey*, Freem. Ch. Rep. 1, a case is mentioned of an administrator in London before the Fire, who, having leases of houses, &c., and a great surplus of assets above what would pay debts and legacies, paid all as they were demanded. Afterwards, the Fire destroyed the houses, which were the greatest part of the assets, and a bond debt started up, but the administrator was relieved against it. See *Holt v. Holt*, 1 Ch. Ca. 191; and see *Jones v. Lewis*, 2 Ves. 240, where Lord Hardwicke held an administratrix not liable to account for goods stolen from a solicitor with whom she had placed them for safe custody; but said that he knew not how it would be at law, as he knew of no such case at law.

So, where an instrument has been obtained by fraud or undue influence, proceedings on it at law will be restrained. Thus, in *Lloyd v. Clark*, 6 Beav. 309, A., very soon after coming of age, was induced by B., his superior officer to accept bills for 3000*l.* at two months, for his accommodation, which were handed by B. to D., a money lender, in payment of a debt of 2590*l.* D., who was privy to the transaction, afterwards agreed to arrange the renewal of these, and another bill for 500*l.* for twelve months, in consideration of A.'s promissory note for 2500*l.*, payable in three years, which sum, D. charged for his expenses and trouble. Lord Langdale, M. R., under the circumstances, restrained D. from suing for the 2500*l.*, as it appeared that, upon further investigation, and upon evidence taken in the cause, it might not improbably turn out that A. was induced to give the note by misrepresentation as to the extent of his previous liability, and as to the nature and extent of D.'s services; *ante*.

Upon the same principle, if a plaintiff at law is suing upon an instrument which does not correctly represent the agreement entered into, and which a Court of equity would rectify upon the ground that such instrument was executed under a mistake by the defendant at law, the Court of equity will restrain proceedings in such action; *Druiff v. Lord Parker*, 5. L. R. Eq. 131.

Where the interest of a person in property is equitable, a person having only a legal interest will be restrained from proceeding at law to recover it. For instance, if a landlord entered into a contract with a tenant to sell him the property he occupied, and afterwards proceeded at law to eject him (which he might do, as the tenant could at law only obtain damages for breach of the contract), in equity, the tenant being looked upon as the owner, could obtain specific performance, and restrain proceedings in the ejectment. Thus, in *Pyke v. Northwood*, 1 Beav. 152, a yearly tenant having the option of purchasing the property, filed his bill against the landlord for a specific performance of the contract for sale: the landlord having proceeded to eject the plaintiff, the latter applied for an injunction to restrain him; the Court granted the injunction, but only upon the terms of the plaintiff undertaking to pay the

rent without prejudice to any question in the cause. It was, however, subsequently agreed that, in lieu of the undertaking, the plaintiff should pay the purchase-money into Court.

In *Newlands v. Painter*, 4 My. & Cr. 408, where personal chattels were bequeathed to a single woman for her separate use, without the intervention of a trustee, upon their being seized in execution by a judgment creditor of an after-taken husband, who was, in fact, at law entitled to such chattels, but in equity only as trustee for his wife, an injunction was issued by Lord Cottenham to restrain a sale under the writ.

Proceedings under a statute will, as is laid down in the principal case, be restrained where there are equities of which a Court of common law cannot take notice. The Interpleader Act (1 & 2 Will. 4. c. 58), for instance applies only to those cases where the opposite claims depend on legal rights; an injunction, therefore, will be granted to restrain proceedings in an issue at law directed by order of the Court of Queen's Bench, where the claims are matters of equitable jurisdiction: *Langton v. Horton*, 3 Beav. 464, See *S. C.*, 1 Hare, 549.

Another class of cases, within which, indeed, the principal case falls, may be noticed as further illustrating how beneficial and necessary, for the administration of justice, is the interposition of equity in staying proceedings at law. For instance, if a person having a title to an estate, stands by and suffers a person ignorant of it to expend money upon the estate, either in buildings or other improvements, and afterwards asserts* his title in a Court of law, upon his proving his title, [*616] judgment would be given for him, without any compensation for improvements being awarded to the person evicted. In equity, however, a person who had expended money under such circumstances on the estate of another, would be entitled to be indemnified for his expenditure, either by a pecuniary compensation, or, in some cases, if he were a lessee under a defective lease, by a confirmation of his title; and as the law is deficient in this respect, and it would be inequitable for the owner to profit by his own fraud, he will be enjoined from proceeding at law: *Hunning v. Ferrars*, Gilb. Eq. Rep. 85; *East India Company v. Vincent*, 2 Atk. 33; *Stiles v. Cowper*, 3 Atk. 692; *Attorney-General v. Batiol College*, 9 Mod. 411; *Jackson v. Cator*, 5 Ves. 688; *Kenny v. Brown*, 3 Ridg. 518, 529; *Pilling v. Armitage*, 12 Ves. 85; *Shannon v. Bradstreet*, 1 S. & L. 52. 73, 74; *The Duke of Devonshire v. Eglin*, 14, Beav. 530; *Rochdale Canal Company v. King*, 16 Beau. 530; *Duke of Beaufort v. Patrick*, 17 Beav. 60, 75; *Piggott v. Stratton*, 6 Jur. (N. S.) 129; *ante* 30; 2 Smith Lead Cases, 738, 7 Am. ed.

As to expenditure on the property of a Corporation upon the faith of a regular corporate resolution, see *Marshall v. The Corporation of Queenborough*, 1 Sim. Stu. 520. In *Powell v. Thomas*, 6 Hare, 300, a colliery proprietor constructed a railway from his colliery across

the lands of several other persons, by agreement, and his solicitors wrote a letter to the defendant across whose lands he desired to carry the railway, referring to the powers of a local Act of Parliament supposed to enable him to take lands within a certain area for roadways, and offering, on the part of the plaintiff, to pay him for the land at a fair valuation. The defendant did not reply to the letter, and the railway was made across his land without further communication with him. A year or two afterwards, the plaintiff and the defendant had an interview, but did not agree as to the price to be paid for the land, and three or four years after the railway was made, the defendant brought his ejectment, whereupon, the plaintiff filed his bill for an injunction, charging acquiescence, and Sir J. Wigram, V. C., on motion restrained the action, upon the plaintiff giving judgment in the ejectment, and paying a sum into Court, not less than the amount of the utmost valuation of the land. See also *Clavering's case*, cited 5 Ves. 690; *Greenhalgh v. Manchester and Birmingham Railway Company*, 3 My. & Cr. 784; *Norway v. Rowe*, 19 Ves. 144; *Hart v. Clarke*, 6 De G. Mac. & G. 232; 6 Ho. L. Cas. 633; *Somersetshire Canal Company v. Harcourt*, 24 Beav. 571, 2 De G. & Jo. 596; *Mold v. Wheatcroft*, 27 Beav. 510; *Slim v. Croucher*, 1 De G. F. & Jo. 518; *Whalley v. Whalley*, 2 De G. F. & Jo. 310. [*617]

And this principle will apply with still greater force, if the person lying by and permitting expenditure upon his own property, stands in some fiduciary relation,—as that of agent, to the person making it,—which renders it more peculiarly incumbent upon him to give notice of his title (*Lord Oawdor v. Lewis*, 1 Y. & C. Exch. Ca. 427).

And it is applicable, it seems, even where the owner of the property is a feme covert. Thus, in the case of *Peterson v. Hickman*, cited in the principal case, where the husband made a lease of the wife's land, and the lessee, being ignorant of the defeasible title, went to great expense in building upon the land, the wife having, upon the husband's death, avoided the lease at law, she was compelled in equity to yield a recompense for the building and improvements upon the land.

So, a party may so encourage that which he afterwards complains of as a nuisance, as not only to preclude him from complaining of it in a Court of equity, but so as to give the adverse party a right to restrain him from recovering damages at law for such nuisance. See *The case of the Watercourse*, and *Short v. Taylor*, 2 Eq. Ca. Ab. 522, pl. 3; *Williams v. The Earl of Jersey*, Cr. & Ph. 91: and see *Harryman v. Collins*, 18 Beav. 11; but in some cases, as for instance, where both parties are ignorant of the injurious consequences of what turns out afterwards to be a nuisance, the Court will, on the ground of acquiescence, refuse an injunction to prevent the injured party from recovering damages at law, although his acquiescence might have been

sufficient to have disentitled him to an injunction to restrain the nuisance: *Bankhart v. Houghton*, 27 Beav. 425.

But the circumstance, that a party is commencing operations avowedly for a purpose which another considers to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the Court either to form its own opinion as to the legality of the meditated purpose, or to put that question into a course of immediate trial; and therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused: *Haines v. Taylor*, 2 Ph. 209.

Upon the same principle, a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit *from the transaction: *Nicholson v. Hooper*, 4 My. & Cr. 186. See cases cited, ante, pp. 31, 32. And see *In re King*, 4 Ir. Ch. Rep. 300, 314. 1 Smith Lead. Cases 759, 7 Am. ed.

Where the owner of the property, knowing that another person is about to commence improvements on it, gives notice of his claim to the property, such person will have no equity to restrain the proceedings of the owner to evict him, although he did not again assert his title before the expenditure began, or while it was going on, although he did not disclose any particulars of his title, and it turns out that the claim exceeds what he was actually entitled to; for the party in possession will not be justified in disregarding it, or supposing it to be unfounded. And the principle is the same, whether the owner and the party making the expenditure by mistake, are strangers, or tenants in common of the property: *Master of Clare Hall v. Harding*, 6 Hare, 273; *a fortiori*, a person will have no equity who lays out money on the property of another with a full knowledge of the state of the title: *Rennie v. Young*, 2 De G. & Jo. 136; ante, 917; 2 Smith Lead. Cases, 710, 7 Am. ed.

A person expending money by mistake upon the property of another has, it seems, no equity against the owner, who was ignorant of, and did not encourage him in, his expenditure. But if it were necessary for the owner to proceed in equity, he would only be entitled to its assistance, according to the ordinary rule, by doing equity and making compensation for the expenditure: *Neesom v. Clarkson*, 4 Hare, 97.

If a person builds on the land of another knowing him to be the owner thereof there is no principle of equity which would prevent the owner claiming the land with the benefit of all the expenditure made on it. Per Lord Cranworth, L. C., in *Ramsden v. Dyson*, 1 L. R. Ho. Lo. 141.

Upon this principle, a lessee or tenant from year to year is not entitled to the interference of equity in consequence of his expenditure, although with the knowledge of the landlord, unless he can clearly show that it was made with reference to some agreement (*Pilling v. Armitage*, 12 Ves. 78; *Dann v. Spurrier*, 7 Ves. 235); but such an agreement may be implied from the conduct of the parties, *White v. Wakley*, 26 Beav. 17, 20. In *Dann v. Spurrier*, 7 Ves. 235, Lord Eldon observes: "I fully subscribe to the doctrine of the cases that have been cited, that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement: a lessor knowing and permitting those acts which the lessee would not have done, and *the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still, it must be put upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement. . . .

In order to give a person a larger interest in the property than he derives under the instrument making his title, it must be shown, that with the knowledge of the person under whom he claims, he conceived he had that larger interest, and was putting himself to a considerable expense, unreasonable compared with the smaller interest, and which the other party observed, and must have supposed incurred under the idea that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment.

Upon the same principle it seems, that if a tenant from year to year laid out money upon the land in his occupation upon an erroneous supposition, created or encouraged by the landlord, that he should have a lease, a Court of equity would not allow the landlord to lie by and profit by such expenditure; (per Lord Cranworth, L. C., in *Ramsden v. Dyson*, 1 L. R. Ho. Lo. 142;) but the tenant would not be entitled to any relief if he failed to show that he had any absolute right as against the owner beyond that of a tenant from year to year, or that the owner believed he was expending his money in the mistaken belief that he possessed such right. Thus, in *Ramsden v. Dyson*, 1 L. R. Ho. Lo. 129, Thornton took a piece of land belonging to Sir J. Ramsden, from Sir John Ramsden's agent by parol agreement. It was known to all parties that the land was to be built upon. A ground rent was fixed at 4l. Thornton laid out 1800l. in building, and afterwards made another application to Sir J. Ramsden's agent for another piece of land, also for the purpose of building on it. In this application Thornton declared himself willing to take the land as "tenant-at-will." The land was allotted to him, and the rent fixed at 1l. 0s. 7d. When the buildings were erected on the land, the persons who

had so taken the land were entered in Sir John Ramsden's rental books as tenants. It was admitted on all sides, that were such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was accepted, much [*620] *after the form of a transfer of copyhold. The tenancies were very numerous. Thornton alleged that there was believed to exist, and that Sir John Ramsden's agents had, by their words and conduct encouraged such belief, a "tenant-right tenure" on the estate, that a person who had so taken and built upon Sir John Ramsden's land was entitled at his pleasure to become a leaseholder, and to demand a grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had, in fact, been granted; but there was no direct evidence of their being granted on any such claim of right. There was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land, held, under parol agreement, on payment of a ground rent, had refused to purchase them unless such leases were granted, and that, in fact, such leases were granted, and thus the tenants received compensation for their buildings. It was held by the House of Lords (dissentiente Lord Kingsdown), reversing the decree of Sir John Stuart, V. C., reported 4 Giff. 519 (nom. *Thornton v. Ramsden*), that these circumstances did not show the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease; and, consequently, that the landlord having brought ejectment against Thornton, equity could not interfere to compel the grant of a sixty years' lease, nor to stay the ejectment.

There are also many cases in which the legal defence to a claim set up at law rests either exclusively, or in a great degree, within the knowledge of the party advancing the claim, by which means that defence can only be obtained through the assistance of a Court of equity, viz., by filing a *bill of discovery*; and as it is inequitable that he should proceed in the assertion of his claim, without communicating his information, equity will, by injunction, stay the proceedings at law: *Eden, Injunct. 3*. And though a party may now at law examine his opponent, he is still entitled to discovery in equity in aid of his case at law: *Lovell v. Galloway*, 17 Beav. 1.

But the common injunction to stay trial will not be extended, if it appears from the pleadings, contrary to the usual affidavit, that the discovery will not assist the defendant at law in his defence to the action: *Ashby v. Jackson*, 6 Beav. 336. It is essential that a plaintiff seeking

to restrain an action at law should show some grounds upon which the action can be maintained, for if he does not do so, his bill will be open to a demurrer: *Derbyshire Railway Company v. Serrell*, 2 De G. & Sm. 353.

The Court of Chancery will not *compel discovery in aid of the prosecution or the defence of an action in an inferior or a foreign court, and consequently will not stay proceedings in such courts until discovery has been obtained *Earl of Derby v. Duke of Athol*, 1 Ves. 202; *Bent v. Young*, 9 Sim. 180, and the remarks thereupon: *Crowe v. Del Rio*, 9 Sim. 185, n., and Mitf. Plead. 151, 3rd ed. [*621]

In *The Transatlantic Company v. Pietroni*, Johns. 634, the plaintiffs were a company of ship-owners, on whose behalf the defendant, as their broker, had effected policies. The plaintiffs had instituted proceedings in a competent court at Genoa against the defendant for an account, to which suit the defendant had appeared. Before final decree in the foreign court, the defendant commenced actions in England against the insurers upon one of the policies which had resulted in a loss. It was held by Sir W. Page Wood, V. C., on demurrer, that it was competent for the plaintiffs to file a bill to restrain the action, and to have a receiver of the policy moneys pending the foreign litigation.

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity: (*Harrison v. Nettleship*, 2 My. & K. 423; *Hardinge v. Webster*, 1 Drew. & Sm. 101); especially since the Common Law Procedure Act, 1854: (*Fairbrother v. Welchman*, 3 Drew. 122) and it is no ground for equitable interference that a party has not effectually availed himself of a defence at law, or that a Court of law has erroneously decided a point of pure law. Per Lord Cottenham in *Simpson v. Lord Howden*, 3 My. & Cr. 108.

Nor will a Court of equity relieve against a mistake in pleading, or in the conduct of a cause at law: *Curtess v. Smalridge*, 1 Eq. Ca. Ab. 377, pl. 1; *Tovey v. Young*, Id. 378, pl. 7; *Stephenson v. Wilson*, 2 Vern. 325; *Blackall v. Combs*, 2 P. Wms. 70; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Manning v. Mestaer*, cited Id. 231; *Field v. Beaumont*, 1 Swanst. 204; *Holworthy v. Mortlock*, 1 Cox, 141; *Stephens v. Praed*, 2 Ves. jun. 519; *Bateman v. Willoe*, 1 S. & L. 201; *Ware v. Horwood*, 14 Ves. 31: see also *Dunn v. Cox*, 11 Hare, 61.

There are, however, cases in which it seems equity will relieve after a verdict, although a defence might have been made at law, but has been omitted without any laches on the part of the defendant. Thus, if a plaintiff at law recovers a debt against the defendant, and the defendant afterwards finds a receipt under the plaintiff's own hand for the very money in question; here, as the plaintiff recovered a verdict against conscience, and though the receipt was in the defendant's own custody,

[*622] *yet, he being not then apprised of it, seems entitled to the aid of equity, it being against conscience that the plaintiff should be twice paid the same debt: *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424; and see *Hennell v. Killand*, 1 Eq. Ca. Ab. 377, pl. 2; *Coddrington v. Webb*, Id. pl. 3; *Barbone v. Brent*, 1 Vern. 176; *Williams v. Lee*, 3 Atk. 224; *Hankey v. Vernon*, 2 Cox, 12. It may be stated, however, that Lord Eldon seems to have doubted the authority of *Countess of Gainsborough v. Gifford*. See *Protheroe v. Forman*, 2 Swanst. 232, 233.

Under the Common Law Procedure Act, 1854, Courts of common law have power to compel discovery (17 & 18 Vict. c. 125, ss. 50-57) and also to admit of equitable defences and replication (s. 83).

But this new jurisdiction conferred upon the Courts of common law has not taken away the jurisdiction of equity: *Evans v. Bembridge*, 2 K. & J. 174, 181; 4 W. R. (L. J.) 350; *British Empire Shipping Company v. Somes*, 3 K. & J. 433; *Croskey v. European and American Steam Shipping Company*, 1 J. & H. 108.

It is clear that when a defendant in an action at law has an equitable defence, he is not compellable, under the Common Law Procedure Act, to plead such equitable defence, but may at once come into equity for an injunction to restrain the action: *Gompertz v. Pooley*, 4 Drew. 484; 28 L. J. N. S. (Ch.) 484; *Kingsford v. Swinford*, 28 L. J. N. S. (Ch.) 413. So in *Stewart v. Great West. Railway Company*, 2 Drew. & Sm. 438, where the fraud alleged was not such as a Court of law could necessarily deal with, it was held by Kindersley, V. C., that the plaintiffs at law were not precluded from coming into equity by reason of their not having attempted an equitable replication in the action which they had commenced.

If a defendant in an action thinks fit to plead and equitable plea, he cannot come into a Court of equity for an injunction to restrain the action, on the very ground that he has made the subject of his equitable plea, provided always that the case is of such a nature, and the form of the pleading at law is such, that the Court of law can and will give such relief on the equitable plea, supposing it established as a Court of equity would give. Per Kindersley, V. C., in *Waterlow v. Bacon*, 2 L. R. Eq. 519; and see *Gompertz v. Pooley*, 4 Drew. 448; 28 L. J. N. S. (Ch.) 484; *Wild v. Hillas*, 29 L. J. N. S. (Ch.) 170; *Fairbrother v. Welchman*, 3 Drew. 122. But if the Court of law cannot give such relief, or if, from the mode in which the pleadings are framed, the matter of the equitable plea may never come on for the decision [*623] of the Court of law, then the Court of equity will not refuse to entertain a bill for an injunction to restrain the action, merely on the ground of the plaintiff in equity having pleaded such equitable plea in the action; though, of course, in such a case the Court of equity would deal with the question as to the costs of the action, and especially as to so much

thereof as may have been caused by pleading the equitable plea; *Waterlow v. Bacon*, 2 L. R. Eq. 514, 519; and see *Prothero v. Phelps*, 4 W. R. (L. J.) 189; 7 De G. Mac. & G. 722; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. Mac. & G. 100.

And it seems that even after a verdict at law on an equitable plea, an application might perhaps in some cases be made in equity for relief; *Terrell v. Higgs*, 1 De G. & Jo. 392.

But where a verdict had been obtained against a defendant at law upon an equitable plea, and he allowed judgment to be entered up before appealing from an order refusing an injunction, relief was refused to him. Thus, in *Terrell v. Higgs*, 1 De G. & Jo. 388, a defendant in an action pleaded an equitable plea upon which issue was joined, and a verdict was found for the plaintiff. After verdict, but before judgment, the defendant filed a bill setting up substantially the same case as that in his plea, and applied for an injunction, which was refused. Three days later, judgment was entered up, after which the defendant at law gave notice of motion, by way of appeal from the order refusing the injunction. It was held by the Lords Justices that the application was too late, and must be refused. "I am not," said Turner, L. J., "prepared to say that in no case can an application be made to this Court for relief after a verdict at law on an equitable plea, but I think that under the circumstances of this case relief ought not to be granted. I rely mainly on the fact that notice of appeal was not given immediately after the decision of the Vice Chancellor, but judgment was allowed to be entered up before any application was made to this branch of the Court."

In order to prevent the exercise of the too large powers of preference which executors have at law with regard to the payment of creditors, Courts of equity have encouraged suits for the general administration of assets, because they produce equality amongst creditors; and as a decree is a judgment for the benefit of all the creditors, all proceedings at law by any of them, whether the action be for an ascertained debt, or for unascertained damages, as upon a breach of covenant to repair, will, after the decree, be restrained by injunction (*Morrice v. Bank of England*, Ca. t. Talb. 217; 3 Swanst. 573; 4 Bro. P. C. 287, Toml. edit.; *Kenyon v. Worthington*, 2 Dick. 668; *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 34; *Drewry v. Thacker*, 3 Swanst. 541, 544; *Clarke v.* [*624] *Ormonde*, Jac. 123, 124; *Largan v. Bowen*, 1 S. & L. 299; *Rouse v. Jones*, 1 Ph. 462; *Vernon v. Thellusson*, 1 Ph. 466; *Belmore v. Belmore*, 12 Ir. Eq. Rep. 493); but not until a decree be obtained, although a bill be filed (*Rush v. Higgs*, 4 Ves. 638; *Teague v. Richards*, 11 Sim. 46); or unless a decree give a present right to go in and prove debts. Thus in *Ranken v. Harwood*, 5 Hare, 215, a creditor recovered judgment, and sued out a writ of *fiery facias* thereupon, in the lifetime of

his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was *afterwards* made in the suit of an equitable mortgagee, of certain parts of the real and personal estate of the debtor, against his devisee and executor, for the sale of the mortgaged property; and *if* the proceeds of such sale should be insufficient to satisfy the plaintiff's debt, *then* for an account and application of the general, personal, and real estate of the testator, in a due course of administration. *After* this decree, the judgment creditor levied under the *fieri facias*, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the Court refused on two grounds: first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the plaintiff's demand; and, secondly, because the judgment creditor acquired a right to the goods of the debtor, by virtue of the writ of *fieri facias*, from the teste of the writ, and therefore paramount to the right of the executor. This decision, on appeal, was affirmed by Lord Cottenham (2 Ph. 22), who observed, that the Court could not interfere unless there was in existence a decree under which the creditor had a *present right* to go in and prove his debt, which he could not do in that case. See *Lee v. Park*, 1 Kee. 714; *Vincent v. Godson*, 3 De G. & Sm. 717; *Marriage v. Skiggs*, 4 De G. & Jo. 4. So, where before an administration decree the creditor of a deceased person had obtained judgment against the executrix of the deceased, and a garnishee order *nisi* against a debtor to the estate, the Court, after decree, refused to restrain proceedings on the garnishee order. *Fowler v. Roberts*, 2 Giff. 226.

As a charging order, when made absolute, operates from the making of the order *nisi*, if a charging order obtained before a decree for administration be made absolute, after the decree, proceedings in the charging order will not be restrained. See *Haly v. Barry*, 3 L. L. Ch. App. 452. There a creditor recovered judgment against his debtor, and issued a *fi. fa.* Shortly afterwards, the debtor *died. The [*625] creditor entered a suggestion on the record entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceeding by the judgment creditor. It was held by the Lords Justices, affirming the decision of Sir R. Malins, V. C., that an injunction ought not to be granted.

Where, however, a creditor obtained a judgment against the executor, and on the same day a decree was made for the administration of the estate, it was held that it ought to be considered that the judgment and decree were obtained at the same moment, and that the judg-

ment creditor could only come in *pari passu* with the other creditors: *Parker v. Ringham*, 33 Beav. 535.

After a decree for administration, an executor cannot exercise any discretion, and he is bound to take the objection of the Statute of Limitations as against creditors (*Phillips v. Beal*, 32 Beav. 26), although before decree he might have paid a debt justly due, although barred by the statute (*Stahlschmidt v. Lett*, 1 Sm. & Giff. 415), but an executor's right of retainer is not forfeited by the institution of a suit: *Phillips v. Beal*, 32 Beav. 26, 27.

Considerable inconvenience arose from the practice which formerly prevailed, by reason of the executor, through the medium of a creditor, frequently applying, for the purpose not of preventing a preference, but of preventing the payment of any creditor, and keeping the assets himself. Lord Eldon introduced the rule, when the answer does not state what the assets are, that the executor shall be called upon to state them by affidavit, and then the injunction may be granted upon his bringing the money into court, or upon such order being made as the state of the assets requires: *Gilpin v. Lady Southampton*, 18 Ves. 470. And see *Paxton v. Douglas*, 8 Ves. 520; *Drewry v. Thacker*, 3 Swanst. 546; *Clarke v. Ormonde*, Jac. 125; *Vernon v. Thellusson*, 1 Ph. 471.

A creditor restrained in equity from taking proceedings at law against an executor or administrator, will be entitled to his costs of the action up to the time when he had first notice of the decree (*Dyer v. Kearsley*, 2 Mer. 482, n.; *Jackson v. Leap*, 1 J. & W. 229; *Vernon v. Thellusson*, 1 Ph. 466); and if the action was commenced *before* the filing of the bill, the creditor, if he comes in under the decree, and discontinues his action, will be entitled to prove for his *costs at law, in addition to his debt (*Goate v. Fryer*, 3 Bro. C. C. 24; [*626] 2 Cox, 201); but he will not be entitled to costs subsequently incurred, nor to the costs of the motion to restrain his proceedings (*Curre v. Bowyer*, 3 Madd. 456; *Anon.*, 2 S. & S. 424; *Powell v. Powell*, 12 Ir. Eq. Rep. 501. But see *Jones v. Jones*, 5 Sim. 678).

After a decree or order on summons for the administration of an estate, a legatee will be restrained from proceeding in a county court to recover a legacy, and that notwithstanding the legatee submits to take a judgment against the executor *de propriis bonis* alleging a devastavit (*Ratcliffe v. Winch*, 16 Beav. 576; but see *Powell v. Powell*, 12 Ir. Eq. Rep. 501; *Mollyneux v. Scott*, 3 Ir. Ch. Rep. 291); but the legatee will be entitled to his costs of the proceedings in the County Court down to the time of his being served with notice of the administration order: *Ratcliffe v. Winch*, 16 Beav. 577.

If a creditor continues proceedings at law after a notice of a decree for administration, he will be ordered to pay the costs of a motion to restrain him from further proceedings, but he will be allowed to set them

off against the cost of the proceeding incurred prior to the notice: *Gardner v. Garrett*, 20 Beav. 469.

Where an estate is administered, and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law: *Dean v. Allen*, 20 Beav. 1; *Fletcher v. Stevenson*, 3 Hare, 370. But see *Simmonds v. Bolland*, 3 Mer. 554; and see *Dodson v. Sammell*, 29 L. J. N. S. (Ch.) 335.

If, after a decree, an executor thinks fit to pay a creditor, he does so at his own risk, and he is only entitled to stand in the place of the creditor against the estate. *Irby v. Irby*, 24 Beav. 525.

If, after a decree to account, the executors let judgment go by default, or permitted creditors to proceed at law, they would be responsible; if the creditors took property of the testator's in execution, the executors would not be able to charge it to the estate: they might be allowed to stand in the place of those creditors against the estate, but they could not do more: per Lord Eldon, in *Clarke v. Lord Ormonde*, Jac. 122; approved of by Lord Justice Turner in the recent case of *Marriage v. Skiggs*, 4 De G. & Jo. 4; *Lucas v. Williams*, 10 W. R. (L. J.) 606, 607, reversing the decision of Sir John Stuart, V. C., reported (Ib.) 578. In *Kirby v. Burton*, 8 Beav. 45, a creditor, in April, 1843, obtained a judgment by default against an executrix. A decree in a creditor's suit was obtained in April, 1844, and on the 25th of May following, the judgment *was set aside on the terms of the executrix pleading [*627] plene administravit. On the 3rd of June, on the eve of trial the executrix moved for an injunction, which the Court granted, to stay execution only, and afterwards refused to permit the creditor to proceed against the executrix for the purpose of charging her personally. See also Seton, Decrees, p. 886, 3rd edit.

After an estate has been fully administered in the Court, an executor will not be permitted, without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit: *Oldfield v. Cobbett*, 5 Beav. 132; 6 Beav. 515.

The principles upon which a creditor is restrained from proceeding at law, after a decree for administration, are not applicable to the case of a creditor in bankruptcy proceeding in a foreign country against a bankrupt having property there, after a fiat of bankruptcy in this country. See *Pennell v. Roy*, 3 De G. Mac. & G. 126. There a debtor became bankrupt in England, having real estate in Scotland: it was held by the Lords Justices that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt. "An endeavour," said Lord Justice Knight

Bruce, "was made to establish a proposition laid down at the bar, of a close analogy, if not identity, between the present demand on the Court and that of an executor or administrator sued by a creditor, or an alleged creditor, of the deceased, after a decree under which all his creditors may come. If the analogy existed, I do not know that it would therefore be right for the Court to interfere in a case such as the present; but there is, clearly, in my opinion, no analogy. The duties of an executor or administrator, the manner in which he represents the deceased, the extent to which, and the mode in which he is by law liable to be sued by a creditor of the deceased, the different defences and judgments possible in an action against the executor or administrator, the right which he has to deliver himself from a suit against him, if he cannot do so otherwise, by applying assets for the purpose, and the title which the creditors generally acquire, by a decree, to those assets, are alone and obviously sufficient to destroy all ground of comparison between the cases." And see and consider *Cockerell v. Dickens*, 3 Moore's P. C. C. 98.

Indian creditors will not be restrained from obtaining payment out of the English assets until *English creditors are paid in full (*Re Brett*, 29 L. J. N. S. (Ch.) 297); but where a person died [*628] domiciled in Ireland, leaving property in Ireland and England, and the same executors in both countries, it was held by Sir R. T. Kindersley, V. C., that an Irish judgment had priority over English simple contract creditors against Irish property remitted to England by the executors and being there administered. See *Cook v. Gregson*, 2 Drew, 286.

After a judgment in scire facias, in the Court of Queen's Bench, annulling letters patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, the duty in cancelling the enrolment being only ministerial: *Reg v. The Eastern Archipelago Company*, 4 De G. Mac. & G. 199.

Injunctions to restrain proceedings in Ecclesiastical Courts.—A Court of equity will also grant an injunction against proceedings in the spiritual Court, not upon the same principle that Courts of common law grant a prohibition,—that the spiritual Court is exceeding its jurisdiction—but because there are some equitable circumstances between the parties, of which the spiritual Court cannot take cognizance: *Davile v. Peacock*, Barnard C. C. 29. Where, for instance, a father has instituted, as guardian, a suit in the spiritual Court for a legacy left his child, the Court will grant an injunction, and prevent the money coming into the father's hands, not because the spiritual Court has not a jurisdiction as to legacies, but from the general care equity takes of the interests of infants: *Rotheram v. Fanshawe*, 3 Atk. 629. So an injunction has been granted to restrain a woman, who in contempt of Court, had married one of its wards, from proceeding in a spiritual Court against his

guardian for alimony, and against the infant himself for restitution of conjugal rights and alimony: *Hill v. Turner*, 1 Atk. 515. So, where a trustee is suing in an ecclesiastical Court for payment into his own hands of a legacy left in trust (*Hill v. Turner*, 1 Atk. 516; Brec. Ch. 547); or a husband, for a legacy left to his wife, a Court of equity will grant an injunction, in the former case, as observed by Lord Hardwicke, in *Hill v. Turner* (1 Atk. 596), "out of regard to the interest of the cestui que trust;" in the latter, because a spiritual Court has no power to compel the husband to make a settlement upon the wife and her issue, which a Court of equity has, if the wife asserts her right to one, and it has not been already barred by an adequate provision: *Tanfield v. Davenport*, Toth. 114; *Anon.*, Prec. Ch. 548; *Harrison v. Buckle*, 1 Stra. 238; *Gardner v. Walker*, *1 Stra. 503; and see [*629] ante, vol. i., pp. 445, 471. In *Backhouse v. Hunter*, 1 Cox, 342, an administratrix, having an equitable demand against the personal estate of her husband, Lord Thurlow granted an injunction to restrain the next of kin from proceeding in the spiritual Court for a distribution; but he held that they might proceed to compel her to exhibit an inventory.

Where a cause is depending in a Court of equity, the injunction to restrain proceedings in the spiritual Court will be until the hearing: *Parre v. Tipelady*, Cary, 104; *Stonehouse v. Stonehouse*, 1 Dick. 98; *Smith v. Kempson*, 2 Dick. 769.

A Court of equity may, in certain cases, hold an executor or legatee to be a trustee for another, but it has been determined in the House of Lords, upon the advice of Lord Lyndhurst, Lord Brougham, and Lord Campbell (dissentientibus Lord Cottenham, C., and Lord Langdale, M. R.), affirming the decree of Lord Lyndhurst (1 Ph. 133), who reversed the decision of Lord Langdale, M. R. (5 Beav. 469), that a Court of equity cannot after probate set aside a will, as having been obtained fraudulently by undue influence and false representations: *Allen v. M'Pherson*, 1 Ho. L. Ca, 191.

Injunctions to restrain proceedings in Admiralty Courts.—The Court of equity has also jurisdiction to restrain proceedings in the Admiralty Courts. For instance, where proceedings are taken upon a bottomry bond obtained by fraud (*Glascott v. Lang*, 3 My. & Cr. 451; S. C., 2 Ph. 310; and see *Dobson v. Lyall*, 3 My. & Cr. 453, n.; 2 Ph. 323, n.); or where matters can be more conveniently, directly and effectually determined in equity (*Duncan v. M'Calmont*, 3 Beav. 409).

And where new evidence has been discovered at a period when according to the practice of the Admiralty Court, it could not be received, upon bringing into court the sum recovered, and the costs in the Admiralty Court, an injunction has been granted to stay process to compel execution of the sentence of the Court; see *Jarvis v. Chandler*, T. & R. 319, in which case Lord Eldon, observed, that his judgment proceeded

upon the notion, that the proceedings in the Admiralty Court were perfectly right; that the question was, whether it was not the same special case as if there had been a trial at law, and a verdict obtained to be effected in equity by subsequent discovery.

But where a Court of Admiralty has full power and jurisdiction to examine a matter, equity will not interfere. Thus, in *Anon.*, 3 Atk. 350, the owners of two privateers seized upon a ship called the "Diligence," as lawful prize, upon its appearing by her *captain's papers that she had carried provisions to the enemy. They [*630] afterwards released him, giving him leave, in consequence of the weather being stormy, to go to Rotterdam, upon his signing a note, in which he acknowledged that they had very justly confiscated his cargo. They, however, captured the "Diligence" a second time, whereupon the captain brought a bill to stay a suit depending in the Admiralty Court, suggesting that some of the papers were lost, and that if the note should be produced which he had been obliged to give, he would be cast in the suit. Lord Hardwicke, however, refused the injunction; for, he said, if he were to grant upon such pretences, the Acts of Parliament in relation to prizes would be entirely defeated, and that the Court of Admiralty could, if it were found that the note was signed owing to duress and imprisonment, by their own authority suppress it.

Statutory jurisdiction under the Merchants' Shipping Act.—Under the 514th section of the Merchants' Shipping Act, 1854 (17 & 18 Vict. c. 104), jurisdiction is given to the Court of Chancery in a suit instituted by a shipowner, to determine the amount of his liability in respect of the losses there mentioned, to have such amount rateably distributed amongst the several claimants, and to stop actions and suits pending in any other Court in relation to the same subject matter.

In an application to the Court, under the 514th section, the owner must aver that he has incurred some liability: *Hill v. Audus*, 1 K. & J. 263. It has also been decided that the Court of Chancery has jurisdiction, notwithstanding the circumstance that an adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled, under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship and freight (*Leycester v. Logan*, 3 K. & J. 446); but the Court has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admiralty Court. (*Ib.*) The shipowner, however, is entitled to an injunction restraining the party who has obtained such a judgment from proceeding further in the Court of Admiralty. *Ib.*

Where there is no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of

costs, and over which the plaintiff has no control, the *plaintiff, [*631] as the party eased by the proceedings, must pay the costs of all the claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit: *The African Steamship Company v. Swanzy*, 2 K. & J. 660; see also *Dobree v. Schroder*, 2 My. & Cr. 489.

The value of a ship, within the meaning of the Merchants' Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 504), is what she would have fetched if sold immediately before the collision, without deduction in respect of the costs of the sale: *Leycester v. Logan* 4 K. & J. 725.

Injunction to restrain proceedings in the Lord Mayor's Court.]—Upon a proper case being made, the Court of Equity will restrain proceedings in the Lord Mayor's Court: *Mildred v. Neate*, 1 Dick. 279; *Barker v. Goodair*, 11 Ves. 78; *Furnival v. Bogle*, 4 Russ. 142; *Sieveling v. Behrens*, 2 My. & Cr. 581; *Collesworth v. Stephens*, 4 Hare, 185.

Injunction to restrain proceedings in Courts out of the jurisdiction.]—A Court of equity will also restrain a person within its jurisdiction from taking proceedings in courts out of its jurisdiction, as in foreign countries properly so called, our colonies, or Ireland or Scotland. It interferes, however, not upon any pretention to control or overrule the decisions of such Courts, or to examine judicial and administrative acts abroad, but on the circumstance of the party on whom the order is made being within the power of the Court. "Soon after the Restoration," says Lord Brougman, "and when this, like every other branch of the Court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of Chancellors, the Nottinghams and Macclesfields,—the parents of equity,—the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Love v. Baker* (2 Freem. 125: 1 Ch. Ca. 67.) In *Love v. Baker*, it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the Court allowed the subpœna to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other Judges; but the report adds, 'sed quære, for all the bar was of another opinion;' and it is said, that when the argument against *issuing [*632] it was used, that this Court had no authority to bind a foreign Court, the answer was given, that the jurisdiction was not directed to the foreign Court, but to the party within the jurisdiction here,—a very sound answer, as it appears to me; for the same argument might apply to a Court within this country, which no order of this Court ever

affects to bind, our orders being only pointed at *the parties*, to restrain them from proceeding. Accordingly, this case of *Love v. Baker* has not been recognized or followed in later times:" *Lord Portarlington v. Soulby*, 3 My. & K. 106. And see *Wharton v. My*, 5 Ves. 71; *Beauchamp v. Marquis Huntly*, Jac. 546; *Campbell v. Houlditch*, cited 3 My. & K. 108; *Bushby v. Munday*, 5 Madd. 297; *Kennedy v. Earl Cassilis*, 2 Swanst. 313; *Bunbury v. Bunbury*, 2 Beav. 173; *The Marquis of Breadalbane v. The Marquis of Chandos*, 2 My. & Cr. 711; *Hope v. Carnegie*, 1 Law Rep. Ch. App. 320.

The fact also of a foreigner having property in this country enables the Court of Chancery to make effectual an injunction issued against him: *The Carron Iron Company v. Maclaren*, 5 H. L. Cas. 416.

Where pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party and restrains the foreign proceedings: *Per* Lord Cranworth, C., 5 H. L. Cas. 437. And see *Harrison v. Gurney*, 2 J. & W. 563; *Beckford v. Kemble*, 1 S. & S. 7; *Wedderburn v. Wedderburn*, 4 My. & Cr. 585.

Upon the same principle, where a creditor came in under a decree in Chancery under an administration suit, and yet proceeded in an action in Scotland, which he had commenced in ignorance of the decree, Sir L. Shadwell, V. C., enjoined the proceedings in Scotland with costs, and his order was affirmed by Lord Cottenham, C., with costs: *Graham v. Maxwell*, 1 Mac. & G. 71. And if a creditor is compelled to come under a suit here, the same principle applies: *Per* Lord St. Leonards, C., 5 H. L. Cas. 455.

In the case of *Beauchamp v. Lord Huntley*, Jac. 546, where a creditor who had a specific charge upon a part of the testator's real estates, came in under a decree in general administration suit, and then claimed to prove in a creditor's suit, which he had instituted in Ireland, Lord Eldon restrained him from proceeding with the latter suit, and made him pay the costs.

Even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill calculated to answer the ends of justice, the Court of Chancery *has restrained the foreign action, imposing, however, terms which it has considered reasonable for pro- [*633] tecting the party who was suing abroad: *Per* Lord Cranworth, C., 5 H. L. Cas. 438; and see *Bushby v. Munday*, 5 Madd. 297. In *Baillie v. Baillie*, 5 L. R. Eq. 175, a testator domiciled in England gave his real and personal property situated in England and Scotland to be divided between two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons. At the death of the testator, the other son, one of the residuary legatees, was indebted to an insurance company carrying on business in Scotland and England, who

obtained judgment in an action in Scotland against such son, and proceeded in Scotland against the executors to arrest the amount in their hands, to which the indebted son was entitled. It was held by Sir R. Malins, V. C., that upon the executors undertaking to obtain forthwith an administration decree in England, granted an injunction to restrain the proceedings in Scotland against the executors.

So likewise when there is no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery is instituting proceedings in a foreign Court, the instituting of which is contrary to good conscience, the Court will, on a bill filed here, restrain the prosecution of such foreign suit just as if it had been a suit in this country. Thus in *Lord Portarlington v. Soulby*, 3 My. & K. 104, an injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt was, under the circumstances, continued by Lord Brougham. "As to the argument," observed his Lordship, "that the Courts of equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the Court of Exchequer has the power of restraining, and therefore there needs no interposition of the Court of Chancery. It suffices to say that the Court in which the action is brought is a Court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth." See also *Simpson v. Fogo*, 1 J. & H. 18; 1 H. & M. 195.

But where the interposition of equity would not place creditors, foreign and domestic, on an equal footing (*Liverpool Marine Credit Company v. Hunter*, 4 L. Rep. Eq. 62), or where the matter may be more conveniently litigated in the foreign Court, equity will not interfere. Thus in *Jones v. *Geddes*, 1 Ph. 725, an injunction [*634] granted on a suggestion of fraud to restrain a party resident in England from prosecuting a suit in the Court of Session in Scotland, to enforce a legal security against land situate in that country, was, on appeal, dissolved, on the ground, that, although the remedy afforded in equity in cases of fraud was more effectual and complete than in the Scotch Court; the question between the parties in the case might, upon the whole be more conveniently litigated, and with a more conclusive result, there. See also *Venning v. Lloyd*, 29 L. J. N. S. (Ch) 152.

When a foreigner seeks no assistance from the courts of this country it will require a very strong case to induce the Court of Chancery to restrain him when domiciled in another country, from proceeding to obtain payment of debts according to the law of that country. See *Carron Iron Company v. Maclaren*, 5 H. L. Cas. 416, reversing S. C., 16 Beav. 279; and see *Stainton v. The Carron Company*, 18 Beav.

146; 21 Beav. 152, 500; 24 Beav. 346; *Maclaren v. Stainton*, 26 L. J. N. S. (Ch.) 332.

Before, however, the Court of Chancery interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. See *Ostell v. Le Page*, 2 De G. Mac. & G. 892; *Kennedy v. Cassillis*, 3 Swanst. 313.

The result of the authorities is, that if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though the authorities will justify such a course, yet they will not, it seems, make it the duty of the Court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should take their own course: *Per* Lord Cranworth, C., 5 H. L. Cas. 439.

The Courts of equity cannot interfere where relief is sought in consequence of errors and irregularities in the decree of a colonial equitable Court, as an appeal lies from that Court to the appellate jurisdiction in this kingdom: *Henderson v. Henderson*, 3 Hare, 100; but where such proceedings may have taken place in a foreign Court, from which there is no appeal to any superior jurisdiction which a Court of equity in this country could regard as certain to administer justice in the case, the result may be different: 3 Hare, 118.

Whether a Plaintiff can sue at law and in equity for the same thing.—Where a party is suing in another Court and in equity for the same thing, and for the *same purpose, he will as a general rule be put to his election in which Court he will proceed; and [*635] if he elects to sue in equity, he will be restrained from proceeding in the other Court; *Vaughan v. Welsh*, Mos. 210; *Anon.*, Mos. 304; *Mocher v. Reed*, 1 Ball. & B. 318, 319, 330; *Pieters v. Thompson*, G. Coop. 294; *Gedye v. Duke of Montrose*, 26 Beav. 45.

And if a plea of proceedings in another Court of competent jurisdiction is put in, it must show not only that the same issue was joined as in the suit in equity, but that the subject-matter is the same, and that the proceedings in the other Court were taken for the same purpose: *Behrens v. Sieveking*, 2 My. & Cr. 602. And if it appears that the suit and action are not for the same matter, an order to elect will be discharged: *Anglo-Danubian Co. v. Rogerson*, 4 L. R. Eq. 3.

If, after decree, a party proceeds in any other Court for the same purpose, whether the proceedings are taken in this or any other country, he will be restrained by the defendant's application, without filing a bill, as it is a contempt of Court: *Jackson v. Leaf*, 1 J. & W. 229, 232; *Mocher v. Reed*, 1 Ball. & B. 318; *Clarke v. Earl of*

Ormonde, Jac. 546; *Wilson v. Wetherherd*, 2 Mer. 406; *Harrison v. Gurney*, 2 J. & W. 563; *Booth v. Leicester*, 1 Kee. 579; 3 My. & Cr. 459; *Boulter v. Boulter*, 2 Beav. 196, n.; and see *Bell v. O'Reilly*, 2 2 S. & L. 430; *Mollyneux v. Scott*, 3 Ir. Ch. Rep. 291, 301. If, therefore, any proceedings in another Court are necessary, the plaintiff should first obtain leave to take them from the Court: *Wedderburn v. Wedderburn*, 4 My. & Cr. 585; *S. C.*, 2 Beav. 208; *Royle v. Wynne*, Cr. & Ph. 252.

The case of a mortgagee is an exception to the rule, for he has a right to proceed on his mortgage in equity, and at law, on any collateral securities, as a covenant or bond, at the same time.

But if he has so dealt with the mortgaged property as to render it impossible for him to restore it on full payment, as where he has either wholly or partially alienated it (*Palmer v. Hendrie*, 27 Beav. 347; and see *Walker v. Jones*, 1 L. R. P. C. 50), or where he is unable to hand over the title deeds to the mortgagor in consequence of another person having a lien upon them (*Schoole v. Sall*, 1 S. & L. 176), he will be restrained from proceeding at law. *Secus*, where his inability to restore the property is prevented by vis major, as if the mortgaged property were swept away by fire or flood, or if, through no default of his own, he were evicted therefrom in the case of leasehold by the owner of the freehold: *Burrell v. Smith*, 7 L. R. Eq. 399, 408.

Even after foreclosure, it seems that a mortgagee alleging that the value of the estate is not sufficient *to satisfy the debt, is not [*636] absolutely precluded from suing on the bond or covenant; but then, by doing so, he opens the foreclosure and gives the mortgagor a right to redeem; if, however, the mortgagee has, after foreclosure, sold the estate, and so precluded the possibility of redemption, he will be restrained from proceeding on his collateral personal securities. See *Lockhart v. Hardy*, 9 Beav. 349, and the comments of Lord Langdale in *Tooke v. Hartley*, 2 Bro. C. C. 125, 2 Dick, 785, and *Perry v. Barker* 8 Ves. 527; 13 Ves. 198. In a recent case a mortgagee, after foreclosure and an attempted sale, was admitted to prove in an administration suit on giving up the property, but he was not allowed the cost of foreclosure: *Haynes v. Haynes*, 3 Jur. N. S. 504.

Injunctions to restrain proceedings by, or against, the officers of the Court.—A Court of equity has also jurisdiction to restrain parties from proceeding at law against their own officers, when the process of the Court has been either irregularly issued or executed. Thus, in *May v. Hook*, cited 2 Dick. 619; *S. C.*, 1 J. & W. 663, n., where an attachment had been irregularly executed, the defendant brought an action for false imprisonment; but Lord Bathurst restrained him from so doing, upon the ground that the Court will punish its own officers, agreeably to the case of *Bailey v. Devereux*,

1 Vern. 269 ; where it is said, "The irregularity of serving the process of the Court is only punishable here ; and therefore, an injunction lies to stay proceedings at law for irregularity:" and see *Frowd v. Lawrence*, 1 J. & W. 665.

So where an action of trover was brought against a sheriff for an ejectment under a writ of assistance issued in pursuance of an order of the Court, an injunction was granted, restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order : *Walker v. Micklethwait*, 1 Drew. & Sim. 49.

In a proper case, the party may apply to the Court, either for a reference to Chambers, to settle a proper compensation, or for liberty to bring an action : *Ex parte Clarke*, 1 Russ. & My. 563 ; *Phillips v. Worth*, 2 Russ. & My. 638 ; *Aston v. Heron*, 2 My. & K. 390 ; *Bricknell v. Stamford*, 1 Beav. 368 ; see *Ex parte Van Sandau*, 1 Ph. 445, 505 ; *Walker v. Micklethwait*, 1 Drew. & Sm. 49. And it seems, that if the person against whom the complaint is made is desirous of having it tried at law, a Court of equity considers that he is entitled, to have it so tried *Whitehead v. Lynex*, 34 Beav. 161, 165 ; *Arrow-smith v. Hill*, 2 Phil. 609. But where, from the circumstances, *it appeared impossible to make out a case for damages, the Court granted an injunction to restrain a party from proceeding in an action of trespass brought against the messenger of the Court, and ordered the plaintiff at law to pay the costs of application : *Chalie v. Pickering*, 1 Kee. 749.

The Court will restrain its own officers, or persons employed under its authority, from proceeding at law. Thus, commissioners for the examination of witnesses have been restrained from proceeding for their fees : *Blundell v. Gladstone*, 9 Sim. 455 ; *Ambrose v. Dunmow Union*, 8 Beav. 43. And *In the matter of Weaver*, 2 My. & Cr. 441, an order was made to restrain an action brought by an auctioneer against the solicitor in a lunacy, for the amount of his bill for appraising and selling property belonging to the lunatic, such sale having been made under the authority of the Court, and the auctioneer having acted on the instructions of the solicitor, and with the sanction of the Master, before whom he had, at first, carried in his claim ; and a reference was directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account. So where an action was brought by a solicitor for the whole amount of his bill of costs, after a tender of the sum awarded to him on taxation, he was restrained by injunction at the instance of the representatives of his client : *Re James Campbell*, 3 De G. Mac. & G. 585.

How far injunctions can be granted to restrain proceedings in criminal matters.—Equity will not, however, restrain proceedings in criminal matters as on an indictment on a mandamus, or on an information or

writ of prohibition (*Holderstaffe v. Saunders*, 6 Mod. 16; *Lord Montague v. Dudman*, 2 Ves. 396), unless such proceedings are commenced by a person also plaintiff in equity, relative to the same matter. Thus, in the case of *The Mayor and Corporation of York v. Pilkington*, 2 Atk. 302, where a bill and cross bill were depending to establish the claim to a sole right of fishery, the plaintiffs in the first suit caused the agents of the defendant to be indicted at York Sessions for a breach of the peace in fishing in their liberty, Lord Hardwicke, upon motion, restrained them from proceeding till the hearing of the cause or further order. He observed, that, supposing it were a suit for a right of land, where entries had been made, and the bill was brought to quiet the possession, and after that they preferred an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is also a civil right, the Court would certainly stop the proceedings upon such indictment; for where parties submitted [*638] their right to the Court, it certainly had a jurisdiction, and might interpose.

But it seems that the Court would not have the same control over defendants: *The Attorney-General v. Cleaver*, 18 Ves. 220.

Whether an injunction will be issued to restrain proceedings in bankruptcy.—Formerly the Court of Chancery had also jurisdiction to stay proceedings in the Court of Bankruptcy. See *Mather v. Lay*, 2 J. & H. 374: there an order had been made in bankruptcy for the sale of the furniture used in a lodging-house kept by the bankrupt and his wife, as being in the order and disposition of the husband. The bill was filed by the wife and the trustee of the marriage settlement of the wife, alleging that the furniture had been purchased before the bankruptcy by moneys arising from the separate estate of the wife. The bill also alleged that the defendant, the assignee, who was the only creditor who had proved, knew the circumstances under which the furniture was purchased, and also that no other creditor had given credit to the bankrupt on the faith of his alleged possession of the goods. It appeared in evidence that the plaintiff had applied to the Court of Bankruptcy for a stay of proceedings, but had not otherwise submitted to the jurisdiction. It was held by Sir W. Page Wood, V. C., that the Court of Chancery had jurisdiction, notwithstanding the order of the Court of Bankruptcy, to restrain a sale and determine the right among the parties.

And a person has been restrained from using the debt of another for the purpose of taking out a fiat against him in fraud of an agreement entered into with respect to it (*Attwood v. Banks*, 2 Beav. 192; *Anon.*, Rolls, 8 Jur. 1085). But an injunction to restrain proceedings at law for the purpose of making a company bankrupt, has been refused, notwithstanding an order had been made for winding up the company, and an official manager and creditors' representative had been

appointed before the commencement of such proceedings—the creditors, representative appearing and expressing his consent to their prosecution: *In re London and Eastern Banking Corporation*, 4 K. & J. 273.

It seems that equity never had any jurisdiction to interfere in the mere distribution of the estate of a bankrupt either on the ground of trust or otherwise. In *Thompson v. Derham*, 1 Hare, 358, the plaintiffs in equity claiming to be admitted as creditors under a fiat in Bankruptcy, in respect of a breach of trust by the bankrupts, which was the subject of the suit in equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed *to enter a claim upon the proceedings, and to have a fund reserved; the application being refused by the commissioners was renewed by petition to the Court of Review, and also refused by that Court. A supplemental bill was then filed, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the plaintiffs' demand. It was held, however, by Sir J. Wingram, V. C., that if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt the Court ought, upon general principles, after an adjudication in bankruptcy on the subject of the distribution, to refrain from exercising such jurisdiction; and see *Halford v. Gillow*, 13 Sim. 44; *Perry v. Walker*, 1 Y. & C. C. C. 672. [*639]

But now every Court having jurisdiction in bankruptcy under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), has full power to decide all questions whether of law or fact arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case; and no such Court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other Court. (Sect. 72.) And by a former section of the same Act such Court has power to restrain, in a proper case, proceedings both at law and equity, sect. 13. See Robson, 278. *Ex parte Rumboll In re Taylor and Rumboll*, 6 L. R. Ch. App. 842; *In re Escherich and Baring*, 20 W. R. (C. J. B.) 766; *Re Marcus Davis*, Ib. 767.

But it does not follow, that because there has been a relation between two parties founded on bankruptcy proceedings, that every dealing between them having any connection with that relation, is drawn within the jurisdiction of the Court of Bankruptcy: *Ex parte Lyons*, 7 L. R. Ch. App. 494.

For the practice as to injunctions to restrain proceedings in other Courts, see Dan. Ch. Prac. 1462, 1536, 5th edit.; *Harris v. Collett*, 26 Beav. 222; *Fitzgerald v. Bull*, 9 Hare, App. lxv.; *Magnay v. The*

Mines Royal Company, 3 Drew. 130; *Fox v. Hill*, 2 De G. & Jo. 353; 15 & 16 Vict. c. 86. s. 58.

Injunctions to restrain proceedings in equity.—Proceedings in one suit in equity may be restrained by an injunction obtained in another. Thus, where there are two claimants to a fund, and one files a bill against the stakeholder without making the other a party, the stakeholder may file an interpleader bill, and restrain proceedings in the former suit: *Prudential Assurance Company v. Thomas*, 3 [*640] L. R. Ch. App. 74; and see *Warrington v. Wheatstone*, Jac. 202; *Sieveking v. Behrens*, 2 My. & Cr. 581; 2 Seton on Decrees, 962, 3rd edit. See *The Erie Railway Co. v. Ramsey*, 45 New York, 637, 650.

It may be here mentioned that a railway company has no power to expend its funds in the prosecution of a suit not instituted by it, and a Court of equity will, at the instance of a shareholder, restrain it from doing so, without going into the question whether or not the suit is proper, or for the benefit of the company: *Kernaghan v. Williams*, 9 L. R. Eq. 228.

As to the practice in equity in staying suits or otherwise,—1st. Where there are two suits for the same purpose; 2ndly. Where they are not exactly for the same purpose: see *Zambaco v. Cassavetti*, 11 L. R. Eq. 439.

How far parties will be restrained from applying for an Act of Parliament.—It has been laid down by many eminent judges, that the Court of Chancery, acting *in personam*, has power, in a proper case, to grant an injunction against a party applying to Parliament for a private act, or an act respecting property; but no such injunction has, it seems, yet been granted, nor has any judge yet ventured to say in what particular case such an injunction would be granted. A leading case upon this subject is that of *Heathcote v. The North Staffordshire Railway Company*, 2 Mac. & G. 100. There the plaintiff had agreed with the Railway Company to withdraw his opposition to their bill in Parliament in consideration of their completing their line of railway in a particular manner. The company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to Parliament for an Act to authorize them to abandon the scheme. Lord Cottenham, C., dissolving an injunction granted by Sir. L. Shadwell, V. C., held that the Court could not interfere to restrain the company from making the application to Parliament. "It has been suggested," said his Lordship, "that this Court could not interfere without infringing upon the privileges of Parliament; so the Courts of common law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases this Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I

should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property ; but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of common law : the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable* use of such legal right ; but the ordinary province of Parliament in such bills is to abrogate existing [*641] rights, and to create new rights. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should by its injunction deprive the subject of the benefit of Parliamentary interference in such cases. . . . The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so. What difference then can it make, whether such pre-existing right exists by the tenure of property or by virtue of contracts ? In both cases Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does or intends to do, compensation to the party affected ; and in neither has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise :'' *Attorney-General v. Manchester and Leeds Railway Company*, 1 Railw. Cas. 436 ; *Lancaster and Carlisle Railway Company v. North-Western Railway Company*, 2 K. & J. 293 ; *In re London, Chatham and Dover Railway Arrangement Act*, 5 L. R. Ch. App. 671, 682 ; 5 L. P. Ch. App. 671 ; *Telford v. The Metropolitan Board of Works*, 20 W. R. (V. C. B.) 481.

Upon the same principle, in the absence of any equity the Court will not restrain an application in a proper case to the legislature of a foreign country : see *Bill v. The Sierra Nevada Lake Water and Mining Company*, 1 De G. F. & Jo. 177. There a company was formed in California for purposes connected with land in that country, but nearly all the shareholders were resident in England. A resolution was passed at a meeting of the English shareholders, authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company. It appearing that there was no intention to create preference shares, except with the sanction of the Californian legislature, it was held by the Lords Justices, reversing the decision of Sir John Stuart, V. C., that an injunction ought not to be granted to restrain the company from acting on the resolution, for that the Court will not in general restrain parties from applying to the legislature, whether of this or a foreign country.

As, however, it is unlawful, and in fact a breach of trust, to apply the funds of a company in an application to Parliament for powers [*642] *to extend the business of the company beyond the objects for which it was constituted, the Court will interfere by injunction, at the suit of any of the shareholders, to restrain such application: *Simpson v. Denison*, 10 Hare, 51. So where it appeared in a suit that certain shareholders of a company had resolved to use its funds, and to pledge its credit, and to make contracts for the purpose of making an application to Parliament to vary the original object contemplated by the Act of Parliament by which the company was formed, the Court of Chancery, at the instance of other shareholders, granted an injunction, restraining the appropriation of funds, the pledging of the company's credit, and the entering into contracts in support of such an application to Parliament: *The Great Western Railway Company v. Rushout*, 5 De G. & Sm. 290; see also *Cunliff v. Manchester and Bolton Canal Company*, 2 Russ. & My. 480, n.; *Ward v. The Society of Attornies*, 1 Coll. 370; *Colman v. The Eastern Counties Railway Company*, 10 Beav. 1; *Cohen v. Wilkinson*, 12 Beav. 125, 138; *Munt v. The Shrewsbury and Chester Railway Company*, 13 Beav. 1, sed vide *Ware v. The Grand Junction Waterworks Company*, 2 Russ. & My. 470.

Upon the same principle, where persons have in their hands funds which have been appropriated by Act of Parliament to certain given puposes, they cannot without the previous consent of the Court of Chancery, apply them for an extension of those purposes; although it is purely and bonâ fide an extension, on a more enlarged application of the fund to those puposes, which the legislature has regarded as good and beneficial. Thus in the case of the *Attorney-General v. The Corporation of Norwich*, 16 Sim. 225, Sir L. Shadwell, V. C., restrained the Corporation of Norwich from soliciting, at the expense of the borough-fund, a bill in Parliament to enable them to improve the navigation of the river which flows through that town to Yarmouth. "If this Court," said his Honor, "had sanctioned the application to Parliament, it would have allowed the corporation the expenses of the application; but if trustees, whether they be a public body or private individuals, think proper to apply to Parliament, without the sanction of the Court, to enable them to carry into effect a project, which, however beneficial it may appear to be, may eventually fail, the Court will not allow them to retain their expenses out of the trust fund:" and see *Munt v. The Shrewsbury and Chester Railway Company*, 13 Beav. 1; *The Attorney-General v. Andrews*, 2 Mac. & G. 225; *Attorney-General v. West Hartlepool Improvement Commissioners*, 10 L. R. Eq. 152, and see *Bowers v. Commissioner of Sligo*, 4 I. Rep. C. L. 489.

*Although, however, funds cannot be applied by persons in [*643] promoting a bill in Parliament, for the purpose of extending their powers, they may be applied in *defence* of existing rights, and

they will not consequently be enjoined by the Court of Chancery. Thus, in *Bright v. North* (2 Ph. 216), where conservators of river-banks were empowered by Act of Parliament to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands) "in doing, constructing, and executing all such works, acts, matters, and things as they should from time to time deem necessary, proper, or expedient for putting the banks into and maintaining the same in a permanent state of stability," it was held by Lord Cottenham, C., that they were authorized to apply a portion of the fund in watching, and, if necessary, opposing a bill in Parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. And see *Attorney-General v. The Mayor of Wigan*, Kay, 268. So likewise it has been held that a municipal corporation is justified in discharging out of the corporate funds the expenses of opposing quo warranto informations against individual members of the corporation, if the object of such informations be to impeach the title, or destroy the legal existence of the corporation as a body: *Attorney-General v. The Mayor of Norwich*, 2 My. & Cr. 466.

Upon the same principle as that laid down in *Simpson v. Denison*, it has been held, that the costs of a prosecution for libel instituted by the directors of a trading company, are not properly payable out of the assets of the company, and the payment of such costs will be restrained by injunction: *Pickering v. Stephenson*, 41 L. J. (N. S.) 493; 20 W. R. 654, in which case, however, the Court refused to order the repayment of costs already paid, as the directors had acted *bonâ fide* in accordance with the wishes of a large majority of the shareholders.

As to Equitable Pleas.—A learned author shows succinctly the extent to which Courts of law will entertain their new equitable jurisdiction.

"The equitable plea will only be admissible in such cases as, having regard to the machinery of the Courts of law and the forms of proceeding therein, *complete justice* can thereby be done between the parties. In all cases, therefore, where the defendant will be only entitled to such a modified relief as cannot be properly dealt with by a Court of law, he will still have to resort to a Court of equity; and, indeed, some of the few decisions in the Courts of law upon this subject have gone so far as to say that no equitable *plea will be good unless it discloses facts which would entitle the defendant to an unconditional relief in equity: " *Williams's Introd. to Plead.* p. 123; and see *Mayne on Equitable Defences*; *Clark v. Laurie*, 1 H. & N. 452; *Wakley v. Froggatt*, 2 H. & Colt. 669; *Jeffs v. Day*, 1 Law Rep. (Q. B.) 372; *Murphy v. Glass*, 2 L. R. P. C. 408; *Smith v. Hayes*, 1 I. Rep. C. L. 333; *Kenna v. Brien*, 6 I. R. C. L. 307.

The equitable defence allowed by the statute means such a defence as would in a Court of equity be a complete answer to the plaintiff's claim, and would as such afford sufficient ground for a perpetual and

unconditional injunction: *Mines Royal Societies v. Magnay*, 10 Exch. 489; *Wood v. Copper Miners Company*, 17 C. B. 561; *Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202.

A Court of law will not allow an equitable defence to be set up under the Common Law Procedure Act, 1854, where the defendant has filed a bill raising the same question in a Court of equity: *Schlumberger v. Lister*, 2 Ell. & Ell. 855; 8 W. R. (Q. B.) 523.

(For injunctions against waste, and to prevent trespasses, see vol. 1, 1011.)

INJUNCTIONS IN RESTRAINT OF LEGAL PROCEEDINGS.—The rule that matters which have received a judicial determination shall not be again controverted, applies as between courts of law and equity; *Holmes v. Stateler*, 57 Illinois, 209. When the jurisdiction of a court of law has attached, it covers the whole ground, so far as it is a subject of legal cognizance, and the judgment cannot be re-examined collaterally on any point which the tribunal was competent to hear and decide. Hence a failure of justice, through the error of the judge, the incompetency of the jury, or the omission of the party to present his case in a proper manner, does not warrant the intervention of a chancellor; *Holmes v. Stateler*; *McClure v. Miller*, 1 Bailey, Eq. 107. This rule does not apply where the cause involves questions which belongs to the exclusive jurisdiction of equity. For, as the ground on which the complainant asks for relief cannot be determined at law, it is not within the estoppel of the judgment. The existence of an equitable defence, which could not have been made available as a legal defence, is,

therefore, a sufficient cause for an injunction; see *Young v. Reynolds*, 4 Maryland, Ch.; *Jones v. Selby*, 5 Harris & Johnson, 372; *Kitten v. Robbins*, 4 Allen, 369; *White v. Crew*, 16 Georgia, 416; *Pollock v. Gilbert*, Ib. 398; *The County of Armstrong v. Brinton*, 11 Wright, 367, 374; *Lamb v. Kelly*, 1 Chandler, 224; *Ross v. Harper*, 99 Mass. 107. Or as the rule was stated, in *Ross v. Harper*, where a defendant has grounds which are not admissible at law, but which yet render the plaintiff's demand unconscientious, a court of equity may intervene for his protection either before or after judgment.

This is not, however, the only ground on which a chancellor may restrain the course of legal proceedings by an injunction. Agreeably to the narrow rule of the common law, a verdict could not be set aside or a judgment opened, however clearly it might appear that there had been a failure of justice from the false testimony of the witnesses, the loss of evidence, or because the party was prevented from taking advantage of a good defence by trick or artifice. This strictness

compelled a resort to the Court of Chancery, which held that when the merits of the case had not been considered, and the complainant was not chargeable with laches, the doctrine of *res adjudicata* did not apply, and the issue ought to be laid before another jury. This doctrine has now been adopted by the courts of common law, and judgment are constantly opened, verdicts set aside, and new trials awarded for reasons that would formerly have required the intervention of a court of equity; 3 Bl. Com. 387. Although this change does not supersede the jurisdiction of a chancellor, it still appeals strongly to his discretion, not to exercise a power which can be as well, and, in most cases better administered by the tribunal, which is in possession of the cause. If the complainant does not move for a new trial in the forum where the suit was brought, and the verdict rendered, the bill will ordinarily be dismissed on the ground of negligence. If he does, and the application is refused, the question should not be reopened before a judge who did not hear the evidence; *Hendrickson v. Hinckley*, 5 McLean, 211; 17 Howard, 443; *Matson v. Field*, 10 Missouri, 100; *Herring v. Winans*, 1 Smedes & Marshall Ch. 466; *Smith v. Lowry*, 1 Johnson Ch. 320; *Bishop v. Dean*, 3 Dana, 15; *Collins v. Butler*, 14 California, 223. But this argument does not apply where the cause which prevented the party from laying his case before the jury,

continues to operate until the term has ended, and it is too late to move for a new trial, and he may then seek the redress in equity which cannot be had at law; *White v. Washington*, 5 Grattan, 645.

The result of the authorities as given by Chancellor Kent, in *Foster v. Wood*, 6 Johnson Ch. 89, is, "that chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." In *The Marine Insurance Company of Alexandria v. Hodgson*, 7 Cranch, 332, the rule was stated conversely by Chief Justice Marshall: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." These cases define the authority of a

court of equity to control the course of legal proceedings; and the principles which they establish are recognized and followed throughout the United States; *Truly v. Wanzer*, 5 Howard, 141; *Hendrickson v. Hinckley*, 17 Id. 443; *Emerson v. Udall*, 13 Vermont, 447; *The Ocean Insurance Company v. Fields*, 2 Story, 59.

A JUDGMENT WILL NOT BE ENJOINED ON LEGAL GROUNDS.—It is accordingly well settled that a court of equity will not enjoin the execution of a judgment on merely legal grounds, however plainly it may appear that the complainant had a good legal defence, which was not presented or considered through the oversight of counsel, or the error of the judge, or from a failure on his own part to collect the evidence in due season, and present it in a way to be available; *Duckworth v. Duckworth*, 35 Alabama, 70; *Becker v. Elkins*, 1 Johnson Ch. 466; *The Marine Ins. Co. v. Hudson*, 7 Cranch, 332; *Wendevart v. Allen*, 13 Maryland, 196; *Katz v. Moon*, 1b. 566; *The Methodist Church v. The Mayor of Baltimore*, 6 Gill, 391. The rule is inflexible, as it regards every point that was or might have been presented at the trial, and will not yield to the clearest proof that the judgment is wrong in law or in fact, or that the effect of allowing it to stand will be to make the party liable for a debt which he never owed, or which was discharged before action brought; *Hendrickson v. Van Winkle*, 27 Illinois; *Vennum v. Davis*, 35 Id. 568; *Holmes v. State-*

ler, 57 Id. 209; *Lyday v. Douple*, 17 Maryland, 188; *Brandon v. Green*, 7 Humphrey, 130; *Johnson v. Lyon*, 14 Iowa, 431; *Hendrickson v. Hinckley*, 17 Howard, 445.

The question was fully considered in *Hendrickson v. Hinckley*, where Curtis, J., said: "The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant and one Campbell, since deceased. A court of equity does not interfere with judgments at law unless the complainant has an equitable defence, of which he could not avail himself at law because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents; *Marine Insurance Company v. Hodgson*, 7 Cranch, 333, *Creath v. Sims*, 5 How. 192; *Walker v. Robbins et al.*, 14 How. 584. The application of this rule to the case stated in the bill leaves the complainant no equity whatever. The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the trial was had and judgment recovered. The reasons alleged by the bill for enjoining the judgment are:

1st. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that

sale. But this alleged fraud was pleaded, in the action at law, as a defence to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold.

2d. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of payment of the notes when they were given. These promises could not be availed of in any court as a defence to the notes; for, to allow them such effect, would be to alter written contracts by parol evidence, which cannot be done in equity any more than at law in the absence of fraud or mistake; *Sprigg v. The Bank of Mount Pleasant*, 14 Pet. 201. But whatever substance there was in this defence, it was set up at law, and upon this, also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3d. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse to the defence, were read in evidence to the jury; and the bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of

their existence, and so was surprised. To this there are two answers, either of which is sufficient. The first is, that the complainant and Campbell being jointly interested in the purchase and ownership of the property for which these notes were given, and joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and, with the use of due diligence, would have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions. Another answer is, that if there was surprise at the trial, a motion for delay, as is practised in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law.

4th. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law, by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: 'Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter specifically set forth;

but the said Campbell, attorney, regarded the defence pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as matter of defence, could it even have been done consistently with the defence made as aforesaid.' He purposely omitted to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate, and complete remedy at law, have purposely omitted to avail themselves of it. It is suggested that courts of equity have an original jurisdiction in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject; 2 Story's Eq. 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a

different determination, and to be restored to the right which he has once voluntarily waived; *Barker v. Elkins*, 1 John. Ch. R. 465; *Greene v. Darling*, 5 Mason, 201. Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the State, and that, therefore, he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the State. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him.

"The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere."

It results from the authorities which have been cited, that a court of equity will not stay the course of law on legal grounds, or for any cause that is not so essentially one of equitable cognizance, that it cannot appropriately be determined in a legal forum. This is equally true whether the point was or was not considered by the court that pronounced the judgment, which the complainant seeks to enjoin. *Forsythe v. McCreight*, 10 Richardson Eq. 308; *Wilsey v. Maynard*, 21 Iowa, 107;

see 2 Smith's Leading Cases, 764, 7 Am. ed. One cannot have relief in equity because he failed or omitted to make out his defence at law; however plainly it may appear that the right lay with him, and that his ill success was due to a want of proof which has since been obtained. *Day v. Cummings*, 19 Vermont, 496; *McVickar v. Wolcott*, 4 Johnson, 510; *Hempstead v. Watkins*, 1 English, 317; *Allen v. Hopson*, 1 Freeman, 276; *The Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332; *Peace v. Nailing*, 1 Dev. Eq. 239; *Champion v. Miller*, 2 Jones Eq. 194; *White v. Cashel*, 2 Swan, 55.

Nor can such relief be afforded on the ground that the court mistook the law, and excluded evidence which should have been received, or heard testimony which was inadmissible; *Beavan v. Monroe*, 7 Leigh, 364. For like reasons a chancellor will not entertain an allegation that the judge who tried the case instructed the jury erroneously, or that the jury misunderstood or misapplied the charge; *Vaughn v. Johnson*, 1 Stockton, 153; see 2 Smith's Leading Cases, 783, 7 Am. ed. *Harnsbarger v. Kinney*, 13 Grattan, 511; *Buckmaster v. Grundy*, 3 Gilman, 626; *The State Bank v. Stanton*, 2 Id. 352; *Paynter v. Evans*, 7 B. Monroe, 420; *Shortridge v. Bartlett*, Ib. 249; *Vaughn v. Johnson*, 1 Stockton Ch. 173; *Dilly v. Barnard*, 8 Gill & Johnson, 170; *Prather v. Prather's Adm'r*, 11 Id. 110; *Bently v. Dillard*, 1 English, 79; *Andrews v. Fenter*, 1 Arkansas,

186; *Hartson v. Davenport*, 2 Barb. Ch. 77; *Vilas v. Jones*, 1 Comstock, 274; *Perrine v. Striker*, 7 Paige, 598; *Powell v. Watson*, 6 Iredell Equity, 94. It has been justly said that where an application is made for relief against a judgment, the province of the chancellor is to test the conscience of the parties, and not the legality of the judgment, nor to correct the errors that may have been committed by the court; *Hood v. The N. R. R. Co.*, 23 Conn. 609; *The Methodist Church v. The Mayor*, 6 Gill, 391; *Clapp v. Ely*, 2 Stockton, 178; *Price v. Johnson*, 15 Missouri, 435. A different rule would render the jurisdiction of chancery universal, by converting it into a court to which an appeal might be had in every instance; *White v. Cahal*, 2 Swan, 550; *Russell v. Slaton*, 38 Georgia, 195.

It was accordingly held in *Donahue v. Prentiss*, 22 Wisconsin, 311, that as one who is twice garnished for the same debt at the suit of two different creditors, may obtain a stay of proceedings in the second proceeding, by averring the pendency of the first, he cannot maintain a bill after judgment has gone against him in both suits, to compel the parties plaintiff, to interplead for the purpose of ascertaining which of them is rightfully entitled to the amount.

Dixon, C. J., said: "If it was competent for the court of law to have relieved the plaintiff upon the motion, then clearly the decision of the court against the plaintiff

was conclusive and binding upon the court of equity in which the bill of interpleader was filed. This doctrine has been frequently under discussion in this court; (9 Wis. 29; *Id.* 16; 14 *Id.* 180; 17 *Id.* 419; 20 *Id.* 320), and it is sufficient here to refer to those cases and the cases cited, and to *Simpson v. Hart*, 1 Johns. Ch. 91, and *Le Guen v. Gouverneur and Kemble*, 1 Johns. Cases, 436. The rule to be derived from those cases is, that the decision of a court of competent jurisdiction, being *res judicata*, is not only conclusive and binding on all other courts of concurrent jurisdiction, as to the subject matter thereby determined, but also as to every other matter which the parties might litigate in the case, and which they might have had decided. In the language of Lord Redesdale, quoted in *Simpson v. Hart*, "equity never interferes to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction;" to which Chancellor Kent adds, that "the settled doctrine of the English chancery is, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defence." If, in case of interpleader, the party has his remedy at law, "that would seem to put an end to the jurisdiction in equity, which comes to the aid

of the party only when there is no remedy at law, or the remedy is inadequate." Per Lord Redesdale, 2 Story's Eq. Jur., Redfield's ed., page 15, note 1.

The cases of *Yarborough v. Thompson*, 3 Smedes & Marshall, 291, and *Houston v. Wolcott & Co.*, 7 Clarke (Iowa), 173, were very like the present, and strongly illustrate this rule. In the former, two judgments having been rendered against a garnishee, one in favor of an attaching creditor, and the other in favor of an assignee of the note, the note being in fact the foundation of both judgments, and the garnishee having defended both cases, it was held that he could not, in a court of equity, by a bill of interpleader, obtain a perpetual injunction against either. It was likewise held that after judgment at law, it was too late to file a bill of interpleader on the mere ground of adverse claims to the same debt or fund. This and *The Union Bank v. Kerr & Glenn*, 2 Maryland Chancery Decisions, 460, are authorities in addition to *Cornish v. Tanner*, 2 Young & Jervis, 333, that a bill of interpleader ought not to be delayed until after a judgment has been obtained. In *Houston v. Wolcott & Co.*, the plaintiff, as garnishee, had been served with process at the suit of two different attaching creditors, and having failed in the second suit to disclose the fact of service of process upon him in the first, two judgments were obtained against him for the same debt; and it was held that equity could

afford him no relief as against either."

A failure to make a defence in due season before a legal tribunal, is not excused by showing that the omission was due to ignorance, unless it appears that the complainant could not have acquired the requisite information by the diligent effort which is incumbent on one when preparing his case for trial; *Slack v. Wood*, 9 Grattan, 40; *Allen v. Hamilton*, 1b. 255; *Holmes v. Statelet*, 57 Illinois, 209; *Hendrickson v. Van Winkle*, 27 Id. 334; *Smith v. Allen*, 63 Id. 474; *Truly v. Wanzer*, 5 Howard, 141; *Emerson v. Udall*, 13 Vermont, 477; *The Ocean Ins. Co. v. Fields*, 2 Story, 59.

An injunction will not therefore be granted at the instance of a surety after judgment, on the ground that he was a stranger to the contract and ignorant that the consideration was usurious as between the creditor and principal, because he should have made inquiry of the latter, while the cause was still pending in the court of law. *Moran v. Woodward*, 8 B. Monroe, 537; *Miller v. Gaskins*, 1 Smedes & Marshall, 224.

For like reasons a party cannot have relief in equity, because he has lost the benefit of a good defence, in consequence of the ignorance, mistake, or negligence of his attorney, however clearly it may appear that a cause was sacrificed, which might have been successfully defended; see *Warner v. Conant*, 24 Vermont, 351; *Barton v. Wiley*, 26 Id. 430; *Emerson v. Udall*, 13 Id. 477; *Fletcher v.*

Warren, 18 Id. 451; *Graham v. Roberts*, 1 Head, 56; *Powell v. Stewart*, 17 Alabama, 719; *Jamison v. May*, 13 Arkansas, 600. The appropriate remedy is through a motion for a new trial in the court which tried the cause, and if this be omitted, the question cannot be raised in another forum, consistently with the doctrine which requires that there shall be an end to litigation. But a judgment confessed by an attorney who is imperfectly acquainted with the facts, during the illness of his client, and of the counsel who has been specially retained to defend the cause, may be enjoined if it appears that there was a good defence to the action; *Clark v. Taylor*, 22 Georgia, 559.

MAY BE AWARDED WHERE THE DEFENCE IS EQUITABLE.—It is not less well settled that an injunction may be granted either before or after judgment, whenever the cause depends on questions which are solely cognizable in equity, and cannot be appropriately considered or determined at law; *Hibbard v. Eastman*, 47 New Hamp. 507; *Frith v. Roe*, 23 Georgia, 139; see *Fanning v. Dunham*, 5 Johnson, Ch. 122; *Edwards v. Varick*, 1 Hoffman Ch. 382; 11 Paige, 290; 5 Denio, 664, 679; *Skinner v. White*, 17 Johnson, 357; *Truly v. Wanzer*, 5 Howard, 141; *Ferri-day v. Selcer*, 1 Freeman, 258; *Miller v. Gaskins*, 1 Smedes & Marshall Ch. 524; *Greenlee v. Gaines*, 13 Alabama, 198; *French v. Garner*, 7 Porter, 549; *Smith v. Walker*, 8 Smedes & Marshall, 131; *Wilson v. Leigh*, 4 Iredell,

Equity, 97; *White v. Crew*, 16 Georgia, 416; *Pollock v. Gilbert*, 1b. 398. And as the intervention of a chancellor is essential in such cases, to prevent a failure of justice, by a partial and incomplete decision, it is a matter of right, not of grace, and cannot be refused, if the grounds on which it is asked are sufficiently made out in pleading and evidence. Thus, constructive fraud is one of the principal heads of equity jurisprudence, for which there is no appropriate legal remedy; *ante*; see vol. 1, 827; and hence where one who has obtained a title by such means, seeks to enforce it by an ejectment, he may be restrained from prosecuting the suit by an injunction, which will be made perpetual if the *allegata* are sustained by the proofs. For like reasons a surety who is equitably discharged by an unauthorized variation of the contract, may enjoin the creditor from enforcing it by suit; notes to *Rees v. Berrington*, 2 Vesey, Jr. 540; *post*; *Viele v. Hoag*, 24 Vermont, 46; 2 American Lead. Cases, 450; and such relief may also be afforded at the instance of a surety, or of a principal debtor, where the creditor's negligence or misfeasance, has resulted in the loss or misappropriation of a security given for the debt; *Ex parte Mure*, Cox, 63; *Williams v. Price*, 1 Simon & Stewart, 581 *Capel v. Butler*, 2 Simons, 457; *Hayes v. Ward*, 4 Johnson Ch. 123; *Gallagher v. Roberts*, 1 W. C. C. R. 156, 328; *Burnham v. Floury*, 37 Missouri, 459; 2 American Lead. Cases, 403, 5 ed.; *ante*; see *Wode-*

house v. Farebroth, 5 Ellis & Bl. 277.

In *Gallagher v. Roberts*, a debtor remitted a bill of exchange to his creditor, which became unavailable as a means of payment, through the creditor's failure to give notice to the drawer and endorsers. The creditor brought an action for the debt and obtained a verdict and judgment. The debtor then went into equity for an injunction, and the creditor pleaded the recovery at law, and that the matters in issue before the jury, were the same as those stated as the ground of relief. Washington, J., said: "In this case the bill lays a ground for relief, which is not denied; namely, that the amount of the bill was lost to the complainant, by the defendant's neglect in not giving notice of the protest. This defence was deemed inadmissible at law; because as it did not appear that it was received as a payment, the claim of the plaintiff, for the improper conduct of the defendant, was for damages only, which could not be set off. But it is a good ground of relief in equity."

It has also been held a surety may file a bill to restrain the creditor from proceeding against him at law, and for a decree that the debt shall be discharged by the principal, as the party primarily liable; although the court will not grant the injunction, where it would prejudice the creditor, nor after he has obtained judgment; see *In re Babcock*, 3 Story, 93; *Garlick v. McArthur*, 6 Wisconsin, 450; unless it appears that the execution

was issued collusively at the instance of the principal, after the debt had been satisfied by him or on his behalf; *Stephenson v. Taverner*, 9 Grattan, 398; *ante*, 315, vol. 1, 135; *Irick v. Black*, 2 C. E. Green, 199; 2 Am. Lead. Cases, 415, 5 ed.

In *Stephenson v. Taverner*, Moncure, J., said: "In regard to the remaining claim, to wit: the claim of the appellant to have the debt to Holliday, for which he is bound as surety, paid out of the estate of the principal debtor; when the suit was brought, the appellant had not paid the debt, and probably has not yet paid it. But he is entitled nevertheless, the debt being due, to come into equity by a bill *quia timet*, against the creditor and the debtor, and compel the latter to make payment of the debt so as to exonerate himself from his responsibility. Story's Eq. Jur. §§ 327, 639 and 849. He may enforce for his exoneration, any liens of the creditor on the estate of the principal; and if the latter be dead, may bring any suit in equity which the creditor could bring for a settlement of the administration account of the estate of the decedent, and for the administration of the assets, whether legal or equitable. The only difference is that he must bring the creditor into court along with him, in order that he may receive the money when it is recovered."

A cause may also be withdrawn from the courts of law by injunction, in order to prevent a multiplicity of suits; see *Pennsylvania v. Delaware*, 31 New York, 91;

Third Avenue R. R. Co. v. The Mayor, 54 Id. 159; *Woodruff v. Fisher*, 17 Barb. 224; *Patterson v. Jersey City*, 1 Stockton, 434; *Trustees v. Nicols*, 3 Johnson, 566; *Eldridge v. Hill*, 2 Johnson's Ch. 281; *Woods v. Monroe*, 17 Michigan, 238; *West v. The Mayor*, 10 Paige, 530; *Oelrichs v. Spain*, 15 Wallace, 211, 228; or where allowing it to go to judgment will give rise to a circuitry of action; *ante*, 584, 294; *Scott v. Shinn*, 12 Wheaton, 605; *Daniels v. George*, 2 Allen, 892; *Marsh v. Pike*, 10 Paige, 595; *Heyer v. Pruyn*, 7 Id. 465; *Jumell v. Jumell*, Ib. 591; *Tice v. Annen*, 2 Johnson Ch. 268; *Klapworth v. Dresser*, 2 Beasley, 62; *Stevenson v. Black*, Saxton, 338. Accordingly where a principal debtor receives the bulk of the creditor's estate, as a distributee or residuary legatee, a court of equity may enjoin the executors from proceeding to enforce the debt against the surety, because if the suit were allowed to proceed to judgment, it would give rise to a demand against the party who is beneficially interested in the proceeds; *Wright v. Austin*, 55 Barb. 133; *ante*, 318; *Cabanness v. Matthews*, 2 Grattan, 325. So, if a creditor, who is indebted to the principal, is permitted to recover against the surety, the surety will have a cause of action against the principal, while the principal may enforce his demand against the creditor; and the interest of all parties is consequently promoted by an immediate settlement on equitable principles, or through

the intervention of a court of equity; *Brittain v. Quiet*, 1 Jones Eq. 128.

A bill may be filed for discovery in aid of a defence at law, and to enjoin the prosecution of the cause until a full disclosure is made in accordance with the prayer of the bill. But it is essential to such relief, that the case set forth and sworn to by the complainant, should be a good defence to the proceeding which he seeks to enjoin; *Williams v. Harden*, 1 Barb. Ch. 298; *Boughton v. Phelps*, 6 Paige, 300; and the injunction will be dissolved on the coming in of the answer, unless exceptions are filed, and sustained by the court; *King v. Clark*, 3 Paige, 76; *Grafton v. Brady*, 3 Halsted Ch.

When the plaintiff at law resides beyond the State, and there is a good equitable defence to the action, the court may, in order to prevent a failure of justice, direct that a subpoena shall be served on the attorney who issued the summons, and the plaintiff must then answer the bill, or be perpetually enjoined; *Marco v. Low*, 50 Maine, 551.

It was accordingly held in *Marco v. Low*, that a "citizen of another State, who though not personally within the jurisdiction of the court, is engaged in prosecuting before this court, sitting as a court of law, a claim against the complainant for land lying in this county, is so far within the jurisdiction of this court, sitting in equity, as to be liable upon service made on his

attorney in the suit at law, and notice to himself in the State where he resides, to an injunction against the further prosecution of his suit, when it appears, by the bill and demurrer, that his claim to the land is founded upon fraud in which he is partaker."

EQUITABLE SET-OFF AND DEFALCATION.—A court of equity may restrain the course of legal proceedings, in order to give effect to a set-off. This seems to have been an original branch of equitable jurisprudence, although it is exercised in subordination to the statutes by which the right of set-off is conferred and regulated at law; see *Lindsay v. Jackson*, 2 Paige, 581; *Hendrickson v. Hinckley*, 17 Howard, 445. Such relief may be accorded: 1. Where the demand is equitable; 2. Where it is legal.

It is well settled that "where there are cross demands of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then, if either demand is matter of equitable jurisdiction, the set-off may be enforced in equity;" *Clark v. Coit*, 1 Craig & Phillips, 154; *Gay v. Gay*, 10 Paige, 369, 392.

In the case first cited, Groscock was indebted to his bankers, Mansfield & Co., for advances, and conveyed certain real estate in trust to sell it, and apply the proceeds to the payment of the amount due, or that might become due to them or to the persons who should succeed them in the firm. They assigned all their effects, including the debt due by Groscock to the complainants. Groscock became a

bankrupt, and his assignees brought an action against the complainants to recover the value of work which he had done for them as a builder.

The complainants then filed a bill alleging that the real estate which had been conveyed by Groscock, was inadequate to discharge his account, and praying that an account might be taken, for the purpose of ascertaining the balance, and that it might then be set off against the amount owed by them to Groscock, and that the assignees might be enjoined from proceeding further in the action at law.

The chancellor said that equity recognized the assignee of a debt as the creditor, and that he was, as such, entitled to set it off against a debt due by him to the debtor. But the complainants were not merely assignees of a legal demand; they were assignees for whose use the debtor had contracted, that the security for the debt should enure. It was not necessary, therefore, to consider what a chancellor would do, if one came into equity simply as an assignee, to have the benefit of a set-off which he could not have at law, although the decision in *Williams v. Davis*, 5 Maddox, 32, went much further than the purposes of such a case would require. The cause must consequently be continued, in order to give the complainants the benefit of the set-off, to which they would have been legally entitled if the advances to Groscock had been made by them, instead of their predecessors in the firm.

It results, from what is here said, that in determining the right

of set-off, a chancellor will consider the equitable rather than the legal ownership of the demand; *Wolf v. Bates*, 6 S. & R. 242, 244. Hence, where the suit is instituted for the use of a third person, or he will be entitled to the proceeds, a debt due by him is a good equitable set-off (*Childerston v. Hammond*, 9 S. & R. 68) which may be enforced by injunction, if not admissible at law; *Selden v. Randall*, 7 Cushing, 217; *Childerston v. Hammond*, 9 S. & R. 68; *The Commonwealth v. The Phoenix Bank*, 11 Metcalf, 129; *Nickerson v. Gilliam*, 29 Missouri, 456; and the principle is the same where a demand against the plaintiff, is assigned to the defendant before action brought; *Wolf v. Bates*; *Dorsey v. Reese*, 14 B. Monroe, 157. The assignee of a chose in action, may consequently come into chancery, to establish it as set-off against the party by whom the debt is due; *Dorsey v. Reese*; *Murray v. Williamson*, 3 Binney, 135; *Hugg v. Brown*, 6 Wharton, 468, 474.

The mere existence of cross-demands, is not a sufficient ground for the intervention of a chancellor; *Mead v. Merritt*, 2 Paige, 403; *Hewitt v. Kuhl*, 10 C. E. Green, 24; and it does not vary the case, that one of them is a subject of equitable cognizance, unless their nature is such that they might have been set off against each other at law, if both were merely legal; *Rawson v. Samuel*, 1 Craig & Phillips, 171. In *Rawson v. Samuel*, A. brought an action against B. for the breach of a contract to accept his drafts, and B. filed a bill alleging that A.

had violated the contract on his part, by drawing to a greater amount than the value of the goods which he had consigned to B. as a means of meeting the bills, and praying that the further prosecution of the suit might be enjoined until an account could be taken, and the balance ascertained.

The chancellor said that as the bill was filed to enjoin the defendant from proceeding to trial, it must be considered as if such trial had taken place, and had resulted in his favor. The question, therefore, was whether there was any equity in preventing one who had recovered damages at law, from proceeding to execution because there was an unsettled account between him and the defendant in the action. Such an equity was obviously fallacious, because the balance might prove to be in his favor, and he would then have no compensation for the delay. The jury must be presumed to assess the damages as the compensation due at the time of the verdict, and the verdict may be no compensation for the additional injury, which the delay in payment may occasion.

The weight of authority is in accordance with this decision, that a chancellor will not suspend the course of legal proceedings, for the sake of enabling the defendant in the action, to set off a balance which he alleges to be due to him on an unsettled partnership account; because, although the subject matter of the defence is equitable, and cannot be appropriately laid before a jury, it is not ascertained or liqui-

dated, and therefore not within the equity which the doctrine of set-off is intended to promote; *Preston v. Stratton*, 1 Anstruther, 50; *Robinson v. Wheeler*, 51 New Hampshire, 385; *Cummings v. Norris*, 25 New York, 625; *Duncan v. Lyon*, 3 Johnson's Ch. 351.

In the case last cited, Lyon brought an action against Duncan, on a covenant in the articles under which they had entered into business as copartners, and obtained judgment before the arbitrators to whom the case was referred, and Duncan then filed a bill to set aside the award, on the two-fold ground that he had a good defence on the merits, which he was unable to lay before the arbitrators, because the facts lay exclusively within Lyon's knowledge, and that there was a large balance due to him on the partnership account.

The court held that it was too late to apply for the discovery, which should have been obtained while the cause was still pending before the arbitrators, and that equity would not compel one whose demand had been reduced to certainty by judgment, to wait until a doubtful or unliquidated demand could be adjudicated.

It has, nevertheless, been held, in some instances, that as the relation of partnership is a principal head of equity jurisprudence, a chancellor may, in the exercise of a sound discretion, enjoin a debtor and insolvent partner, from enforcing a legal demand against another member of the firm, without waiting for the settlement of the partnership ac-

counts, which will show a balance in favor of the party against whom the suit is brought; see *Lindsay v. Jackson*, 2 Johnson's Ch. 583; *Haigh v. Clafflin*, 4 Sneed. 238; *Searchet v. Searchet*, 2 Ohio, 320; and in the case last cited, the complainants were permitted to off-set an equitable balance due to them from their copartner, against a joint bond given by them to him; although, from the unliquidated nature of their claim, it could not be set off at law.

Debts cannot be set off against each other at law, unless they are mutual, liquidated, and due on both sides at the time of action brought. While the spirit of these rules prevails in equity, the court is not bound to a strict observance of the letter. One who is sued for another's debt, may consequently set off a demand which that other has against the plaintiff. Hence a surety may in general take advantage of any counter-claim which could be made by the principal; see *Knour v. Dick*, 14 Indiana, 20; *Davis v. Milburn*, 3 Clark, 163; *Crist v. Brindle*, 2 Rawle, 121; *Wodehouse v. Farebrother*, 5 Ellis & Bl. 276. So a partner may set off a debt to the firm, against a debt which he has contracted severally on the partnership account; *Smith v. Fullon*, 45 New York, 419. Allen, J., said, that in determining whether demands are mutual, courts of equity look to the substance rather than the form. It mattered not that the defendant was sued severally as an endorser, because the note was negotiated

and discounted for the use of the firm.

In general, joint debts cannot be set off against several, or several against joint. If C. is indebted to A., and A. and B. are under a joint obligation to C., A. cannot apply the several debt to extinguish that which is joint. But where A. and B. borrowed money on their joint account, and each applied half of it to his own use, and B. subsequently paid his share of the debt, it was held that A. might file a bill for an injunction against the lender, to set off the amount which the latter owed him severally on another account; *Downer v. Dana*, 17 Vermont, 518. And it is generally held in the United States, not only that two or more joint debtors may agree that a debt due severally to one of them, shall be set off against the joint obligation (*Stewart v. Coulter*, 12 S. & R. 252), but that two or more persons who have a joint demand, may authorize one of their number, to use it as a means of paying an amount which he owes to the person who is indebted to them; *Marshall v. Cook*, 7 Watts, 464; *Tustin v. Cameron*, 5 Wharton, 379; *Craig v. Henderson*, 2 Barr, 262. In the case last cited, Rogers, J., said: "In a suit against one member of a firm, it is not permitted to set off a debt due the firm from the plaintiff, because of the want of that mutuality which is essential to a set-off. But a surviving partner may set off a debt of the partnership against a demand on him, in his own right; *Slipper v. Lane*, 5 Term Rep. 493;

recognized in 6 Term Rep. 582; *Wrenshall v. Cook and Shoyer*, 7 Watts, 465. The reason is, that as he has the settlement of the business, he may release or compound the debts of the firm, and there is nothing to prevent him from using them as a set-off against a demand against him in his own right. And the same principle, for the same reason, holds, where, by contract, one of the members of the firm becomes the owner, or has the exclusive right to settle and control the partnership effects. Indeed, the power to set off may be necessary to prevent the loss of the debt, as when the plaintiff is, or is like to be, insolvent. It is for the advantage to the other members of the firm that he should so use his authority to collect the debts, and their assent is an implication necessary to carry into effect his power. The acting partner is, of course, answerable for the abuse of his authority, and will be bound to account for the use of the partnership funds."

It has been said that although a joint demand is not divisible for the purposes of an action, it may be divided for that of enabling one of the holders to use his share or proportion, by way of equitable compensation or offset, in an action against him for his individual debt; see *Smith v. Myler*, 10 Harris, 36. But this can hardly be maintained as a general proposition, or in any case where the other owner does not consent, unless the extent of his interest is so clearly defined, that it cannot be a subject of dispute in any suit

which he may subsequently bring for the purpose of enforcing the demand; *Dale v. Cooke*, 4 Johnson's Ch. 11. Accordingly, where judgment was recovered by Cooke against Dale, as the executor of Fulton, and Dale filed a bill alleging that Fulton had, together with Robert and Edward Livingston, executed a lease to Cooke, under which he was indebted to them in a large amount for rent, and prayed for an injunction, and that he might be allowed to deduct that amount, or so much thereof as properly belonged to Fulton's estate, from the judgment, the chancellor said that there was no mutuality or privity between the demands, and it would be unprecedented and dangerous to interfere. Before he could deal with the rent by way of set-off, the two Livingstons ought to be brought into court; and it would be requisite to take an account between them and the complainant, or, in other words, to ascertain what proportion of the rent belonged to Fulton, and might be equitably set off against the demand in suit; *Dale v. Cooke*.

All the authorities agree that a debt due by one of several co-plaintiffs to the defendant, cannot be set off against the demand in suit, because the effect would be to pay his debt with the joint assets, and compel the other plaintiffs to look to him for compensation, instead of to the person by whom the amount was originally due; *Archer v. Dunn*, 2 W. & S. 327; *Johnson v. Kent*, 9 Indiana, 252. So the court will not com-

pel a partner to pay a partnership debt out of his separate property, by setting it off against a demand held by him individually; *Mitchell v. Silliman*, 5 Maryland, 876.

An unliquidated demand, like a demand which is not yet due, cannot be set off without a delay, which may be injurious to the plaintiff; *Livingston v. Livingston*, 4 Johnson Ch. 287. Hence a creditor will not be restrained from proceeding to judgment or execution, until a settlement can be had between him and the defendant, of an account embracing other matters, although they may have arisen out of the same course of dealing. The rule applies, although the subject matter of the account is equitable, and cannot be considered in a court of law, and hence a court of equity will not enjoin a suit by one partner against another, on an allegation that the plaintiff is indebted to the firm, and would owe a large sum to the defendant if the partnership accounts were settled; *Robertson v. Wheeler*, 51 New Hampshire, 385.

There is a material difference where the plaintiff has not fulfilled the contract which he is seeking to enforce. Under these circumstances, the defence is recoupment, defalcation, or failure of consideration, rather than set-off, and goes to impeach the right in suit; and if the evidence be not technically admissible at law, there may be ground for the intervention of a chancellor; *Rawson v. Samuel*, 1 Craig & Phillips, 161, 179; *Ragsdale v. Hagy*, 9 Grattan, 409. Hence

a suit on a mortgage, or bond for the purchase money of land, may be stayed by an injunction, in order to let in a defence founded on fraud or misrepresentation, or a breach of the covenants for title, or the defendant may wait until judgment has gone against him at law, and then bring the matter into chancery; see *Piggott v. Williams*, 6 Maddox, 95; *Bearley v. Darcy*, 2 Schoales & Lefroy, 203, note; *Ex parte Stephens*, 11 Vesey, 24; *Costa v. The Monroe Man. Co.*, 1 Green Ch. 476; *Wray v. Furniss*, 27 Alabama, 471; *Walton v. Bonham*; 24 Id. 513; *Green v. Campbell*, 2 Jones Eq. 446; *Pence v. Huston*, 6 Grattan, 304; *Bowen v. Thrall*, 2 Williams, 382; *Shelby v. Marshall*, 1 Blackford, 385; *Lacket v. Triplett*, 2 B. Monroe, 39; Rawle on Covenants for Title, 677, 4 ed.; although it has been held in some instances that an injunction should not be granted on such grounds after judgment, unless the vendor is insolvent, and cannot respond in damages; *Wilkins v. Hogue*, 2 Jones Eq. 479.

In like manner, a failure of consideration, arising from the plaintiff's fraud, default, or negligence, is a valid answer to an action for services, for work and labor done, or for goods sold and delivered, and a chancellor may intervene if the defence cannot be made at law; see *Rawson v. Samuel*, 1 Craig & Phillips, 179; *Richardson v. Williams*, 3 Jones Eq. 116. It would seem that the bill in *Rawson v. Samuel*, was within this principle, because the allegation that the plaintiff in the suit which the com-

plainant sought to enjoin, had overdrawn his account, "impeached the title to the legal demand;" and although the question might be laid before a jury, it could be better and more appropriately determined by a court of equity.

It is now generally conceded, that a failure of consideration is a good legal defence to an action on a parol contract, although resulting from fraud, breach of warranty, or negligence; 1 Smith's Lead. Cases, 7 ed. 353; 2 Id. 36; *Mondel v. Steel*, 8 M. & W. 858; *Gaw v. Walcott*, 10 Barr, 44; *Heck v. Shiner*, 4 S. & R. 249; and hence it does not ordinarily afford a ground for a recourse to equity; *Beale v. Brown*, 7 Maryland. In *Beale v. Brown*, the court accordingly refused to enjoin the execution of a judgment for goods sold and delivered, although the bill alleged a breach of warranty, and that the vendor, who resided in another State, was insolvent.

Although the defendant in an action *ex contractu*, may show how much less the consideration is worth by reason of the plaintiff's failure to comply with the agreement, he cannot set off the consequential and unliquidated damages arising from the default; see *Mondel v. Steel*, 8 M. & W. 858, 871; nor will a chancellor carry the right of compensation beyond the limits set by law, unless there is some special ground. A plaintiff will not, therefore, ordinarily be enjoined from proceeding to judgment and execution in a suit for a breach of contract, because he has not fulfilled another and

independent stipulation in the same contract; *Wright v. Smyth*, 4 W. & S. 527, 534; see Rawle on Covenants for Titles, 684, 4 ed., *Hopper v. Lutkins*, 3 Green's Ch. 149. In *Watts v. Coffins*, 11 Johnson, 495, the violation of a covenant on the part of the lessor, to allow the tenant common of pasture and estovers, was held to be inadmissible as a defence to an action for the recovery of the rent; and the rule was applied in *Livingston v. Livingston*, 4 Johnson Ch. 287, although the landlord had filed a bill for relief and discovery. But this decision is questionable in view of *Beales v. Ditrey*, 2 Schoales & Lefroy, note. See *Rawson v. Samuel*, 1 Craig & Phillips, 161, 179; *Warner v. Caulk*, 3 Wharton, 193; *Phillips Monges*, 4 Id. 296.

Agreeably to the statute law of Pennsylvania, cross-demands arising from the breach of stipulations of the same, or of different agreements, may be tried simultaneously, and if the jury certify that the balance is in favor of the defendant, he may proceed to judgment and execution; *Hunt v. Gilmore*, 9 P. F. Smith, 450; *Gaw v. Walcott*, 10 Barr, 44; *Everson v. Fry*, 22 P. F. Smith, 326; *Nickle v. Baldwin*, 4 W. & S. 290; *Phillips v. Phillips*, 6 Id. 180; *Ellmaker v. The Franklin Ins. Co.*, Ib. 431. "If," said Gibson, C. J., in the case last cited, "an unliquidated demand, may be set off when it has sprung from the same transaction, and we have consistently held that it may, why may it not be set up when it

has sprung from a distinct and independent contract." It is believed that the bench and bar in Pennsylvania, would agree that the wisdom of this rule has been vindicated by experience.

A present equitable demand may be set-off, although it is not a legal cause of action; and as a surety may equitably require the principal to pay the debt as soon as it matures, so he may file a bill to compel the appropriation of an amount which he owes the principal, to discharge the obligation to the creditor. For like reasons, a payment by the surety to the creditor, may be set off in an action by the principal against the surety, although not made until after suit brought; *Thompson v. McClelland*, 5 Casey, 475; *Beaver v. Beaver*, 11 Harris, 166; *Brittain v. Quilt*, 1 Jones' Eq. 328.

"As soon," said Rogers, J., in *Beaver v. Beaver*, "as the surety's obligation to pay becomes absolute, he is entitled in equity to require the principal debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment from him; *Theobald's Principal & Surety*, 226; *Nesbit v. Smith*, 2 Bro. C. C. 579; *Lee v. Brook*, Moseley R. 318; *Story's Equity*, 327. But the surety would not be entitled to exoneration before the debt became payable, because it is implied by the contract that he engaged to stand bound for the principal until the maturity of the obligation; *Cock v. Ravie*, 6 Ves. Jr.

283; *Antrobus v. Davidson*, 3 Mer. 569; *Theobald*, 227.

In regard to the note given to Ann Eliza Matlack, which has been paid since suit brought, the defendant below ought to have been allowed a credit for the sum which he paid, as surety, on this claim. Although paid since suit brought, the equity originated before, and the defence does not stand upon the footing of a cross demand purchased by a defendant after suit brought."

Every one is a surety within this principle, who is under a liability which, in equity and conscience, should be discharged by another; *ante*, 283. Hence, when land, subject to a judgment, is conveyed with a covenant of warranty, or against incumbrances, the grantee may not only require that the judgment should be deducted from the purchase money, but may file a bill to have the amount set off in a suit for a distinct cause of action; *Terry v. Wooding*, 2 Patton & Heath, 187; see *Ragsdale v. Hagey*, 9 Grattan, 419. It was objected in *Terry v. Wooding*, that the defence was legal and could not be set up in equity, but the court was clearly of opinion that the set-off arising from the payment of the judgment lien, was purely equitable, arising out of the doctrine of substitution, which is the creature of equity.

One who withdraws from a firm, on the faith of an undertaking by the remaining partners to indemnify him against the partnership debts is virtually a surety, and if

he is compelled to satisfy the partnership creditors, may file a bill in equity for subrogation to their demands, and to set them off against the price of goods which he has purchased from his former partners since the dissolution of the firm; vol. 1, 147; *Hupp v. Hupp*, 6 Grattan, 310.

It is moreover a legal requisite that both debts should not only exist, but be due at the time of action brought. The essential part of this rule is that which forbids the payment of a present debt, with one which will not become due until a future day, and there is no reason why a debtor should not be relieved from the burden of an immediate payment, and required to credit the amount on an obligation which has not yet matured; *Lindsay v. Jackson*, 2 Paige, 581. In *Lindsay v. Jackson*, the complainants held the defendant's acceptance, payable on demand, and gave him their promissory notes at six months. He became insolvent, and they filed a bill to restrain him from negotiating the notes, and praying that they might be set off against the acceptance.

The chancellor said that, as the notes were not bearing interest, there could be no injustice in compensating the defendant for the amount to become due thereon at a future day, by an immediate payment. The complainants alone had an interest in obtaining the time of credit which was given on these demands. A different question would arise if the complainants were seeking to compensate a debt

which was already due to the defendant, by a claim against the defendant which would not be payable until a future day. It results from these considerations that a chancellor will not stay the course of legal proceedings, for the purpose of enabling the complainant to set off a debt which is not due, against one which has reached maturity, although the plaintiff at law is insolvent, and the effect of refusing the injunction will be to leave the complainant without any effectual remedy; *Bradley v. Angell*, 3 Comstock, 475.

The better opinion seems to be that the insolvency of the plaintiff in the action, or his residence in another State, does not authorize a chancellor to sustain a set-off that is not within the spirit of the statute; see *Rawson v. Samuel*, 1 Craig & Phillips, 161, 175; *Hendricks v. Hinckley*, 17 Howard, 445; *Beall v. Brown*, 7 Maryland, 393; *Rives v. Rives*, 7 Richardson Eq. 353; *Tone v. Brace*, 8 Paige, 597; and in the case first cited, the Lord Chancellor intimated that the counsel who moved to dissolve the injunction, need not address himself to the circumstance that the creditor against whom it had been issued, was out of the jurisdiction and insolvent, as these circumstances would not give an equity, if it did not otherwise exist. Conversely, a court of equity may overrule a merely technical and formal objection to a set-off which is really mutual, although the plaintiff in the action is not beyond the reach of process, or shown to be unable to pay

his debts; *Tustin v. Cameron*, 5 Wharton, 379.

Whatever may be thought on these points, it is clear that the absence of the plaintiff and his inability to meet his engagements, are material circumstances, which may be properly taken into view in determining whether a court of equity should take cognizance of the cause, or stay the course of legal proceedings by an injunction; *Robbins v. Hawley*, 1 Monroe, 194; *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 Id. 369, 375; *Brittain v. Quiet*, 2 Jones Eq. 329; *Pond v. Smith*, 4 Com. 302; *McClellan v. Kinaird*, 6 Grattan, 352; *Bradley v. Angel*, 3 Comstock, 475; and this distinction may serve to reconcile decisions that might otherwise appear to be at variance. Insolvency alone is not a sufficient cause for equitable interference, although it may strengthen a claim based on other grounds; *Hulman v. The Union Canal Co.*, 1 Wright, 100. It has accordingly been held in North Carolina, that although a non-resident vendor, who has no property or effects within the State, may be restrained by an injunction, from enforcing a bond given for the price of a tract of land to which he has no title, although there is a covenant of warranty in the deed, on which the obligor might proceed, such relief will not be accorded when the vendor is within the jurisdiction, and able to respond in damages to any recovery that may be had against him on the covenants for title; see *Wil-*

kins v. Hogue, 2 Jones Eq. 479; *Green v. Campbell*, Ib. 446.

It is held on like grounds in Virginia, that one who fails to make a set-off at law, cannot have relief in equity although the omission is due to surprise or accident, unmixed with negligence, because he still has a legal remedy by suit; *Hudson v. Kline*, 9 Grattan, 379; *Morgan v. Carson*, 7 Leigh, 238.

It is well settled that when there are mutual debts or credits, and the estate of either party passes into the hands of a receiver, assignee, or administrator, the other may come into equity for relief, if the defence is inadmissible at law; see *M'Laren v. Pennington*, 1 Paige, 102, 112; *Miller v. The Receiver*, Ib. 444; *The Receivers v. The Patterson Gas Light Co.*, 3 Zabriskie, 283, 294; *Aldrich v. Campbell*, 4 Gray, 284; *Clarke v. Hawkins*, 5 Rhode Island, 219, 224; *Meeks v. Barker*, 1 W. C. C. R. 178; *Gochenauer v. Cooper*, 8 S. & R. 186; *Furnell v. Nisbit*, 16 B. Monroe, 351; *Morrow v. Bright*, 20 Missouri, 298; 2 Smith's Lead. Cases, 307; 7 Am. ed.

CONCURRENT JURISDICTION.—When any material or turning point in a cause is purely equitable, a chancellor may bring the whole before him by an injunction, although the cause involves other questions which are legal, and might properly be laid before a jury. This results from the established rule that a court which has equitable jurisdiction for one

purpose, may exercise it for all; see *Hawley v. Cramer*, 4 Cowen, 712; *Grant v. Lathrop*, 23 New Hamp. 67; *Rust v. Ware*, 6 Grattan, 501; *Phillips v. Sears*, 5 Id. 31; *Parker v. Kelly*, 10 Smedes & Marshall, 184. This course will not be pursued unless it is essential to the ends of justice, nor where the questions are so far distinct that each may be considered in the appropriate forum. Under these circumstances, both tribunals may proceed in their respective spheres, and there is no need of an injunction, unless the plaintiff at law obtains judgment, and then issues an execution without waiting for the determination of the equity; *Williams v. Jersey*, 1 Craig & Phillips, 91. On the other hand where the complainant under like circumstances, filed a bill conceding that he had no legal defence, but alleging acts of encouragement which though not amounting to a license, were yet an equitable defence, and prayed that the defendant might be restrained from prosecuting the action which he had brought for damages, the court held on demurrer that the bill disclosed a sufficient equity, and that the injunction should continue until the final hearing; *Williams v. Jersey*, 1 Craig & Phillips, 91.

It results from these authorities, that where some of the questions involved in a cause are legal, and others equitable, as where there is both actual and constructive fraud, the defendant may apply at once to chancery, or wait until a conclusion has been reached

at law. But if he adopts the latter course, a chancellor will not ordinarily prevent the plaintiff from going to trial, although he may enjoin him from issuing an execution in the event of his obtaining judgment, and then proceed to hear the equity, which could not legally be considered; *Ragsdale v. Haggy*, 9 Grattan, 409; *Justice v. Scott*, 4 Iredell Eq. 108. In *Justice v. Scott*, Ruffin, C. J., said: "It has been objected that the questions arising on the bill were properly triable at law, and that the plaintiff could not transfer them to a court of equity. The bill contains two allegations, one that the deed was a fraud on creditors, the other of a resulting trust. As to the former point, the court thinks the objection sound. The bill does not allege a deficit of proof of any fact on which the question of fraud depends, and if such an averment had been made, it would only have been a ground for discovery in aid of the trial at law. In its nature, the controversy, whether a deed by a debtor, is fraudulent as to his creditors, under the statute of Elizabeth, is a legal one; though, in particular cases it may be made the subject of a suit in equity. But here it was in a course of litigation at law; and it is plain that it ought not to go on there, and a suit be carried on here at the same time upon the very same subject. Then upon what principle has the defendant at law a right to change the forum, and say that he will have the matter tried by the judge in the court of equity, and not by

a judge and jury in a court of law? It follows that although the case is clearly one of equitable cognizance in its second aspect, the injunction ought not to have stayed the trial at law, but only the suing out execution, should the plaintiff at law get a judgment. The plaintiff has no right to delay the trial at law until his cause shall have been heard here, and perhaps his bill dismissed, by which time the other party may not be able to prove his case at law by the death or removal of witnesses, or the loss of documents. All the plaintiff can justly ask is, that as he has an undetermined equity, the plaintiff at law shall not proceed to execution. If the plaintiff means to rely altogether on his relief in equity, then he ought to let judgment go, inasmuch as his defence is on an equitable and not a legal title. But, in this case, he no doubt insists that he has a good defence at law, as well as a good ground for his bill in equity. We do not see that he may not resist the recovery at law, if he can, or that the court should require him to submit to a judgment. While that is so, it would be an injury to the other side to stay the trial. Therefore the decree should be reversed, and the injunction modified so as to stay execution upon the judgment, if the plaintiff at law should obtain one, until the existence of the trust can receive an equitable determination."

In like manner, where the jurisdiction is concurrent, and the plaintiff has a perfect defence in

the court of law, if he chooses to avail himself of it, a court of equity will not grant a preliminary injunction for the mere purpose of obtaining the exclusive possession of the case, and thus depriving the adverse party of his common law right of trial by jury; see *Mitchell v. Oakley*, 7 Paige, 68; although, "in cases of concurrent jurisdiction, a party may come into equity for relief on the final hearing, subject to the right of the court to refuse him his costs, where he takes the jurisdiction from the court of law unnecessarily;" *Mitchell v. Oakley*; *Gridley v. Garrison*, 4 Paige, 647.

The case is materially different where the equitable element pervades the entire controversy, or is so closely interwoven with the legal, that neither can be advantageously considered without the other, and a court of chancery may then cover the whole ground by an injunction. Thus a *suppressio veri* may be actually fraudulent, or merely an abuse of confidence, for which relief must be sought in equity. Here there are two aspects of one and the same fact, and the case should be heard and determined by a tribunal which can consider both. In like manner the existence of an element of trust, may bring the entire cause within the reach of a chancellor, although it contains points which he could not touch if they stood alone; *Detrichs v. Spain*, 15 Wallace, 211, 228.

A case depending on legal principles, and which would ordinarily be within the jurisdiction of a court

of law, may be withdrawn by injunction, if the ends of justice cannot be attained under the circumstances, without the peculiar powers of a chancellor; see *Hamilton v. Cummings*, 1 Johnson Ch. 517. Thus, in *Gash v. Leadbitter*, 6 Iredell, 183, an injunction was awarded to restrain an action of partition, on the ground that the premises could not be divided without injury, and that the intervention of a court of equity was requisite to effect a sale; *ante*, 904. So, where numerous suits involving the same question of law or of fact, are brought by one or by different persons, and the controversy cannot be determined finally at law, or without ruinous delay and expense, a bill may be filed to bring the whole matter into chancery and have it disposed of in a single issue; see *Huntington v. Nicoll*, 3 Johnson; *Livingston v. Livingston*, 6 Johnson Ch. 497; *M'Henry v. Rowland*, 45 New York, 580; although such relief will not ordinarily be granted, until an adjudication has taken place in some one or more of the suits, which shows that the right is with the complainant, and that further litigation would be frivolous and vexatious; *Eldridge v. Hill*, 2 Johnson Ch. 261; *Thompson v. Engle*, 3 Green Ch. 271; *West v. The Mayor of New York*, 10 Paige, 539. And when the result of one legal proceeding, will or should be governed in point of law or equity by the determination of another, the first may be stayed by injunction until the second is de-

termined; *Preston v. Harris*, 2 Cushman, 247.

ACTUAL FRAUD.—It is not always easy to determine whether the course of legal proceedings should be enjoined on grounds which, though belonging to the jurisdiction of chancery, are also cognizable by a court of common law. In general, as between concurrent jurisdictions, that which first attaches is exclusive; *Thompson v. Hill*, 3 Yerger, 167; *Winn v. Albert*, 2 Maryland Ch. 42; *Merrill v. Lake*, 16 Ohio, 373; *Mallett v. Dexter*, 1 Curtis, 178; *Stevens v. Stevens*, 16 Mass. 171; and hence a bill cannot ordinarily be filed to withdraw a case from a court of law, and bring it into equity, when the subject matter is within the cognizance of both tribunals; *Gould v. Hayes*, 19 Alabama, 438; *The Bank of Bellow's Falls v. The R. & B. R. R.*, 2 Williams, 470; *The C. & A. R. R. Co. v. Stewart*, 3 C. E. Green, 435; *Smith v. M'Ivor*, 9 Wheaton, 532; *Grand Chute v. Winegar*, 15 Wallace, 373; *Hipp v. Babin*, 19 Howard, 271; *Gould v. Hays*, 19 Alabama, 438. Such is the established rule in England, and it exists *a fortiori* in the United States, where the right of the citizen to a trial by jury in due course of law is guaranteed by the constitution, and cannot be withheld unless in exceptional cases, and on some definite and specific ground; *Grand Chute v. Winegar*; *Hipp v. Babin*, 19 Howard, 271; *ante*, 861. Fraud is one of the chief heads of equitable jurisprudence,

but it has also from the earliest periods been a defence at law; see *Hazard v. Irwin*, 18 Pick. 95; *Fleurey v. Slocum*, 18 Johnson, 403; *Russell v. Clark*, 7 Cranch, 69. A court of equity will not, therefore, enjoin an action, on a deed or bond, on the ground that the instrument was fraudulently procured, unless the circumstances are such that the legal remedy would be inadequate; see *Mason v. Piggott*, 11 Illinois, 85; *Ross v. Buchanan*, 13 Id. 55; *Bumpass v. Reams*, 1 Sneed, 595; *Crane v. Bunnell*, 10 Paige, 333. In *Crane v. Bunnell*, a suit was brought on a note payable in specific articles, which was alleged to have been obtained by false and fraudulent representations, and the defendant went into chancery to have the instrument delivered up and cancelled, and that the plaintiff might be perpetually enjoined. The chancellor held that a court of equity has a concurrent jurisdiction in cases of fraud, and may entertain a bill for discovery and relief, and proceed to a final adjudication and decree. But there was a material difference where the complainant filed the bill after proceedings had been instituted against him at law. He might still be entitled to a discovery, and to enjoin the plaintiff until that was made, but the court would dissolve the injunction on the coming in of an answer which denied the fraud, and would not withdraw the cause from the forum which the holder of the instrument had selected, and where he could have the benefit of a trial by jury.

The principle is irrespective of

the nature of the fraudulent design, if it be actual and as such within the appropriate sphere of a legal tribunal, and it may consequently be applied where the object of the bill is to set aside a deed as having been executed with an intent to hinder and delay the grantor's creditors; see *Roberts v. Anderson*, 3 Johnson Ch. 371; 18 Johnson, 515; *The Bank of Bellow's Falls v. The Rutland & Burlington R. R. Co.*, 28 Vermont, 470. In the case last cited, an action was brought in Massachusetts, to recover damages for a trespass which was alleged to have been committed by taking certain property in execution, under a judgment against a railway company, which the latter had previously conveyed to the plaintiff in the action, and the defendant filed a bill in Vermont, to enjoin the plaintiff from proceeding with the suit, and praying that the conveyance might be declared null and void. It was held *inter alia*, to be an established and salutary principle, that in all cases of concurrent jurisdiction the cause must be left to the forum which first obtains possession of it, and that chancery cannot withdraw the question whether a deed has been fraudulently made from a court of common law, unless some reason is assigned why the case should be an exception to the rule. No such ground appeared in the case in hand, nor was it requisite to take cognizance of the cause in order to prevent a failure of justice from the lapse of time, because the action at law was pending when the bill was filed,

and might be tried before it would be possible to take testimony before a master or examiner, and bring the bill to a final hearing.

The same view has been taken in other instances, and is well established under the general course of decisions; *Grand Chute v. Winegar*, 15 Wallace, 373.

"It is," said Hunt, J., in the case last cited "an elementary principle of equity, that, when full and adequate relief can be obtained in a suit at law, a suit in equity cannot be maintained. In *Hipp v. Babin*, 19 Howard 271, the court say: "The bill in this case is in substance and legal effect, an ejectment bill. The title appears by the bill to be merely legal, the evidence to support it appears from documents accessible to either party, and no particular circumstances are stated showing the necessity of the court's interfering, either for preventing suits or other vexation, or for preventing an injustice irremediable at law. In *Welby v. Duke of Rutland*, it is stated that the general practice of courts of equity in not entertaining suits for establishing legal titles, is founded upon clear reasons, and the departing from that practice where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity. . . . Accordingly, the established and universal practice of courts of equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cogni-

zable by them, notwithstanding the defendant has answered the bill and insisted on matter of title." After citing numerous other authorities, the matter is thus summed up: "And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." The right to a trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it. It is in vindication of this great principle, and as declaratory of the common law, that the Judiciary Act of 1789, in its sixteenth section, declares "that suits in equity shall not be sustained in any of the courts of the United States in any case where adequate and complete remedy may be had at law."

A demurrer having been interposed to the present bill, all of its allegations are to be taken as true. This is so both in favor of the plaintiff and against him. It seems quite clear upon the statements of the bill that the defence to the suit at law upon the bonds is adequate and complete. Thus, the bonds, it is alleged, were issued without authority and in fraudulent violation of the duty of those having the subject in charge. It is not suggested that

there is any difficulty, either legal or practical, in establishing these facts by competent proof. If proven, they furnish as complete a defence to the suit at law to recover the amount of the bonds as they do in equity. In each suit the question arises, were they received by Winegar before their maturity, without knowledge of the defence, and for a valuable consideration by him paid on the purchase thereof?"

It was held in like manner, in *The Insurance Co. v. Bailey*, 13 Wallace, 616, that a court of equity would not direct the surrender and cancellation of a policy of life insurance, on the ground that it had been fraudulently procured, where the bill was not filed until after the death of the party who effected the insurance, and the question might receive a speedy determination in the action which his executors had brought at law, subsequently to the filing of the bill.

On the other hand, it has been authoritatively declared by the Supreme Court of Massachusetts that there is ample authority for a decree in chancery, that a policy of insurance, or other instrument, shall be given up or cancelled on the ground of fraud, and that the exercise of such a jurisdiction does not impair the privilege of trial by jury, because "although the issues in suits in equity do not grow out of the pleadings, as in suits at law, but are framed by the court; yet in framing the issues the court will have regard to the constitutional provision,

and allow the parties to submit to a jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts at issue conclusively;" *Franklin v. Green*, 2 Allen, 522; *The Insurance Company v. Loomis*, 14 Id. 351; see *Reubens v. Joel*, 13 New York, 494, 494; *Parsons v. Bradford*, 3 Peters, 433, for the demarcation between law and equity, and as to whether it can be abolished by the legislature.

Whatever the rule may be in cases of actual fraud, there can be no doubt of the right to come into equity for the relief against constructive fraud, and undue influence, which cannot be had at law, nor that a suit on an instrument which has been obtained by such means may be enjoined, and the case brought into chancery for a decision which will be final; *ante*; see *Van Horne v. Keenan*, 28 Illinois, 445; *Arnold v. Guines*, 2 Iowa, 177; *Bishop v. Reed*, 3 W. & S. 26; So when a deed or obligation is procured by false representations touching the consideration, and not the execution of the instrument, the defence is, agreeably to the authorities in some of the States, purely equitable, and the case may be withdrawn by an injunction from the courts of common law; *ante*, 981.

SURRENDER AND CANCELLATION.

—The rule that an injunction will not be granted, for the purpose of withdrawing a case depending on

the actual fraud which is a question of fact, from a forum where the parties can have the benefit of a trial by jury, is not universal, and admits of an exception where the legal remedy is not adequate to the ends of justice; *Hamilton v. Cummings*, 1 Johnson Ch. 517; *The Town of Glastonbury v. McDonald*, 44 Vermont, 453; *Bessell v. Beckworth*, 33 Conn. 357.

"Perhaps," said Chancellor Kent, in *Hamilton v. Cummings*, "the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defence, not arising upon its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to chancery proper and clear of all suspicion of any design to promote expense and litigation."

It is established in accordance with this reasoning, that a court of equity may, when the exigency of the case requires it, enjoin the further prosecution of a suit on a deed or note, and direct the instrument to be given up and cancelled; *The Town of Glastonbury v. McDonald*; *The Atlantic De Laine Co. v. Tredick*, 5 Rhode Island, 171, *Miller v. Miller*, 4 C. E. Green, 457.

Thus where the complainant was induced to grant an annuity by

fraudulent representations, and might be sued for each successive instalment if the instrument remained outstanding, the court ordered it to be delivered up, and enjoined the proceedings which had been instituted at law; *Dale v. Rosevelt*, 5 Johnson's Ch. 174. In *Bushnell v. Harford*, 4 Johnson's Ch. 301, one against whom a verdict had been rendered in ejectment, on the ground that he had fraudulently altered the deed which constituted his title to the land in dispute, caused the instrument to be recorded, and threatened to bring another ejectment, and the chancellor held that the case was a clear one for a decree that the deed should be surrendered, and the party claiming under it enjoined from using the record of it as evidence.

So an injunction may be issued to prevent one who has obtained land, goods, or securities by misrepresentation or deceit, from making a transfer to a *bona fide* purchaser, which will preclude the original grantor or vendor; see *Miller v. Miller*, 3 C. E. Green, 270; 4 Id. 257; *Bell v. Gamble*, 9 Id. 117; *Ferguson v. Frick*, 21 Conn. 501; *Hamilton v. Cummings*, 1 Johnson's Ch. 517; *Franklin v. Green*, 2 Allen, 520; *The Town of Glastonbury v. McDonald*, 44 Vermont; *Poor v. Carleton*, 3 Sumner, 70; *Delafield v. Illinois*, 22 Wend. 19.

This reason does not apply unless the property or security involved is negotiable, or will be freed from existing equities by a sale for value and without notice;

The Bank of Bellow's Falls v. The R. & B. R. R. 28 Vermont, 470; *Piersoll v. Elliott*, 6 Peters, 95; *Van Doren v. The Mayor of New York*, 9 Paige, 389; *Cox v. Cleft*, 2 Comstock, 118. But a chancellor may nevertheless when such an instrument is outstanding in the hands of a person, who refrains from enforcing it by suit, direct that it shall be given up or cancelled, in order to remove a cloud from the complainant's estate or title, and to prevent the loss of evidence through the lapse of time; see *Sherman v. Fitch*, 98 Mass. 59.

The principle on which relief is granted in such cases, was clearly stated in *Sherman v. Fitch*. The complainants were the assignees of an insolvent corporation, and the defendant held an instrument purporting to be a mortgage of the personal property of the corporation, the validity of which was denied by the assignees, who desired to sell the property free from the incumbrance. The defendant did not take possession, or in any way intermeddle with the property in dispute, and the complainants asked for a decree that the mortgage should be given up and cancelled. The court held that the complainants were remediless at law, and entitled to the aid of a chancellor. The defendant refrained from disturbing their possession, or doing any act which would enable them to bring the question to a legal issue. He might bring an action against them, but he did not choose to do so. In the meantime there was a cloud

upon their title, which seriously affected its value. The mortgage was upon record, and it was evident that they could not sell the property with any prospect of obtaining a fair price, because the purchaser would know that he exposed himself to an action, if the defendant's claims was well founded.

The principle does not ordinarily apply to real estate, because the complainant may bring a writ of entry or ejectment, and compel the defendant to maintain his title, or to disclaim; *ante*, 862; *Thayer v. Smith*, 9 Met. 469; *Woodman v. Saltonstall*, 7 Cushing 181; *Pratt v. Pond*, 5 Allen, 59, *Norris' Appeal*, 14 P. F. Smith, 275.

But when a title to real estate is claimed for which there is no present remedy by action at law, a bill in equity may be maintained to set it aside. Thus in *Hall v. Whiston*, 5 Allen, 126, the assignee of an insolvent debtor, was allowed to bring a bill in equity to vacate an execution levied upon land in which the debtor owned a reversion. The same doctrine was affirmed in *Martin v. Graves*, 5 Allen, 601, and the general rule is said to be that "whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be de-

livered up and cancelled, or by making any other decree which justice and the rights of the parties may require;" 2 Story Eq. § 694;" *Sherman v. Fitch*, 98 Mass. 59. For a like reason one may come into equity, to establish the invalidity of a fraudulent judgment, which in an apparent lien on his real estate; *Monroe v. Delavan*, 26 Barb. 16.

In *Ferguson v. Fisk*, 28 Conn. 501, a suit for a bill of exchange was enjoined on the ground of failure of consideration, and the instrument ordered to be delivered up and cancelled, although it had reached maturity, and would not be freed from the equity by negotiation, Sanford, J., saying that the suit might be discontinued, and the bill transferred to a third person who would harass the drawer or acceptor by another action. The same point was determined in *Glastonbury v. McDonald*, 44 Vermont, 453.

In *McHenry v. Rowland*, 45 New York, 580, an obligation which had been obtained by false representations, was transferred by the obligee to A., and subsequently, in the course of a distinct transaction, to B., and each of them brought a suit in his own name against the obligor, and it was held that the latter might institute an equitable proceeding against both claimants, for an injunction, and to have the obligation surrendered as fraudulent and void. The ground taken was that "A court of equity has power to compel the surrender and cancellation of written instruments obtained by fraud, or held for inequitable and unconscientious

purposes. The exercise of this jurisdiction is in the sound discretion of the court, depending upon the special circumstances of each case; and it is not material, upon the question of jurisdiction, that the party seeking the relief has a defence at law to the instrument of which he prays the surrender and cancellation. Although a defendant might have obtained the equitable relief to which he is entitled, in an action brought against him, he may, nevertheless, during the pendency of such suit, bring an action on his own behalf to accomplish the same result."

Whatever the rule may be where the complainant seeks to have the cause removed while it is still pending and undetermined, such relief cannot be granted after verdict and judgment, because the adjudication is conclusive of every fact that could have been laid before the jury, although the question might have been brought in the first instance before a chancellor; *Dutil v. Packers*, 21 California, 438; *Crompton v. Baldwin*, 42 Illinois, 165; *Parton v. Luterloh*, 6 Jones Eq. 341; *Foster v. The Bank*, 17 Alabama, 672; *Jamison v. May*, 8 English, 600. A judgment that a note or bond is, or that it is not vitiated by fraud, will therefore preclude a reconsideration of the question in the same or in any other tribunal, and the principle is the same where the defendant in an ejectment, comes into equity for a new trial on the ground of fraud, after a verdict has been obtained at law; *Anderson v. Roberts*, 18 Johnson, 515, 533; *Ha-*

den v. Garden, 7 Leigh, 157, 166; *Smith v. McIver*, 9 Wheaton, 552; *Duncan v. Lyon*, 3 Johnson Ch. 351; *Lansing v. Eddy*, 1 Id. 49.

In *Smith v. McIver*, the bill alleged that the defendant had obtained a verdict and judgment in ejectment against the complainant, by virtue of a pretended grant from the State of South Carolina, which had been surreptitiously obtained from the land office, and afterward altered so as to include the complainant's land. The court held that although the parties might have chosen either forum in the first instance, yet the court of law acquired an exclusive jurisdiction on the institution of the suit which could be taken from it by a chancellor. "Admitting," said Chief Justice Marshall, "the concurrent jurisdiction of the courts of equity and law in matters of fraud, we think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other. A question decided at law cannot be reviewed in a court of equity without the suggestion of some equitable circumstance, of which the party could not avail himself of at law." It was declared in like manner in *Galbraith v. Martin*, 5 Humphrey, 50, that one cannot come into equity for relief against a judgment, on grounds that would have been available at law, whether they are both equitable and legal, or merely legal.

In *Haden v. Garden*, 7 Leigh, 56, the court held, in conformity with this principle, that though

courts of equity have a concurrent jurisdiction in cases of fraud, yet if a suit be brought at law which involves such a question, it must be determined there, and the defendant cannot remove the cause by an injunction. Carr, J., said: "Upon the facts relied on by Garden in his bill, he had a perfect legal defence against the bond executed by him to Haden. For, surely, if he meant to execute it to Scott; if a bond drawn payable to Scott was read to him as that which he was to execute, and at the moment of execution a bond to Haden was substituted for it, and executed by him without knowing the change, a plea of *non est factum* might have been supported. No excuse has been stated for the failure to make the defence at law. If it be said that the courts of law and equity have concurrent jurisdiction in such matters of fraud, that is true; but it is equally true, that in all such cases the court which first gets possession of the cause will make an end of it; and any defence which a party, according to the rules of that tribunal, can make, must be made there."

For like reasons, a judgment will not be less conclusive of all the points which could be heard and determined by the tribunal which pronounced it, because the cause involves other matters which are proper for the consideration of a chancellor, and hence a tenant who comes into equity for relief against a recovery which has been had against him in an ejectment for a forfeiture incurred by the

non-payment of rent, is precluded from denying that the rent was due; *Sheets v. Selden*, 7 Wallace, 416.

It is established, in accordance with the principle of these decisions, that one cannot come into equity for relief against a judgment, on any ground that was or might have been considered in the original forum. See *Brown v. Home*, 2 Barb. 586; *Le Guen v. Gouverneur*, 1 Johnson Cases, 436; *Anderson v. Roberts*, 18 Johnson, 515; *Orcutt v. Orms*, 3 Paige, 459; *Dilly v. Barnard*, 8 Gill & J. 170; *Vilas v. Jones*, 1 Comstock, 274; *Green v. Robinson*, 5 Howard, 80; *Houston v. Royston*, 1 Smedes & Marshall, 238; *Thomas v. Phillips*, 4 Id. 358; *Williams v. Jones*, 10 Id. 108; *Haden v. Garden*, 7 Leigh, 157; *Brown v. Swann*, 10 Peters, 497; *Benty v. Dillard*, 1 English, 79; *Dickson v. Richardson*, 16 Arkansas, 114; *Minor v. Stone*, 1 Louisiana Ann. R. 283; *Snediker v. Pearson*, 2 Barbour Ch. 107; The rule was applied in *Heckrote v. Barnard*, 8 Gill & John. 171. Buchanan, J., said, where "courts of equity and law have concurrent jurisdiction as in matters of account, it seems that equity will not relieve against a judgment on the mere ground of the difficulty of making the defence at law, but the case must be one where it was impossible to do so."

ILLEGALITY. — Illegality, like fraud, is ordinarily a defence at law, and hence a court of equity will not ordinarily grant an injunction on that ground after judgment; *Sample v. Barnes*, 14 How-

ard, 70. But the rule admits of an exception when the contract is contrary to the policy of the law, and cannot be enforced consistently with a due regard for the public welfare; see *Paulding v. Watson*, 21 Alabama, 279, *post*.

WHERE THE COURTS OF LAW HAVE ASSUMED A CONCURRENT JURISDICTION. — The question is more complicated where the courts of law have a concurrent jurisdiction, which is of recent growth, and borrowed from the Court of Chancery. It is well settled that the incorporation of equitable principles with the common law, and the consequent extension of legal rights and remedies, do not circumscribe the authority of a chancellor, or preclude him from exercising any of the powers that have belonged immemorially to his office; *Varet v. The New York Ins. Co.*, 7 Paige, 560, 568. "The equitable action of assumpsit," said Chancellor Walworth, in the case last cited, "is now allowed in many cases where the remedy originally was in equity only. But the fact that a remedy now exists at law does not deprive that court of its ancient jurisdiction to grant relief here, or in the language of an English chancellor, this court is not at liberty to give up its jurisdiction, because the courts of law have fallen in love with it." In *Kilpatrick v. McDonald*, 1 Jones, 387, and *The Wesley Church v. Moore*, 14 Barr, 273, the Supreme Court of Pennsylvania followed the same rule. An application for equitable relief may, consequently,

be maintained under these circumstances, although the complainant has an adequate remedy at law.

The relation of suretyship, which once belonged exclusively to chancery, is now a subject of legal cognizance, but a surety may, notwithstanding, elect whether he will proceed at law or in equity for contribution, or ask that a creditor, who has given time to the principal, shall be perpetually enjoined, vol. 1.

It may, nevertheless, be contended, that if the creditor proceeds at law before an application is made to chancery, the surety is not entitled to remove the suit to another forum, and the tribunal which has taken cognizance of the cause should retain it to the end. But the weight of authority seems to be that a surety may come before a chancellor for relief after an action has been brought against him at law, and although the case has passed into judgment; *Rathbone v. Warren*, 10 Johnson, 387; *King v. Baldwin*, 2 Johnson Ch. 554; 17 Johnson, 384; *Montague v. Mitchell*, 28 Illinois, 486; *Smith v. Hays*, 2 Jones' Eq. 321; *Miller v. Gaskins*, 1 Smedes & Marshall, 524; *Viele v. Hoag*, 24 Vermont, 46.

In the case first cited, the defendant, in a writ issued on a recognizance of bail, filed a bill alleging that the creditor entered into an agreement for forbearance with the principal debtor, knowing that he was about to leave the State, and then took advantage of his absence to forfeit the recognizance and proceed

against the complainant. The bill also averred that the creditor had received a promissory note and goods, as collateral security, and prayed for an account, and that the suit might be perpetually enjoined. It was contended before the chancellor, and in the Court of Errors, that the complainant should have taken advantage of the facts set forth in the bill, as a ground for his discharge in the Supreme Court. Such a defence was not less available at law than in equity, and where a party had a perfect defence at law, and might protect himself there and did not, a court of equity would not relieve. Spencer, J., said, that he had no doubt that the case was one for equitable relief. If a remedy could be had at law, it was not clear or assured. Moreover, the complainant had a right to bring the creditor into a court of equity, to account for the property and securities which he had received from the principal debtor, and where a court of chancery acquired jurisdiction for one purpose, it might proceed to a final disposition of the cause.

The question arose in another form in *King v. Baldwin*. The surety there required the creditor to collect the money from the principal debtor. The request was not complied with, and the principal became insolvent. The creditor then brought suit against the surety, who offered to prove the request and the refusal to comply with it, as a defence to the suit. The evidence was overruled, and a verdict and judgment ren-

dered for the plaintiff, and the surety then filed a bill for relief. The chancellor was inclined to think that the facts alleged did not exonerate the surety, and held that if they did, he was precluded from taking advantage of them, as the trial and recovery at law were a sufficient answer to the bill. The complainant had presented the same matters which he now advanced, and the defence was overruled. It had been determined, in the case of *The People v. Jansen*, that a defence on such grounds was not peculiar to a court of equity, and that whatever would exonerate the surety in one jurisdiction, ought to have the same effect in the other. This decree was reversed in the Court of Errors. Spencer, C. J., said: "It is an established principle, that where a court of equity once had jurisdiction, it will insist on retaining it, though the original ground of jurisdiction, the inability of the party to recover at law, no longer exists. (1 Madd. Ch. 23 :) In *Atkinson v. Leonard* (3 Bro. Ch. Rep. 218), Lord Thurlow said, "it does not follow, because a court of law will give relief, that this court loses the concurrent jurisdiction it has always had; and till the law is clear on the subject, the court would not do justice in refusing to entertain the jurisdiction." To the same effect are 9 Ves. 464, and 7 Ves. 19. In *Bellow v. Muhell* (4 Atkyns, 126), Lord Hardwicke overruled an objection like the one made here: the plaintiff had been sued at law, and upon the trial, insisted to have a

sum of money allowed him; and because it was not allowed, he filed his bill in equity, and his lordship entertained the bill, because it was matter of contract and account, and because he considered the party justly entitled to it.

I cannot view the appellant's bill as founded on a matter which is *res adjudicata*. Suppose a matter of set-off be offered on a trial at law, and overruled, and the party acquiesced, would that have been a bar to a suit? Certainly not; for, as the matter was never passed upon by the jury, it never was a subject of trial: it was not the appellant's fault that the evidence was not received, and it would be unjust that he should suffer. If it had been a clear case of a defence at law, the objection would have force; but until the case of *Pain v. Packard*, the principle had not been distinctly settled in the Supreme Court; and, beyond all doubt, if the appellant was entitled to relief, the relief in similar cases, in the English courts, had been usually afforded in equity. I entirely subscribe to the opinion of Lord Redesdale (*Bateman v. Willoe*, 1 Sch. & Lef. 205), that, on a bill, in the nature of a bill for a new trial, after a trial at law, and where the subject was passed upon and decided on its merits, though the decision was wrong, a court of equity will not give relief. I go further, and hold, that if the matter was strictly of legal jurisdiction, and the nature of the case required the defendant at law to make his defence, as in the case of a direct payment upon a bond or

note, in such cases a court of equity will not aid the negligence of the party. But if it be doubtful whether a court of law can take cognizance of the defence, and there exists no doubt of the jurisdiction of a court of equity; and if, in such a case, a defendant at law, under the influence of such doubt, omits to make his defence, or if he bring it forward, and it be overruled, under the idea that it is not a defence at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law. In the case of *Bateman v. Willoe*, Lord Redesdale said: "There may be cases cognizable at law, and also at equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere, as in case of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. But the case of *Rathbone & Rathbone v. Warren* (10 Johns. Rep. 587), is expressly in point."

In *Armistead v. Ward*, 2 Patton & Heath, 327, a creditor who had given time to the principal, obtained a judgment against the surety, and the latter filed a bill for an injunction, alleging that he did not discover the agreement for forbearance, until it was too late to set it up as a defence. The court held that there was a clear ground for equitable relief, which was not precluded by the estoppel of the judgment. The right to come into chancery for relief after judgment, on equitable grounds, although

they might have been taken advantage of at law, was also also recognized in *Hampstead v. Watkins*, 1 English, 317, and *Dorsay v. Reese*, 14 B. Monroe, 157; see *Calloway v. M'Elroy*, 3 Alabama, 406; *Harlan v. Wingate*, 2 J. J. Marshall, 138; *Clay v. Fry*, 3 Bibb, 248; *Hempsted v. Watkins*, 1 English, 317; *Boyce v. Grundy*, 3 Peters, 210.

In the *Hestonville Company v. Shields*, 3 Brewster, 257, a creditor sold the collaterals in his hands, and bought them in, and then brought suit for the debt. The defendant applied for an injunction, which was granted, although the defence would have been admissible, under the equitable jurisprudence of Pennsylvania, in the court of common law.

The power of a court of equity to vacate a contract, which is forbidden by a statute or contrary to public policy, has been recognized from an early period; and it was long held that when the contract was under seal, a remedy could not be had at law, unless the defect appeared on the face of the instrument. It was finally established in *Collins v. Blantern*, 2 Wilson, 341, that the illegality of the consideration might be pleaded as a defence to a bond or covenant, but the change did not affect the jurisdiction of chancery, which remained on its ancient footing; see *Bromley v. Holland*, 7 Vesey, 319; *Harrington v. Du Chatel*, 1 Brown C. C. 124; *Atkinson v. Leonard*, Ib. 218.

"I am quite sure," said Lord Eldon, in *Bromley v. Holland*,

"that courts of law, properly, if you please, taking on themselves to do that by new forms of pleading which they had never before done, as dispensing with proferet, or permitting the announcement of a consideration not in the body of a deed, could not destroy the ancient jurisdiction of this court in matters of that nature." A suit on a gaming or usurious contract may accordingly be restrained, and the matter brought into chancery by an injunction; *Gough v. Gough*, 9 Maryland, 526; *Fanning v. Dunham*, 5 Johnson Ch. 122; *Wistar v. McManes*, 4 P. F. Smith, 318, 327; *Lucas v. Waul*, 12 Smedes & Marshall, 157; *Miller v. Gaskins*, 1 Id. 524. Agreeably to some of the authorities, relief may be afforded on this ground after judgment; see *Gough v. Pratt*; *Thomas v. Watts*, 9 Maryland, 536; *Humphries v. Barter*, 10 Smedes & Marshall, 282, 295; *West v. Peanes*, 3 Harris & Johnson, 568; *White v. Washington*, 5 Grattan, 645; *Lucas v. Waul*, 10 Peters, 497; *Day v. Cummings*, 19 Vermont, 496. Such is no doubt the rule where the judgment is entered by confession on a warrant of attorney; *Fanning v. Dunham*; *Wistar v. McManes*; but one who lies by without pleading or proving usury until the suit has been determined adversely, is chargeable with laches, and should not be allowed to lay the case before a chancellor; *Thompson v. Berry*, 3 Johnson Ch. 395; *Brown v. Swann*, 10 Peters, 497.

It was declared in *Sample v.*

Barnes, 14 Howard, 70, on the authority of *Creath v. Sims*, 5 Howard, 192, that equity will not relieve on the ground of illegality, when the complainant is *in pari delicto*, but this rule is inapplicable where the transaction is contrary to legal policy, and must be set aside from a regard for the public welfare; *Goochenauer v. Cooper*, 8 S. & R. 186; 2 Smith's Lead. Cases, 701, 7 Am. ed.; *ante*, 1236.

It would notwithstanding appear, that where the courts of law have adopted equitable principles, and can administer them effectually through legal forms, there is a strong appeal to the discretion of a chancellor, not to withdraw the cause from a forum where the parties can have the benefit of a trial by jury; and this consideration should not be disregarded unless some cause is shown which takes the case out of the rule, that a court of equity will not intervene where justice can be adequately administered at law.

In *Hood v. The New York and New Haven R. R. Co.*, 23 Conn. 606, the court held that as the doctrine of equitable estoppel has been incorporated with the common law, it is not a ground for relief in equity, but a different view has been taken in other instances; see 2 Smith's Leading Cases, 734, 7 Am. ed.; *Wells v. Pierce*, 7 Foster, 503; *Jones v. Sasser*, 1 Dev. & Bat. 462; *Sasser v. Jones*, 3 Iredell Eq. 19.

The case is still stronger against the complainant, when he does not apply for relief until judgment has been rendered against him at law,

because an injunction cannot be issued and the case reopened, without a delay which is necessarily injurious, if the right ultimately proves to be with the opposite party; *Smith v. McIver*, 9 Wheaton, 552; *Duncan v. Lyon*, 3 Johnson Ch. 351; *Lansing v. Eddy*, 1 Id. 49.

In *Schroepel v. Shaw*, 3 Comstock, 446, Harris, J., questioned the decision in *King v. Baldwin*, and inclined to the opinion of Chancellor Kent, that a surety who does not set up the negligence of the creditor as a defence, is not entitled to enjoin the judgment. In *Dickinson v. The Commissioners*, 6 Indiana, 128, a surety was accordingly held to be precluded from seeking the relief in equity, which he could as well have obtained in the legal tribunal; and the same point was determined in *Meek v. Howard*, 10 Smedes and Marshall, 502. Such should seemingly be the rule where the power of making an equitable defence to an action at law has been conferred by statute; see *Winfield v. Baron*, 24 Barb. 254; *Savage v. Allen*, 59 Id. 591; *Schell v. The Erie Railway Co.* 51 Id. 368; 45 New York, 642; *Wolcott v. Jones*, 4 Allen, 367; *Brown's Appeal*, 16 P. F. Smith. 155; *Glenn v. Fowler*, 8 Gill & Johnson, 340.

The question nevertheless depends on the real or supposed intention of the legislature; see *Bromley v. Holland*, 7 Vesey 318. And in *Babcock v. McCommant*, 55 Illinois, 214, the court held that the power of the courts of equity, to vacate judgments on the ground

of fraud and mistake, had not been abrogated by a statute which conferred a like power on the courts of law. A similar view was taken in *Dorsay v. Reese*, 14 B. Monroe, 157.

The better opinion is that where an equitable defence is made and overruled at law, the adjudication should be final in both jurisdictions, unless it appears to have been based on a plain misconception of the doctrines of equity jurisprudence, or that the court dismissed the question as lying beyond their province and requiring the intervention of a chancellor; see *King v. Baldwin*; *Matson v. Field*, 18 Missouri, 100; *Burton v. Hynson*, 14 Arkansas, 32; *Simpson v. Hart*, 14 Johnson, 63; *Wheaton v. Washington*, 5 Grattan, 645; *Price v. Reynolds*, 23 Grattan, 518. In *Burton v. Hynson*, the court held that wherever chancery anciently had jurisdiction it still exists, although a like jurisdiction may have been assumed by the courts of common law, and the defendant may suffer judgment to go against him, and then apply to a court of equity for relief, but that if he on the contrary elects to make such a defence in the court of law, and the decision is adverse, he will not be allowed to try the case over again before a chancellor. It has accordingly been declared, that a defendant cannot come into chancery for relief after judgment, on the ground of failure of consideration; *Robinson v. Shortridge*, 2 Blackford, 480; *Parker v. Morton*, 15 Indiana, 1; *Rains v. Scott*, 13 Ohio, 107; of

fraud, or of usury, because these defences might equally well be made at law.

It has nevertheless been held, that the hearing and dismissal of a motion for equitable relief in a court of law, will not preclude a subsequent and more formal appeal to chancery, even where the point was heard and determined upon equitable principles; see *Neilson v. Rockwell*, 14 Illinois, 375; *The Hestonville Railway Co. v. Shields*, 3 Brewster, 251; *Simpson v. Hart*, 1 Johnson, Ch. 98; 14 Johnson, 63; *Crawford v. Thurmond*, 3 Leigh, 5. In *Simpson v. Hart*, the Court of Errors reversed the decision of the chancellor in the court below, and held that the refusal of a legal tribunal, to set off one judgment against another, did not preclude the unsuccessful party from accomplishing the same object through a bill in equity.

The principle was applied in a different form in *Arden v. Patterson*, 5 Johnson Ch. 44. There S. & R. assigned a demand *pendente lite* to their attorney P., who prosecuted the suit to judgment. They subsequently received the amount from the defendant in the judgment, and marked it satisfied, but the entry was stricken off on the motion of the attorney. S. & R. subsequently filed a bill against P. to have the assignment set aside as fraudulent, which he resisted on the ground that the question was *res adjudicata*. Chancellor Kent said :

"The question touching the validity of the assignment to P., is said

to have been already decided by the Supreme Court, on the motion of the defendant P., to have the satisfaction of the judgment acknowledged by S. & R., and entered upon record, vacated. I do not consider the decision of that motion, upon affidavits, to amount to a *res judicata*, which ought to conclude the present inquiry. It could not have been so intended by that court. We have not the reasons upon which the court decided, and the decision may have been upon grounds very different from the question of the validity of the assignment. But this objection utterly fails upon the principle adopted by the judges of the Supreme Court, and sanctioned by the Court of Errors, in *Simpson v. Hart* (14 Johns. Rep. 63). In which case it was declared, that decisions upon motion and summary application, which do not admit of great discussion, or of being subject to a writ of error, are not final and conclusive, so as to amount to a *res judicata*, and a bar to a renewed consideration of the case in another court of concurrent jurisdiction."

It was held for like reasons in *Wistar v. McManes*, 4 P. F. Smith, 318, that the refusal of a court of law to open a judgment on the ground of usury, did not preclude the defendant from coming into equity for an injunction, and to have the securities for the debt delivered up on the payment of the principal, and legal interest. This decision is the more significant, because the courts of Pennsylvania exercise an equitable

jurisdiction under the forms of law, and may afford relief against a judgment for any cause that would be available before a chancellor. Strong J., said: "The summary determination of a question raised by a motion in a court of law, is not a bar to a bill in equity, if the question be an equitable one, though it be decided that there is no equity. The set-off of one judgment against another is strictly a right in equity alone. Courts of law may, however, direct it. In *Simpson v. Hart*, 14 Johns. 63, where there had been a motion in a court of law to allow a set-off of one judgment against another, and the court had refused it after full consideration of all the facts and all the equities, the Court of Appeals in New York sustained a bill for an injunction, and ordered that the set-off be decreed. The doctrine was laid down that the decision of a court of law upon a summary application to its equity, is not such a *res judicata* as to preclude chancery from examining the question. So in *Fanning v. Dunham*, 5 Johns. Ch. 122, where a leader at usurious interest had proceeded at law, and recovered judgment on a bond and warrant of attorney, a bill for the relief of the borrower was entertained, though the court of law had granted a feigned issue to try whether there was usury, which had resulted in establishing its existence, and the court had afterwards rescinded the order granting the issue, had set aside all proceedings under it, and had allowed an execution to issue on the judg-

ment. To the same effect is *Arden v. Patterson*, 5 Johns. Ch. 44. And such I understand to be the doctrine of the English courts of equity; *Bromley v. Holland*, 7 Ves. 3."

This decision virtually overrules *Gravenstine's Appeal*, 13 Wright, 310-320, where the refusal of a court of law to set aside a judgment on the ground of fraud, was held to preclude the defendant from coming into equity; see *The Hestonville Railway Co. v. Shields*, 3 Brewster, 257.

The authorities agree that a defence which is purely equitable, and could not be considered in the legal forum, may be a good excuse for an injunction, although it was made and overruled at law; see *The Bank of Bellows Falls v. The Rail Road*, 2 Williams, 470; *Nelson v. Dunn*, 15 Alabama, 501; *White v. Washington's Ex'rs*, 5 Grattan, 645; *Power v. Reeder*, 9 Dana, 6; *The State Bank v. Bozeman*, 8 English, 631; *Newton v. Field*, 16 Arkansas, 216.

INJUNCTIONS AFTER JUDGMENT.

—In the instances hitherto considered, the injunction was granted for the purpose of giving effect to an equitable defence which could not be made available at law. It is equally well settled that one who is prevented from taking advantage of a legal defence, by fraud, accident, or mistake, may obtain relief in equity, if there have been no laches on his part, and the judgment cannot be conscientiously enforced; *Robinson v. Wheeler*, 51 New Hampshire, 385; *Pelham v. Moreland*, 11 Arkan-

sas, 443; *Nelson v. Rockwell*, 14 Illinois, 375. This was a constant ground for the interposition of a chancellor, before the practice of granting new trials was introduced, and it is still a recognized head of equity jurisprudence, although the necessity for its exercise has diminished with the increasing liberality of the courts of law.

The jurisdiction may be exercised on two grounds, one that the judgment was obtained or entered, through fraud, accident, or mistake, the other, that the complainant was prevented by such means from making a just defence; see *Nelson v. Rockwell*; *Wingate v. Heywood*, 40 New Hamp. 441; *Robison v. Wheeler*, 51 Id. 385; *Wistar v. McManes*, 4 P. F. Smith, 518; *Robson v. Pearce*, 12 New York, 157; *Howe v. Martell*, 28 Illinois, 479; *Tompkins v. Tompkins*, 3 Stockton Ch. 514; *Webster v. Skipwith*, 4 Cushman, Miss. 341. Or as the rule was stated in the case last cited: "Any fact which proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in the court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence, of himself, or his agents, may be a sufficient ground for enjoining the execution of a judgment."

If, said *Fowler, J.*, in *Wingate v. Haywood*, "a judgment is rendered by accident, or mistake, or through fraud, or any fact ex-

ists which proves it to be against conscience to execute the judgment, of which the injured party might have availed himself at law, but was prevented by fraud, accident or mistake, unmixed with any fault or negligence of himself or his agents, a court of equity may interfere by temporary or perpetual injunction to restrain the adverse party from availing himself of such a judgment."

It was said in like manner in *Tompkins v. Tompkins*, that "the power of a court of equity, to look into the judgments of other courts and relieve against them on the ground of fraud, is well established. It was affirmed in this court, in *Glover v. Hedges*, Saxton, 119; *Bulon v. Scott's Adm'rs et al.*, 2 Green Ch. 236, 241; *Vanmeter v. Executor of Jones*, 2 G. C. R. 523; *Gifford, Administrator, v. Thorn*, 1 Stockton, 703. The authorities are cited in these several cases where the jurisdiction has been sustained. When the judgment has been procured by artifice, or concealment on the part of the plaintiff, and the court, where the fraud has been perpetrated, is not able to afford adequate relief, then this court will take hold of the party who has committed the fraud, and will prevent his using the judgment to the injury of his adversary; or if he has enforced his judgment, this court will hold him as a trustee, and compel him to account for the fruits of his iniquity. In *Barnesty v. Powell*, 1 Ves. 258, case 146, Lord Hardwick, says: "Though this court

cannot set aside a judgment of a common law court obtained against conscience, yet it will decree the party to acknowledge satisfaction on that judgment, though he has received nothing, because obtained where nothing was due; so it cannot set aside a fine for being obtained by fraud and imposition, as the court of C. B. to a certain degree, and with some restriction, may; yet, on a conveyance so obtained, this court never sent the plaintiff to C. B. to set it aside; but considers the person obtaining the estate, even by fine, as a trustee, and decreed him to reconvey on the general ground of laying hold of the ill conscience of the party, to make him do what is necessary to restore matters as before." This court may grant an injured party relief against the fraudulent use of a *bona fide* judgment. If by any artifice, or unconscionable contrivance, the plaintiff has become himself the purchaser of the defendant's property at a grossly inadequate price, this court will grant relief by holding him a trustee, and will compel him to account for the property at its fair value, or subject it to another sale. And as this court has frequently granted relief against awards fraudulently obtained, against verdicts and probates of wills, and even against private acts of legislative bodies obtained by fraud, with much greater propriety will it relieve against a fraudulent judgment, where the defendant has had no opportunity of being heard. The usual ground upon which a court of equity re-

fuses to interfere with a judgment, is because the defendant should have protected himself in the court where the judgment was obtained. In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte*, it would be hard indeed, if this court could not interpose to protect a party against the fraud of the plaintiff. But even in a case where a judgment has been obtained in the absence of a party, and upon a hearing entirely *ex parte*, this court will not try the merits of the case over again where those merits have been properly submitted to the tribunal established by law to hear and adjudicate upon them. In the case of foreign attachments, auditors are appointed by the court, before whom the claims are proved.

There is no appeal from their decision. If the plaintiff imposes a fictitious claim upon the auditors, or a claim which has been satisfied, and for which the defendant has a receipt—in fine, if he conceals from the auditors any fact which tends to show that his claim is not a valid one, he commits a fraud upon the absent party, against the consequences of which this court will protect him, if it is within its power to do so, either by enjoining the enforcement of the claim at law, or, if the judgment is executed, by compelling such restitution to be made as is just, under the circumstance of the case."

It results from what has been

said, that a judgment obtained by fraud, or by taking an undue advantage of the complainant's ignorance or weakness, is voidable, and may be enjoined even when relief might presumably have been had on motion in the court of law; *David v. Tileston*, 6 Howard, 114; *Moore v. Gamble*, 1 Stockton Ch. 246; *Mann v. Worrall*, 16 Barb. 221; *Garrity v. Russell*, 40 Conn. 450; *Humphries v. Bartel*, 10 Smedes & Marshall, 282, 295; *Nelson v. Rockwell*, 14 Illinois, 375.

Such relief is constantly afforded where a party is prevented from appearing, or taking proper measures to defend the cause, by a fraudulent assurance that it will not be pressed, or that no further steps shall be taken in it without his knowledge; *Holland v. Trotter*, 22 Grattan, 136; *Cardwell v. Farrell*, Ib. 445; *Howe v. Martell*, 28 Illinois, 479; *Pearce v. Olney*, 20 Conn. 544; *Lee v. Baird*, 4 Hen. & Mun. 427; *Wierich v. De Zoya*, 2 Gilman, 385; *Truett v. Wainwright*, 4 Id. 418; *Brooks v. Whitson*, 7 Smedes & Marshall, 513; *Huggins v. King*, 3 Barb. 616; *Powers v. Butler*, 3 Green Ch. 465; *Booth v. Stamper*, 6 Georgia, 172.

It is essential to relief on such grounds, that the assurance should have been fraudulent and deceptive, and the efficient cause which led the complainant to omit appearing or making defence; *Perry v. Siter*, 37 Missouri, 373; *Jarboe v. Kepler*, 4 Indiana, 177; and in the case last cited, it was held not to be a sufficient ground

for relief, that the defendant in the suit at law had remained at home, in reliance on a promise to allow him all the credits to which he was entitled.

A chancellor, may afford relief where a default has arisen from accident unmixed with negligence; *Bell v. Cunningham*, 1 Sumner, 89; *Carrington v. Holabird*, 17 Conn. 530, 19 Id. 84; *Forrester v. Wilson*, 1 Duer, 624; *Griffith v. Brown*, 3 Robertson, 627; *Agron v. Bonn*, 7 Id. 340. Hence one who from illness or some other fortuitous cause for which he is not responsible, does not learn that he has been summoned until after judgment, may ask the aid of a court of equity to enable him to make a just defence; see *Griffith v. Brown*, 3 Robertson, 637; *Rice v. The Bank*, 7 Humphreys, 39; *Owen v. Ranstead*, 22 Illinois, 161. In *Duvall v. Seeles*, 49 Maine, 320, an injunction was granted in aid of a defendant against whom judgment had been taken in his absence, after he had paid the debt in full.

Surprise may also be a ground for setting aside a judgment, especially where there is reason for believing, that it was designed by the party whom the complainant seeks to enjoin. In *Carrington v. Holabird*, an action was brought against B. and C. to June T., 1841, in the Superior Court of Connecticut. They did not appear, and the plaintiff might, agreeably to the practice in that State, have taken judgment the next term. He did not do so, but laid by until August, 1842, when judgment was en-

tered against B. and C., and execution issued. In the meantime they had applied to the District Court of the United States for the benefit of the bankrupt act, and obtained a certificate on the 1st of July, 1842, under the belief that it would be a bar to the judgment, which they supposed to have been already taken in the Superior Court. The defendants then filed a bill for an injunction on the ground of surprise, and it was held that the judgment should regularly have been entered after the suit was brought; and that the defendants having been thus deprived without their fault, of the protection of the decree in bankruptcy, were entitled to relief. *Hinman, J.*, dissented; and when a similar question arose in *Belamy v. Woodson*, 4 Georgia, 175, it was held that the complainant might have protected himself by due care, and therefore was not entitled to relief in equity.

Surprise, resulting from the forgetfulness, perjury, intoxication, or absence of witnesses, is not ordinarily a ground for the relief in equity, which can as well be obtained through a motion for a new trial in the original forum; see *The State Bank v. Stanton*, 2 Gilman, 352; *Governor v. Barrow*, 13 Alabama, 540; *Drew v. Hague*, 8 Id. 438; *Smith v. Lowry*, 1 Johnson Ch. 320; *Woodward v. Van Buskirk*, Ib. 432; *Vaugh v. Johnson*, 1 Stockton Ch. 173.

In *Jamison v. Deshields*, 3 Grattan, 4, an injunction was granted after judgment, on proof that the bond which was the cause

of action, had been fraudulently obtained from the obligee by the party for whose use, the suit was brought, and that the fraud did not come to the knowledge of the complainant, until it could no longer be set up as a defence.

In general, one who seeks relief against a judgment, must show not only that it was fraudulently or unduly obtained, but that he has a good legal or equitable defence to the demand, or cause of action, because the effect of granting the prayer of the bill would otherwise be to increase litigation, by compelling the judgment creditor to bring another suit with the same result; *Stokes v. Kramer*, 11 Wisconsin, 389; *Way v. Lamb*, 13 Iowa, 79, 83; *Saunders v. Albreton*, 37 Alabama, 716; *Dawson v. The Bank*, 30 Georgia, 664; *Reeves v. Cooper*, 1 Beasley, 223; *Paine v. Dudley*, 1 Washington, 199; *Lee v. The Ins. Co.*, 2 Alabama, 21; *Bradley v. Richardson*, 23 Vermont, 720; *Nason v. Smedley*, 8 Id. 118. "Although," said Phelps, J., in the case last cited, "the judgment has been obtained in such a manner that it ought not to bind the complainants, yet it would be useless to interfere if the debt for which it is rendered is just and equitable, so that if it were set aside, a court of law would be compelled to render a like judgment." And in *Tompkins, v. Tompkins*, 3 Stockton's Ch. 514, the court refused to enjoin a judgment which had been rendered in a foreign attachment against an absent defendant, because it was for necessities furnished to his child, and

he was morally if not legally answerable.

In general, every one is entitled to notice, and a day in court, and although an *ex parte* judgment is not necessarily void, a chancellor may intervene if there is reason to believe that injustice has been done to a party who did not have a hearing; 1 Smith's Lead. Cases, 1119, 7 Am. ed. It follows that one who is aggrieved by a verdict or judgment rendered in his absence, may have relief in equity if he can succeed in showing that he was not summoned, and did not hear of the proceedings in time to take defence or move for a new trial; see *Stubbs v. Leavitt*, 30 Alabama, 352; *Owens v. Ransstead*, 22 Illinois, 161; *Harshey v. Blackmar*, 20 Iowa, 161; *Skilton v. Tiffin*, 6 Howard, 163; *Walker v. Gilbert*, Freeman Ch. 85; *Bell v. Williams*, 1 Head, 229; *Miller v. Gorman*, 2 Wright, 309.

A judgment which had been rendered against an executor without notice or appearance, on an instrument which did not impose any legal or equitable liability was accordingly enjoined in *Propst v. Meadows*, 13 Illinois, 160. In this instance the record did not aver that the defendant had been summoned, and the court declined to say whether relief can be granted in the face of such a recital; but in *Ridgway v. The Bank of Tennessee*, 11 Humphreys, 525, the defendant was allowed to contradict a return of service, and show that he had no notice or knowledge of the suit, before the case went to judgment and execution, in the court of law.

Totten, J., said: "We may conclude that in the circumstances of this case, there is no remedy at law against the judgment in question. The action for a false return is an inadequate remedy for such an injury; for it might be that after a ruinous sacrifice suffered in the payment of a judgment so recovered, and the delay and expense of litigation with the officer, who made the false return, he might be unable to make the proper indemnity, or succeed in evading his liability. The fact that there is no remedy, or no sufficient remedy at law, for this admitted injury, is a strong reason why there should be a remedy in equity."

It was declared in like manner in *Crafts v. Dexter*, 8 Alabama, 767, that one who had not been summoned through the fraud or mistake of the sheriff, might obtain relief in equity, although such a decree would not be made unless the complainants showed not only that he had no notice of the suit, but that it was unjust.

It is not easy to draw the line in cases of this description. If, as the authorities indicate, ignorance is a sufficient ground for an injunction, it may be awarded *a fortiori* when an unjust demand is recovered against one who was not summoned. But the risk of opening a judgment, on an allegation which like that of the want of notice, depends on the uncertain testimony of witnesses, is so great, that the complainant should be left to his remedy against the sheriff, unless it is obvious that the party

who obtained the judgment knew that he had no cause of action, and acted in bad faith; see *Windewart v. Allen*, 13 Maryland, 196; *Walker v. Robbins*, 14 Howard, 584. A judgment against one who was not within the jurisdiction of the court, and could not be summoned, stands on a different footing, and may be treated as a nullity in any court where it is sought to be enforced; see *Bicknell v. Field*, 8 Paige, 440; 2 American Leading Cases, 644, 5 ed.; *Skilton v. Tiffin*, 6 Howard, 163; *Harshey v. Blackmar*, 20 Iowa, 161. But it seems, that a chancellor will not enjoin the execution of a judgment, because the defendant was not served with process, unless it is also shown that the debt is not due; see *Coon v. Jones*, 10 Iowa, 131; *Givin v. Campbell*, 20 Id. 179; *Gregory v. Ford*, 14 California, 138; *Secor v. Woodward*, 8 Alabama, 500; *Gardner v. Jenkins*, 14 Maryland, 581; *Harris v. Givin*, 10 Smedes & Marshall, 563; *ante*, 1369.

It is well settled, on like grounds, that where execution is issued, or a judgment entered under a warrant of attorney for more than the real debt, or where such an instrument is employed to enforce a usurious obligation, a court of equity may correct the abuse by injunction, although a motion for relief has been made and denied at law; *Wistar v. McManes*, 4 P. F. Smith, 318; *Finning v. Dunham*, 5 Johnson Ch. 122. So a surety against whom judgment is taken on a *cognovit*, may obtain relief in equity, on

proof that time has been given to the principal without his knowledge; *Montague v. Mitchell*, 28 Illinois, 481. The jurisdiction originated in the unwillingness of the common law judges to allow any matter to be averred *dehors* the record, or to contradict what it sets forth, and is still exercised, although relief may now generally be had on a motion to that effect in the court of law; see *Fanning v. Dunham*.

In *Griffith v. Clark*, 18 Maryland, 457, the court enjoined a judgment against a *feme covert*, for a cause of action arising *ex contractu*, as being not less invalid than the agreement on which it was based. Such is no doubt the rule where a judgment is entered against a married woman on a warrant of attorney, and perhaps where her attorney confesses judgment in a suit brought adversely; *Caldwell v. Walters*, 6 Harris, 79; *Swayne v. Tryon*, 17 P. F. Smith, 436. But it would seem that a woman who neglects to plead or prove her coverture in due season, should not be allowed to take advantage of it subsequently, at all events where she has received, or profited by the consideration of the agreement which she is seeking to evade.

Judgments obtained by default, in proceedings commenced by attachment against absent or non-resident debtors, without actual notice or service, are also fit subjects for the interposition of a chancellor, because the defendant cannot be charged with neglect in not appearing to or defend-

ing an action, of the institution of which he was ignorant; *Moore v. Gamble*, 1 Stockton Ch. 246; *Tompkins v. Tompkins*, 3 Id. 514; *Nelson v. Rockwell*, 14 Illinois, 375. But here as in other cases of a like kind, a court of equity will consider the result, as well as the means by which it was obtained, and will not set aside the judgment if it appears that the cause of action is just, or one for which the complainant is morally or legally responsible; see *Tompkins v. Tompkins*, ante; *Norris v. Campbell*, 27 Maryland, 688.

To render an adjudication by one court conclusive in another, the jurisdiction of the former tribunal must be broad enough to cover the whole ground, and leave no essential point untouched or open for consideration. Hence even when a defence is legally cognizable, and might have been received in a court of law, it may be requisite to consider whether it could have been made fully and effectually, and if it could not, recourse may still be had to chancery, for a larger measure of relief than the law affords. That an action has been brought on a contract for the sale of land, and a judgment recovered against the vendee for an instalment of the purchase money, will not, therefore, necessarily preclude him from filing a bill to have the execution of the judgment stayed, and the amount paid or collected under it refunded, and the whole contract set aside as fraudulent; because, although the fraud might have been pleaded

or given in evidence as a defence to the action, it would only have been an answer to the stipulation or covenant on which the suit was brought, and the defendant would still have been obliged to seek relief in chancery; *Boyce v. Grundy*, 3 Peters, 240. So constructive fraud or undue influence, may be a ground of equitable relief against a judgment in covenant or ejectment; see *Jack v. King*, 4 Cowen, 207, 220; *Chesterfield v. Jansen*, 2 Vesey, 125; vol. 1., 773, 827.

It is a general principle, that one who needs the aid of a chancellor, must be prompt and diligent, and the rule applies *a fortiori* where the application must necessarily delay the course of justice whatever may be the merits of the controversy. Hence an injunction will not be granted after judgment, for any ground that would have been available in the court of law, unless the complainant can show that he was prevented from laying his case before the appropriate tribunal, by fraud, mistake, or accident, and that the cause was one which could not have been obviated, or controlled by diligence on his part; *Emerson v. Udall*, 13 Vermont, 477. The rule is peremptory, and will not yield to the clearest proof that the cause of action was invalid, or that the effect of sustaining the judgment will be to compel the payment of a demand that was never due, or that had been satisfied; *Floyd v. Jayne*, 6 Johnson Ch. 479; *Bierne v. Mann*, 7 Leigh, 364; *Kilheffer v. Herr*, 17 S. & R. 319, 321; *Fletcher v. Warren*, 18 Vermont, 45; *Emerson v. Udall*,

13 Id. 477; *Warner v. Conant*, 24 Id. 851; *Perkins v. Clements*, 1 Patton & Heath, 14; *The Railroad v. Shippen*, 2 Id. 327; *Paynter v. Evans*, 7 B. Monr  e, 420; *Buckmaster v. Grundy*, 3 Gilman, 626; *Robb v. Halsey*, 11 Smedes & Marshall, 141; *Semple v. M'Gatagan*, 10 Id. 98; *Williams v. Jones*, Ib. 108; *Meek v. Howard*, Ib. 502; *Pichon v. M'Henry*, 6 Blackford, 517; *Parker v. Morton*, 5 Id. 1; *Dunn v. Fish*, 8 Id. 407; *Bently v. Dillard*, 1 English, 79; *Graham v. Stagg*, 2 Paige, 321; *Smith v. Lowry*, 1 Johnson Ch. 320; *Woodworth v. Van Buskerk*, Ib. 432; *Duncan v. Lyon*, 8 Id. 351; *Foster v. Wood*, 6 Id. 87; *M'Vicar v. Wolcott*, 4 Johnson, 510; *Meen v. Rucker*, 10 Grattan, 506; *Conway v. Ellison*, 14 Arkansas, 360; *Vilas v. Jones*, 1 Comstock, 274; *Walton v. Hamilton*, 9 Grattan, 425; *George v. Strange*, 10 Id. 499; *Vaughan v. Johnson*, 1 Stockton, 173; *Keefe v. Rice*, 1 Bailey, Eq. 179; *Thompson v. Meek*, 3 Sneed, 271; *Hampson v. Ware*, 4 Clarke, 13; *Pearce v. Chastain*, 3 Kelly, 256; *Robbins v. Mount*, Ib. 74; *Stroup v. Sullivan*, 2 Kelly, 275; *Trippe v. Lowe*, Ib. 305; *Bellamy v. Woodson*, 4 Georgia, 175; *Brandon v. Green*, 7 Humphreys, 130; *Bently v. Dillard*, 1 English, 79; *Parker v. Morton*, 5 Blackford, 1; *Seth v. Allen*, 63 Illinois, 474; *Ballin v. Loomis*, 22 Id. 82; *Smith v. Powell* 50 Id. 21; *Ramsey v. Perley*, 34 Id. 504.

It does not vary the case that the plaintiff was insane, when the action was brought, or judgment rendered, if he was in the

hands of a committee who might have ascertained the facts, and made defence; *Henderson v. Mitchell*, 1 Bailey Eq. 113; although lunacy or extreme illness, may be among the circumstances tending to excuse laches. For like reasons a bill for discovery and relief comes too late after judgment, unless it sets forth some equitable ground which could not have been made available at law; *Anderson v. Roberts*, 18 Johnson, 515, 533; *Robinson v. Wheeler*, 51 New Hampshire, 385; *Brown v. Swann*, 10 Peters, 497; *Ramsey v. Perley*, 34 Illinois, 534; *Lucas v. Sherer*, 27 Id. 15; *Smith v. Rowell*, 50 Id. 21; *Gott v. Cair*, 6 Gill & Johnson, 309; *Dilly v. Barnard*, 8 Id. 137; *Barker v. Elkins*, Ib. 465; *Dilly v. Barnard*, 8 Gill & J. 170; *Hill v. M'Neill*, 8 Id. 432; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Thompson v. Berry*, 3 Id. 395; *Kinney v. Ogden*, 2 Green Ch. 168; *Hill v. M'Neill*, 8 Porter, 432; *M'Grew v. The Tombeckbee Bank*, 5 Id. 547; *French v. Garner*, 7 Id. 549; *Stinett v. The Branch Bank of Mobile*, 9 Alabama, 121; *Governor v. Barrow*, 13 Id. 546; *Faulkner's Adm'r v. Harwood*, 6 Randolph, 125; *Norton v. Woods*, 22 Wend. 520. Thus in *Lansing v. Eddy*, a bill averring that the usurious nature of the contract, on which the respondent had obtained judgment was known to him, and could not have been proved by the complainant, was dismissed on the ground that the discovery should have been obtained in time to be used at the trial.

The same point was determined in *Brown v. Swann*. The question said Wayne, J., is, "can the complainants have any relief in equity against the judgment? The general rule is, that after a verdict at law a party comes too late with a bill of discovery; *Duncan v. Lyon*, 3 Johns. Ch. 355; *Barbone v. Brent*, 1 Vern. 176. There must be a clear case of accident, surprise, or fraud, before equity will interfere. In the case of *Pro'heroe v. Forman*, 2 Swanst. 227, the Lord Chancellor says: "If a defendant has a good legal defence, but the matter has not been tried at law; it becomes a serious question whether a party who being competent does not choose to defend himself at law, can come into equity and change the jurisdiction. Consider the effect: he might not have succeeded at law; but by coming into equity he secures so much additional time." In the same case the chancellor says: "Lord Thurlow was very tenacious of the doctrine, that a party who had an opportunity of a trial at law, and would not avail himself of it; could not come here." Such now is the established doctrine in England, and has been for a longer time the doctrine in the United States. And the doctrine, as applied to a case for relief from usury, is, that a defendant sued at law on a contract alleged to be usurious, will not be entitled to a bill of discovery, if he suffers a verdict and judgment to be taken against him; and especially when he does so without making a defence at law. The case of *Thomp-*

son v. Berry and Van Buren, 3 Johns. Ch. 395, is one directly in point; meeting the case before us also in this, that an injunction will not be granted against a judgment where a party seeks a discovery of usury, and claims a return of the excess beyond the legal interest. The reason of the rule is, that the proof of usury is a good defence at law; and when it is in the knowledge of the defendant, no satisfactory reason can be given why the discovery was not sought while the suit was pending. It is our opinion then that whenever a party seeking a discovery had knowledge of the facts during the pendency of a suit at law, equity will not permit him to do so afterwards to enjoin a judgment."

When a contract is forbidden by statute, or contrary to public policy, a defendant may be entitled to come into equity after judgment, not for his own sake but to vindicate a rule which is essential to the well being of society; and judgments for gaming and usurious debts, have been enjoined on this ground, although the complainant might have made defence at law; *Lloyd v. Watson*, 9 Maryland, 536, note; *Gough v. Pratt*, 9 Id. 526; see *Lucas v. Waul*, 12 Smedes & Marshall; *Humphries v. Bartee*, 10 Id. 282; *Nelson v. Armstrong*, 5 Grattan, 354.

A chancellor will not enjoin a judgment, because it was irregularly entered, or because the proceedings are erroneous and might be reversed; *Shottenkrick v. Wheeler*, 3 Johnson Ch. 275;

Bicknell v. Field, 8 Paige, 440; *Nicholson v. Patterson*, 6 Humphreys, 394. Whether such a defect exists, and how to rectify it, are questions appertaining to the legal forum, and which must be determined there; see *Reynolds v. Haine*, 13 B. Monroe, 234; *Ex parte Christian*, 23 Arkansas, 639; *Suydam v. Beals*, 4 M'Lean, 12; *Merrett v. Baldwin*, 6 Wisconsin, 439. But a defendant in a judgment which fails for want of jurisdiction, may come into equity to remove the cloud from his title, or for a decree that a purchaser under the judgment shall reconvey; *Skelton v. Tiffen*, 6 Howard, 163; *Harshey v. Blackmar*, 26 Iowa, 161; *Ballinger v. Tarhill*, 16 Id. 491; *Cornwille v. Griffing*, 21 Barb. 9. Yet in *Bicknell v. Field*, the court refused to enjoin an action in New York, on a judgment which had been entered *in personam* in Massachusetts, in a suit commenced by attachment against a non-resident defendant, without notice or appearance, on the ground that the want of jurisdiction was patent, and constituted a good legal defence.

IGNORANCE.—The complainant's ignorance of the nature, or even of the existence of the defence, will not exempt the case from the operation of the rule, if he could have obtained the requisite information by inquiry. One who suffers judgment to go against him, cannot obtain relief in equity on the ground that the cause of action originated in a fraud which he had no means of proving, because

he should have filed a bill of discovery in time to lay the answer before the jury; *Heckrote v. Barnard*, 8 Gill & Johnson, 171; *Shelmire v. Thompson*, 2 Blackford, 272.

"The only reason alleged," said Holman, J., in *Shelmire v. Thompson*, "for not defending at law, is ignorance of the erasure. There is nothing to excuse this ignorance. It was occasioned by negligence alone, and we know of no principle or precedent that authorizes relief." It was held in like manner in *Heckrote v. Barnard*, that "if facts essential to the case of either party, rest in the knowledge of the opposite party, it is too late after a trial at law, for the losing party to apply to a court of equity for relief upon that ground. He should have filed his bill for discovery before the trial."

In like manner a mistake in the account, upon which the judgment was entered, and which was not discovered until after the verdict, and the time for a motion for a new trial had elapsed, is not sufficient to authorize an injunction restraining the execution of the judgment, when the error is apparent on the face of the account, and might have been discovered by a careful examination; *Falls v. Robinson*, 5 Maryland, 365.

The rule may, nevertheless, yield to circumstances, and an heir or administrator, who does not learn that the deed or bond in suit was fraudulently procured from the ancestor or intestate, until it is too late to take defence at

law, may come into equity for an injunction; *Gardiner v. Bowling*, 12 Gill & Johnson, 382; and the case is the same in principle, where the deceit or malpractice is secret, or so industriously concealed, that the injured party does not ascertain the truth until the case has gone to judgment.

A court of equity will not grant relief, because the complainant was erroneously advised by counsel, that his defence was only available in equity, and therefore suffered judgment to go against him at law by default; *Dickerson v. The Commissioners*, 6 Indiana, 128; *Meek v. Howard*, 10 Smedes & Marshall, 502; *Taylor v. Manley*, 6 Id. 505; *The State Bank v. Stanton*, 2 Gilman, 302. Such ignorance is simply a mistake of law, and consequently not a sufficient ground for the intervention of a chancellor. In *Hayden v. Moore*, 4 Bush, 107, the court refused to enjoin a judgment which had been rendered against the widow of a deceased partner, in an action against her for a partnership debt, although she was not a member of the firm, and had omitted to attend in consequence of being informed by a friend, that she was not liable, and need not defend the suit. So it has been held that a defendant who confesses judgment, in the belief that it will simply establish the existence of the demand against the estate which he represents as administrator, and will not impose a personal obligation, is not entitled to relief in a court of equity; *Kearney v. Sasscer*, 37 Maryland,

264. In the case last cited the court said, that whether the mistake was as to the operation of the judgment, or in supposing that the estate was insolvent, it was equally due to the complainant's negligence in not employing an accountant, or attorney. The plea of *inops consil* could not be urged on his behalf, in any sense in which it might not be made for every one who chose to act for himself instead of retaining counsel, nor was it unconscientious in the creditor to avail himself of the judgment, as a means of obtaining payment of a debt which was confessedly due from the estate. And in *Richmond R. R. Co. v. Shippen*, 2 Patton & Heath, 327, the court refused an injunction, although the complainant had been prevented from making his defence, by a mistake of law which was shared by his opponent.

It is well settled that money paid under the compulsion of legal process, with a knowledge of the facts, cannot be recovered back; 2 Smith's Leading Cases, 401, 7 Am. ed. The rule applies *a fortiori* where one against whom judgment has been obtained, recognizes the validity of the obligation by payment. Under these circumstances the door to relief is closed at law; see *De Medina v. Grove*, 10 Q. B. 152, 172; and a court of equity will not afford redress, unless it is clearly shown not only that the judgment was fraudulently obtained, but that there were such circumstances of duress, ignorance, undue influence, or weakness of mind, as excused the

failure of the complainant to apply in time, and before making a concession, which is ordinarily irrevocable; *Powell v. Watson*, 6 Iredell Eq.; *Williamson v. Johnson*, 1 Halsted, 537.

It is not a sufficient ground for an injunction, that the complainant was unavoidably prevented from taking advantage of a defence or set-off, if he has an adequate remedy which is not precluded by the judgment, and may obtain redress by a suit for compensation or damages; see *Gilliot v. Lynch*, 2 Leigh, 493; *Collins v. Jones*, 6 Leigh, 330; *Morgan v. Carson*, 7 Id. 238; *Hudson v. Kline*, 9 Grattan, 379. But this rule should not be applied, where the defence is in effect a failure of consideration growing out of a breach of warranty, or covenant for title; *ante*; see *Richardson v. Williams*, 3 Jones, 116; 2 Smith's Leading Cases, 65, 785, Am. ed.

Where a judgment has been perpetually enjoined by a court of chancery, as having been obtained by fraud, the decree is final, and an equitable defence to an action on the judgment, in the original, or any other forum; *Dobson v. Pearce*, 12 New York, 157. In this case the plaintiff in a judgment recovered in New York, brought an action upon it in the Superior Court of Connecticut, and the defendant thereupon filed a bill on the equity side of the same court, alleging that the judgment was procured by fraud, and praying relief. The court adjudged that the allegations of the bill were true, and enjoined the plaintiff

from prosecuting the action. A suit having been brought subsequently in New York on the judgment, by one to whom it had been assigned, the court held that a duly authenticated copy of the record of the bill and decree in Connecticut, was conclusive evidence that the judgment was fraudulent, and should not be enforced.

BILLS FOR A NEW TRIAL.—A bill for a new trial, is subject to the general rule that a court of equity will not intervene where there is an adequate legal remedy, or what comes to the same thing where a legal remedy existed, and might have been taken advantage of, but for the complainant's negligence. To sustain such an application it should consequently appear, not only that the complainant could not lay his case before the jury, but why he did not move to set aside the verdict. Unless this is shown with sufficient clearness to satisfy the chancellor, he ought not to interfere with the tribunal which having obtained cognizance of the cause, is proceeding in due course of law to verdict and judgment. It is a general if not invariable principle, that a cause which has been litigated and determined, shall not be reconsidered in another forum, on any ground that could have been taken in the original proceeding.

It follows that although the power of a court of chancery to inquire into an alleged mis trial still subsists, it has been circumscribed, and will not be exercised unless it appears not only that the verdict was erroneous, but that the

plaintiff could not have had the mistake rectified by the use of proper diligence; *Smith v. Lowry*, 1 Johnson Ch. 320; *Anderson v. Roberts*, 18 Johnson, 516; *Jamison v. May*, 8 English, 600; *Hill v. McNeill*, 8 Porter, 432; *French v. Garner*, 7 Id. 549; *Bishop v. Duncan*, 3 Dana, 15; *ante*.

"Applications to this court for a new trial," said Chancellor Kent, in the case first cited, "are very rare in modern times, since courts of law exercise the same jurisdiction, and to the same liberal extent. In the late case of *Bateman v. Willoe*, 1 Schoale & Lefroy, 201, Lord Redesdale observed that 'a bill for a new trial was watched by equity with extreme jealousy, and it must see that injustice has been done, not merely through the inattention of the parties;' and he held it to be "unconscientious and vexatious, to bring into a court of equity a discussion, which might have been had at law." Even in the old cases, and before new trials were much known and used at law, the court of chancery proceeded with great caution in awarding a new trial at law. In *Curtis v. Smallbridge*, 1 Ch. Cas. 43; 2 Freeman, 178, the bill was for relief against a recovery in trover; and though it appeared, that the recovery was unjust, and had so been admitted by the plaintiff in law, yet, as it did not appear, that the defendant at law was prevented by accident from having his witnesses at the trial, the Master of the Rolls would not grant a new trial for the neglect of the party, and so dismissed the

bill. In *Tovey v. Young*, Prec. in Ch. 193, the bill for a new trial at law was dismissed, though the plaintiff had discovered, since the trial, that the principal witness against him was interested; and the lord keeper observed, that "new matter may, in some cases, be ground for relief, but it must not be what was tried before; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, was convicted of perjury." And Lord Hardwicke, in *Richards v. Symes*, Atk. 319, refused a new trial on the suggestion, that the party was not apprised of a particular evidence, and, therefore, not prepared to meet it. The chancery cases have generally agreed in granting a new trial at law, on the discovery, since the trial, of a receipt or acquaintance in full of the demand. (The master of the rolls in *The Countess of Gainsborough v. Gifford*, 2 P.Wms. 424. *Hennell v. Kelland*, 1 Eq. Cas. Abr. 377, and 2 Vern. 437, cited *Ib.*; *Williams v. Lee*, 3 Atk. 223.) But since the decision in the King's Bench, in *Marriott v. Hampton*, 7 Term. Rep. 269, this doctrine seems to be overruled, on the broad ground, that there must be an end of litigation; and it may be questioned whether equity would now interfere, even in this case, after the refusal by a court of law. I find that so early as the case of *Sewell v. Freeston*, 1 Ch. Cas. 65, the court of chancery refused assistance, where the defendant at law had written a letter,

which the plaintiff could not prove at the trial, and which would have discharged him." Language equally strong was held by the same judge, in *Simpson v. Hart*, ante, 189, where he said: "Before courts of law were in the exercise of their present liberal jurisdiction over the subject of new trials, the parties were frequently forced into equity to be relieved from oppressive verdicts; 3 Black, Com. 388; *Vaux v. Shelly*, Rep. temp. Finch, 472; since, however, that jurisdiction has been well established, and freely exercised, on equitable, as well as legal grounds, the party failing in his application at law for a new trial, will not be relieved in equity, at least, upon the same merits already discussed, and fully within the discretion of a court of law. Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery." The same ground was taken in *Powers v. Buller*, 3 Green Ch. 465, where the court held the following language: "New trials were granted by courts of law at a very early date, as early, at least, as the year sixteen hundred and fifty-five, and even before that time, as appears from *Slade's Case*, Style, 138, and by a remark of Glynn, Chief Justice, in *Wood v. Gurist*, Style, 446; although no report is found further back, as the old books do not contain reports of the determinations made by the

court upon motions;" *Bright, Ex'or v. Eynon*, 1 Burr. 395.

But for a long time the rules for granting new trials were held with a strictness so intolerable that parties were driven into a court of equity, to have, in effect, a new trial at law upon a mere legal question, because the verdict, under all circumstances, ought not to conclude; *Ib.* 394, 395.

Subsequently these rules have been relaxed until the jurisdiction has become well established, and is frequently exercised at law, upon equitable as well as legal grounds; so that in almost every case where the court are satisfied that there are strong probable grounds to suppose, that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case, they will grant a new trial; 3 Black. Com. 392; 6 T. R. 638; 2 Arch. Pr. 222; *Hutchinson v. Coleman*, 5 Hals. 74.

Upon an examination of the numerous authorities, most of which have been referred to by the counsel in this cause, it will be seen, that as the courts of law have extended their jurisdiction over this subject, the courts of equity have withdrawn their jurisdiction from it. And this is in accordance with the general principle, that where a court of law can furnish an adequate remedy, a court of equity will not interfere.

Hence, it has become the settled doctrine of the English chancery, not to relieve against a judgment at law on the ground of its being

contrary to equity, unless the party aggrieved was ignorant of the fact in question, pending the suit, or it could not have been received as a defence; *Williams v. Lee*, 3 Atk. 223.

In *Bateman v. Willoe*, 1 Sch. & Lef. 201, Lord Redesdale said: "There are cases cognizable at law, and also at equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; so where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but without circumstances of that kind I do not know that equity ever does interfere to grant a new trial of a matter which has already been discussed there, and over which the courts of law can have full jurisdiction."

A chancellor will not take cognizance of a legal defence or cause of action, merely because there has been a mis trial in the court of law, and will, on the contrary, send the issue to another jury; *Howe v. Martell*, 28 Illinois, 445. In *Howe v. Martell*, a verdict and judgment in ejectment were obtained during the absence of the defendant, on the faith of an agreement that the case should not be brought to trial, and he was ousted under writ of *habere facias*. He filed a bill for relief, and the court reinstated him and ordered a new trial, but refused to enter on the question of title, which was remitted to the

legal forum. But the rule is not inflexible, and if it appears that the case involves a long and complicated account, it may be referred to a master, and a final decree rendered in accordance with his report; *Rust v. Nace*, 6 Grattan, 50. So, when it appears from the answer, that there is no legal or available cause of action, the injunction may be made perpetual, without the form of sending the case back to law; *Propst v. Meadows*, 13 Illinois, 160.

In general, a court of equity will not order a new trial, on the ground that a receipt or other material document was lost or missing, and has been discovered since the verdict. This is a rule of policy, intended to secure care and vigilance, and prevent parties from coming forward subsequently with evidence, which a close investigation would have disclosed at the time. Interest *reipublicæ ut sit finis litium*; and a failure of justice in a particular instance, is not so great an evil, as that there should be no certain end to litigation; *Anderson v. Roberts*, 18 Johnson, 533. Thus, where a plaintiff, not being able to prove a letter written by him to the defendant, filed a bill of discovery to clear up the matter, and the defendant pleaded the verdict and demurred for want of equity, the plea and demurrer were allowed (Ch. Cases; 65, 3 Viner, 542). Where money was paid in part for goods sold, and the receipts were lost, and the whole was recovered at law, a bill of discovery was then filed, and Lord Keeper North said, "you come too late

for a discovery after verdict;" *Anderson v. Roberts*, 18 Johnson, 515, 533.

The rule admits of an exception where it appears from the pleadings or proofs, that the complainant must have known that his demand was unconscientious, and yet went on to judgment. Such a case may arise where a creditor who has been paid in full, brings suit and obtains a judgment in consequence of the inability of the defendant to lay his hands on a receipt, which is subsequently found and produced. Under these circumstances the debtor can hardly be acquitted of *laches*, and yet a chancellor may issue an injunction, to prevent the creditor from taking an undue advantage which is not distinguishable in its effects from fraud; *Wilkey v. McConnell*, 63 Illinois, 238; *Riggins v. Brockman*, Ib. 316; *Gardner v. Bowling*, 12 Gill & Johnson, 381.

In *Vathier v. Zane*, 6 Grattan, 246, 267, the accidental loss of a material document, was held to be a sufficient excuse for the complainant's failure to make defence at law, and authorize him to come into equity for a perpetual injunction, on the ground that the note on which the judgment was rendered, had been obtained by fraud. This decision is questionable, because the plaintiff was, if not a holder for value, one who had taken the note in good faith for an antecedent debt.

It is equally well settled that relief will not be granted, because the trial took place in the absence of the complainant, and of his at-

torney, unless it is shown not only that he was prevented from appearing by accident, but that there were no *laches* on his part at the time or afterwards; *French v. Carver*, 7 Porter, 549; *Drew v. Hague*, 8 Alabama, 438; *Watts v. Gayle*, 20 Id. 87. It is not, therefore, enough to show that the case was undefended in consequence of the illness or death of the party or of his attorney; the presumption being that a continuance would have been granted, or a new trial awarded on a motion to that effect in the original forum; *Monk v. Cardiff*, 6 Porter, 24; *Powel v. Stewart*, 17 Alabama, 719; *Robb v. Halsey*, 11 Smedes & Marshall, 140; *Watson v. Palmer*, 5 Arkansas, 501; *Lester v. Hoskins*, 26 Id. 63; *Jamison v. May*, 13 Id. 600.

In *Essex County v. Berry*, 2 Vermont, 161, the bill was dismissed, although the cause had gone by default, in consequence of the miscarriage of a letter addressed to the defendant's attorney, asking him to appear and take charge of the suit. So, it is not a sufficient ground for relief, that the complainant was prevented from reaching the court with his witnesses, by the swelling of an intervening stream, unless it appears that he could not have arrived in time to move for a new trial; *English v. Savage*, 14 Alabama, 342.

It results, from what is here said, that an injunction will not be granted after verdict in aid of a legal defence, however just, unless it appears that the complainant was prevented from laying his case

properly before the jury, or obtaining a new trial, by fraud or accident, without any admixture of negligence; *Duncan v. Lyon*, 3 Johnson Ch. 351; *Glover v. Hodges*, Saxton, 351; *Mann v. Rucker*, 10 Grattan, 506; *Bently v. Dollard*, 1 English, 79; *Fowler v. Roe*, 3 Stockton, 367; *Thurmond v. Durham*, 3 Yerger, 991; *Burton v. Wiley*, 26 Vermont, 430; *Stinnett v. The Branch Bank of Mobile*, 9 Alabama, 120; *Deaver v. Erwin*, 7 Iredell Eq. 250. It is not, therefore, a sufficient ground for such relief, that the party was surprised by the false or erroneous statements of his witnesses, or of the witnesses called on the other side, because he might presumably have adduced other testimony, which would have revealed the truth; *Smith v. Lowry*, 1 Johnson Ch. 320; *Woodworth v. Van Buskirk*, Ib. 432; *Drew v. Hayne*, 8 Alabama, 438; and the principle is the same where one goes to trial in the absence of his witnesses, or in reliance on a witness who is intoxicated and cannot state the facts clearly or correctly; *The State Bank v. Stanton*, 2 Gilman, 352; *Governor v. Brown*, 13 Alabama, 540. The credibility of witnesses, and whether their mistakes or errors are a ground for a new trial, can be best determined by the tribunal which hears the testimony, and should not, therefore, be brought into another forum for adjudication; *Vaughan v. Johnson*, 1 Stockton Ch. 178.

A verdict obtained by tampering with the witnesses of the opposite party, stands on a different footing

and may be enjoined if the fraud is not discovered until it is too late to move for a new trial; *Burgess v. Lovengood*, 2 Jones Eq. 457.

"The cases," said Pearson, J., in *Burgess v. Lovengood*, "of *Fentress v. Robbins*, N. C. Term Rep. 177; *Peagram v. King*, 2 Hawk. Rep. 295; Id. 605; *Deaver v. Erwin*, 7 Iredell Eq. R. 250; *Dyche v. Patton*, 8 Id. 296, recognize the general doctrine that if a verdict be obtained in an action in a court of common law, by fraud, circumvention, or perjury, a court of equity may decide that the party shall consent to set aside such verdict, and have the matter tried *de novo* at law; in other words, a court of equity may require the party to give his adversary a new trial. But it is agreed that this power should be exercised with 'extreme caution,' and the application of the doctrine is greatly restricted, and is confined to cases which present 'peculiar circumstances' under the maxim 'there must be an end to litigation.'

"For instance, the doctrine does not apply if the court be misled, and from ignorance, or other cause, mistake the law; for equity cannot review the judgments of courts of law. So, it is agreed that the doctrine only applies where there is *new matter*, or something discovered after the trial at law, and which could not have been available either on the trial or as a ground for a new trial in that court. So it is agreed, that to set aside the verdict on the ground of its being obtained by perjury, there must be an allegation that the party who

used the testimony *knew it to be false*. So there must not only be newly discovered evidence, but such evidence must bear directly upon the merits of the case, and must be decisive of it, and not tend simply to impeach the testimony of a witness in a former trial, or to add cumulative evidence as to a matter before controverted. In this connection we will remark, that *Peagram v. King* was decided at a time when, according to *M'Farland v. Shaw*, 2 Car. L. Rep. 102, the dying declarations of the witness, Jinks, were evidence in chief, and not merely evidence to impeach.

"In *Terry v. Young*, Pre. in Ch. 193, the lord keeper declared, 'the relief must be grounded upon new matter, and not what was tried before. When it consists in swearing only, I will never grant a new trial, unless it (that is, the falsehood) appear by *deed* or *writing*, or that the witness, upon whose testimony the verdict was given, *has been convicted of perjury*.' Accordingly, in *Peagram v. King*, which is the only case in which our courts have applied the general doctrine (as it is termed), this qualification is assumed to be correct; and the court treat the fact of the death of the witness before a prosecution could be instituted, as bringing the case within the reason of the decision."

In *Steward v. Carr*, 50 Illinois, 228, a verdict and judgment were obtained on the testimony of a single witness, and the court decreed a new trial on his affidavit that his evidence was false, but

the case does not seem to be within the rule; *Falls v. Robinson*, 5 Maryland, 365.

It is well settled that a new trial will not be granted, because the complainant was prevented from laying his case before the jury by fraud, accident, or mistake, where the evidence which he was unable to adduce is merely cumulative, nor unless it is so clear, that there can be no doubt as to the result if the case goes to another jury. See *Robison v. Wheeler*, 51 New Hampshire, 385; *Houston v. Smith*, 6 Iredell Eq. 264. This is a general rule, and prevails, whether the application is made in a court of law or before a chancellor. The rule is clearly stated in *Holmes v. Stateler*, 57 Illinois, 29. "Where a party has been brought into a court of law, and has had an opportunity of interposing a defence, and fails to do so, the repose of society requires that by the judgment then rendered, the litigation should there end and the controversy terminate, unless by accident, mistake, or fraud, the party has been prevented from interposing his defence, or establishing his claim. And even though the judgment is manifestly wrong in law and in fact, or when allowing it to stand will compel the payment of a debt the defendant does not owe, unless it appears it was obtained by fraud or was the result of accident or mistake, relief in equity will not be granted.

"Where, however, a party, after making every effort in his power to discover evidence, fails, upon its being afterwards discovered, a

court of equity will treat this as an accident, and will, when satisfied that such evidence would have produced a different result, and that the judgment thus obtained is unjust and should not be paid, grant a new trial; but all these requirements must concur before it will interpose its power to afford relief. It must appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of the complainant after the trial; that he had exhausted all reasonable means and efforts to discover it before the trial, and that it would, without a reasonable doubt, when introduced on a new trial produce a different result; it is not enough that the newly discovered evidence only renders it probable that a different result would follow."

For like reasons, where a valid defence fails through the disqualification or incompetency of the only witnesses, who are acquainted with the transaction, a court of equity may enjoin the judgment, or grant a new trial, especially if the facts were not known to the opposite party, and could not have been brought to light by a bill for discovery; *Norton v. Woods*, 5 Paige, 249; *Molder v. McCann*, 7 Id. 456; *Jordan v. Laftin*, 13 Alabama, 547; and in the case last cited, a surety who had been sued jointly with the principal, was held entitled to come into chancery after verdict, on the ground that his defence lay exclusively within the knowledge of the principal, and could not be substantiated at the trial, because the latter was

a party, and could not be allowed to give evidence in his own behalf. But the exclusion of the witnesses who are put on the stand, will not justify the intervention of a chancellor, if there are other persons who are cognizant of the facts, and might have been called to testify; *Robinson v. Wheeler*, 51 New Hampshire, 385.

IGNORANCE.—A court of equity will not enjoin a judgment, because the complainant was ignorant of the facts, which are set forth in the bill as constituting a defence, unless it is shown that he could not have ascertained the truth in time to lay it before the jury; *Taliaferro v. The Bank*, 23 Alabama, 755; *Powers v. Butler*, 3 Green Ch. 465; *Mean v. Rucker*, 10 Grattan, 506; *Slack v. Wood*, 9 Id. 40; *Floyd v. Jayne*, 6 Johnson's Ch. 479; *Bierne v. Mann*, 5 Leigh, 364; *Hare v. Lowe*, 19 Alabama, 224; *McGrew v. Tombeckbee Bank*, 5 Porter, 557. It was accordingly held in the case last cited, that a surety could not rely on his ignorance that the debt had been paid by the principal, in support of a bill for a new trial, because he ought to have inquired of the principal, or called him as a witness; and in *Taylor v. Sutton*, 15 Georgia, 103, the court held that to give an equitable right of relief against a judgment, these things must concur: ignorance of the defence, diligence on the part of the defendant, and inability to obtain redress by an application in the original forum. Or as the rule has been stated in other instances, it is not enough that the complain-

ant was ignorant of the facts when the case was tried; it must appear that he could not have acquired the requisite information with proper effort; *Miller v. Gaskins*, *Smedes & Marshall* Eq. 524; *Falls v. Robinson*, 5 Maryland, 345; see *Lee v. Ins. Bank*, 2 Ala. 21, *Stinnet v. The Branch Bank* 9 Id. 121.

It has been held conversely, that one who is prevented from making a just defence by ignorance, may obtain relief in equity, if he can satisfy the court that he could not have ascertained the truth by inquiry, and that the opposite party knew that the claim was invalid or had been discharged; *Gardiner v. Bowling*, 12 Gill & Johnson, 381; *Fitch v. Polk*, 7 Blackford, 564; *Reed v. Harvey*, 23 Arkansas, 44; *Davis v. Tileston*, 6 Howard, 114; *Winthrop v. Lane*, 3 Desaussure, 310.

A judgment was accordingly enjoined in the case last cited, on proof of a defence growing out of transactions between the plaintiff in the judgment and a third person, of which the complainant was ignorant when the case was tried, and until it was too late to set aside the verdict. The chancellor said: "It is true, that if a party does not use reasonable diligence to obtain testimony material to his cause, it is a neglect for which he must suffer. And he shall not be allowed to renew the litigation, on pretence of the discovery of new evidence, which he ought to have obtained before the first trial. But this rule itself has reasonable limits. The testimony must have

been within the knowledge of the party, or he must have had some clue to guide him in the search, before he can be said to have neglected the proper steps to obtain it.

In the case of the *Countess of Gainborough v. Gifford*, reported in 2 P. Wms. 424, it is laid down that a court of equity may give relief in a matter where the defendant at law might have defended himself; as if plaintiff at law recover a debt at law, and the defendant afterwards discovers a receipt under the plaintiff's own hand for the money in question. There the plaintiff recovered at law against conscience, and though the receipt was in the defendant's custody, yet he not being then apprized of it, seems entitled to the benefit of equity. So if the plaintiff's own book appeared to be crossed, and the money paid before the action. So if other circumstances showing injustice done by the verdict at law by surprise or accident, or I may add ignorance, as in the very case reported."

No case can be stronger for the application of this principle, than where advantage is taken of the ignorance of an executor, to obtain judgment for a debt which has been satisfied by the testator; *Gardiner v. Bowling*; because the defendant is then unavoidably in the dark, and may have no clue to direct his inquiries.

In *Gardiner v. Bowling*, relief was afforded against a judgment which the complainant had confessed, as her husband's administratrix, on the production of a re-

ceipt, although the intestate had informed her that the debt was paid, and the receipt was among his papers, because it appeared that these were in the custody of a co-administrator, who answered her inquiries by saying that he had made a diligent search, and that no such document could be found.

The court held, in effect, that the seeming negligence of the complainant, was excused by the fact that the papers were in the keeping of the co-administrator, on whom she relied as a man of business, and that, as she had been misled by the creditor's declaration under oath in the Orphans' Court that the debt was justly due, there was a sufficient ground for the interposition of a chancellor.

AFTER-DISCOVERED EVIDENCE.—

A prayer for relief on the ground of after-discovered evidence, is questionable, and should not be granted, unless it is shown not only that the right is with the complainant, but that he could not have established it in due season. For, as the allegation is not that he was ignorant of the defence, but that he did not know of the existence of the proofs which he has since obtained, there is a presumption that the same diligence would have been successful at an earlier period; see *Nelson v. Leigh*, 4 Iredell Eq. 100; *Henderson v. Mitchell*, 1 Bailey Eq. 113; *Le Guen v. Gouverneur*, 1 Johnson's Cases, 495. The court said, in the case last cited: "The charge of fraud was in their knowledge, and if it did exist, the presumption is that they had the proof in their power;

for the presumption is, that a party is not ignorant of, or incapable of evincing, the truth of his cause. If the fact be so it is incumbent on him to show it, in order to excuse the apparent neglect, and support his claim to an exemption in his favor. In the present case there is no circumstance alleged, from which it can be reasonably inferred that the respondents could not with proper diligence have possessed themselves of evidence of the fact, if such was the fact, in the trial at law, and no such pretence is alleged in their bill."

The rule is not inflexible, and if the party who files the bill can succeed in showing that he has not been negligent, and that the claim of the opposite party is fraudulent, or so entirely destitute of foundation that it could not have been made in good faith, there is a strong appeal to the conscience of a chancellor, and relief may be granted in the exercise of a sound discretion; see *Cantey v. Blair*, 1 Richardson Eq. 41; *Bellups v. Sears*, 5 Grattan, 31; *Williamson v. Johnson*, 1 Halsted, 537; *Davis v. Tillston*, 6 Howard, 114.

The case is still stronger for relief, where the judgment is but the consummation of a preconceived and fraudulent design, especially where the means are such as must be harmful to the community, as well as subversive of the private right; *The Ocean Insurance Company v. Field*, 2 Story, 65. An injunction was accordingly awarded in this case, against a verdict and judgment on a policy of insurance, on proof that the vessel had been

purposely cast away by the insured, and that although this was known or suspected by the insurers, they were unable to ascertain, or procure the means of substantiating it, in time to lay the proofs before the jury. Story, J., said, that it was established in accordance with the judgment in *Le Guen v. Gouverneur*, 1 Johnson's Cases, 495, that an injunction would not be granted for the sake of enabling the complainant to make a defence which was known to him at the trial, and might therefore have been substantiated if just, but that the rule did not apply where his knowledge was merely conjectural, or at best a moral certainty for which there was no legal proof. If the insurers had good reason for believing that the loss of the vessel was the result of design, they were not aware of the boring of the auger holes, which had been brought to light since the trial. Merely cumulative evidence was not a sufficient ground for the intervention of a chancellor, because the public interest required that there should be an end to litigation, that "suits may not be immortal while men are mortal," but that "where the defence has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminate bearing before the jury, and afterwards newly discovered evidence has come out full and direct, and positive to the very gist of the controversy, a court of equity may interfere to

grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence."

The case is still stronger when the fraud which invalidated the cause of action, was concealed from the complainant, and he was thereby prevented from relying on it as a defence in the court of law; *Fitch v. Polk*, 7 Blackford, 564. A judgment for the purchase money of real estate, was accordingly enjoined in *Fitch v. Polk*, on proof that the vendee had been misled by the vendor, and did not discover the deceit in time to lay it before the jury. Sullivan, J., said: "We are satisfied that this is a proper case for an injunction. It appears that the complainant was deceived by the false representation of the vendor as to his title, and that he remained in ignorance of the defect, until after the rendition of the judgment. This excuse for not defending at law, is sufficient to authorize the inference of a court of equity."

In *Rust v. Ware*, 6 Grattan, 64, it appeared from after-discovered evidence, that the jury had mistaken the balance in a suit involving mutual accounts, and the court granted an injunction, and referred the case to a commissioner; but this case goes beyond the line as usually drawn; see *Falls v. Robinson*, 5 Maryland, 265.

In *Williams v. Lee*, 3 Atk. 223, Lord Hardwicke said: "As to relief against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be

otherwise than what the jury find by their verdict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for a debt, &c., and the defendant after the verdict, discovers a receipt for the very demand, in the action here the court would relieve. But even in these cases they will not always relieve against a verdict, where the defendant submits to try it at law first, when he might by a bill of discovery have come at this fact by the plaintiff's answer upon oath, before any trial at law was had." It results from what is here said, that a bill for a new trial should not be sustained, unless there was *mala fides* on the plaintiff's part in enforcing a demand which he must have known to be unjust, and such ignorance on the part of the complainant, as excuses his apparent negligence in not applying for relief before verdict.

AWARDS.—It is well settled that a court of equity may enjoin or vacate an award, for misbehavior or corruption on the part of the arbitrators, or where the party in whose favor it was rendered is chargeable with fraud or malpractice; *Cleland v. Hedley*, 5 Rhode Island, 163; *Ludington v. Taft*, 10 Barb. 447; *Rand v. Redington*, 13 New Hamp. 72; *Sisk v. Gary*, 27 Maryland, 401; *Craft v. Thompson*, 51 New Hamp. 543; *Allen v. Ranney*, 1 Conn. 571; *Brown v. Green*, 7 Conn. 542; *Duren v. Getschell*, 55 Maine, 251; *Spurck v. Crook*, 19 Illinois, 415; *Wingate v. Haywood*, 40 New

Hamp. 437; *Elkins v. Page*, 45 Id. 310; *The Grand Falls Man. Co. v. Worster*, 45 Id. 110; *Adam's Eq. **192; *Lee v. Petillo*, 4 Leigh, 436; *The Boston Water Power Co. v. Gray*, 6 Metcalf, 131, 169.

In the case last cited *Shaw, C. J.*, said: "The class of cases in which the court will set aside an award, upon matter not arising out of the submission or award, is where there is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judge chosen by the parties: the former is the result of prejudice, uninfluenced by law and fact; the latter may be a true judgment, but upon a case falsely imposed on them by the fraud of a party." An award will accordingly be set aside, if it appears that one of the parties had a private conference with one of the arbitrators, or that he laid evidence before them, in the absence of the other party and without his knowledge or assent, although the information was given at their instance, or request, and without any sinister or corrupt design; *Cleland v. Hedley*; *Harvey v. Stilton*, 7 Bevan, 445; *Sisk v. Garey*, 27 Maryland, 40. But a judgment on an award, will not be enjoined except for some cause which could not have been taken advantage of as a defence at law, or which the complainant could

not discover until after the judgment was obtained ; see *Emerson v. Udall*, 13 Vermont, 477 ; *Shedeker v. Pearson*, 2 Barb. Ch. 107 ; *Sisk v. Garey*.

CONFLICT OF JURISDICTION.—

The rule that courts should abstain from interfering with each other's proceedings, on points where they have a common or co-ordinate jurisdiction, is sanctioned by considerations of policy and reason, and should not be disregarded, unless it is apparent that an adherence to it would result in a failure or denial of justice ; see *The Bank of Bellows' Falls v. The B. & R. R. R.*, 2 Williams, 471 ; *Grant v. Quick*, 5 Sandford, 112 ; *Loomis v. Loomis*, 3 Casey, 233. It is accordingly a general, though not invariable rule, that a court of equitable jurisdiction will not enjoin a suit in a court of a like jurisdiction ; *ante*, 1324 ; *Ricketts v. Johnson*, 8 California, 31 ; *Gorham v. Toomey*, 9 Id. 77 ; *Deaderick v. Smith*, 6 Humphreys, 481. This is not merely because the tribunal in possession of the cause, can afford all the relief that may be requisite, but because both tribunals are equally armed, and each of them may treat the interposition of the other as intrusion. Hence a cross-fire of injunctions, which may end in the commitment of the parties for contempt, and perhaps of the officers and witnesses ; see *Peck v. Jenness* 7 Howard, 612, 624 ; *Ableman v. Booth*, 21 Id. 515. Such a conflict of jurisdiction seemed imminent in the reign of James II. and could hardly have been avoided but for the wisdom

with which the field of jurisprudence was apportioned between chancery and the courts of common law ; *ante*, 1297. It has occurred in our own times in New York, under circumstances which are a lasting blot on the administration of justice.

It is therefore providently held in Pennsylvania, that as the Orphans' Courts of that State are courts of equity, nothing that is within their jurisdiction can be withdrawn from it, by an injunction issued by a Court of Common Pleas, or by any judge sitting as a chancellor ; *Loomis v. Loomis*. 3 Casey, 233 ; *Mussleman's Estate*, 15 P. F. Smith, 480.

The principle is nearly if not quite the same, where a court has both legal and equitable jurisdiction, and can exercise the powers of a chancellor on one side, and those of a court of common law on the other ; *Ricketts v. Johnson*, 8 California, 34 ; *Anthony v. Dunlap*, Ib. 26 ; *Uhlfelder v. Levy*, 9 Id. 607. The Circuit and District Courts of the United States are in this category, and so are the Courts of Common Pleas in Pennsylvania, and the Supreme Courts in New York. The better opinion therefore seems to be that when an action has been brought in such a tribunal, and the defendant finds it needful to seek relief in equity, he should apply to the judges who have already taken cognizance of the cause in their legal capacity ; *Grant v. Quick*, 5 Sandford, 612.

The courts of the United States are prohibited from enjoining the proceedings of the State tribunals,

and if one who is sued in a national court wants equitable relief, the bill should be filed on the other side of the same tribunal, and not in a State Court, nor in a court of the United States for another district; *Diggs v. Wolcott*, 4 Cranch, 119; *Peck v. Jenness*, 7 Howard, 612; *Rogers v. The City of Cranworth*, 5 McLean, 337. So a bill to enjoin a suit in a State court, which is endowed with equitable powers, ought to be laid before the judges who issued the summons or attachment; *Grant v. Quick*, 5 Sandford, 112.

In the case last cited, the complainant obtained an injunction order in the Superior Court of the City of New York, restraining the defendant from enforcing or attempting to enforce, certain securities and agreements in writing. The defendant then presented an affidavit, setting forth that he had, prior to the filing of the bill, sued the complainant in the Court of Common Pleas on the same agreement; and the injunction was dissolved, on the ground that the equitable jurisdiction of the Court of Common Pleas, was not less full than that of the Superior Court, and that no tribunal in the State of New York, could rightfully enjoin a proceeding in another tribunal of the same State having equal power to grant the relief. Duer, J., said: "The only ground upon which the Court of Chancery formerly acted in granting an injunction, in cases like the present, was the inability of the court of law, in which a suit was pending, to grant the necessary relief; but

as, since the code, the jurisdiction of all our courts is equitable as well as legal, or more properly as the distinction between legal and equitable except in reference to the nature of the relief demanded, is now abolished, the reasons, by which the exercise of a power always invidious and frequently abused could alone be justified, have ceased to exist, and have left a case, to which the maxim emphatically applies that '*cessante ratione cessat etiam lex*.'"

It is said that the suit in the Common Pleas relates only to one of the agreements from which the plaintiff seeks to be relieved, and that the injunction should therefore be only partially dissolved, but it is evident from the pleadings that all the securities and agreements set forth in the complaint, are so connected that, in all probability they must stand or fall together, and it is upon this connection that the complainant especially insists.

It may be true that all the matters set forth in this complaint, cannot with propriety, be set forth in an answer to the plaintiff's complaint in the Common Pleas, or if contained therein cannot be made the ground of the affirmative relief to which the plaintiff deems himself entitled; but there is an obvious and conclusive reply. If affirmative relief cannot be granted to the plaintiff upon his answer (which however I am far from thinking), he may file a complaint in the Common Pleas in the nature of a cross-bill, and that court according to the course in chancery,

will then stay the proceedings in the first suit, until both shall be at issue, so that both may be tried and decided at the same time. Although nominally there will be two suits, there will be in reality but one controversy. It is in the Common Pleas that the controversy was commenced, and it is there that it ought to be terminated."

It was declared in like manner, in *Carpenter v. Keating*, 10 Abb. Pract. R. 228, that "as a defendant can now, as a general rule, interpose any defence he may have, whether it be legal or equitable, and thus obtain, by answer, motion, or otherwise, all the relief in the original suit to which he would be entitled if he instituted a distinct proceeding, it is no longer requisite or allowable to commence a suit, nor will an injunction be granted, merely for the purpose of restraining the proceedings in another suit, both being in the same court; *Harman v. Remsen*, 23 How. Pr. 174; *Minor v. Webb*, 10 Abb. Pr. 284; *Bowers v. Tallmadge*, 16 How. Pr. 325; *Arndt v. Williams*, Id. 244; *Hunt v. Farmers' Loan & Trust Co.*, 8 Id. 416."

It was held for like reasons, in *Plato v. Deuster*, 22 Wisconsin, 482, that as the Circuit Courts of Wisconsin, possess equal powers, and are alike authorized to afford equitable relief, so a suit brought in one such tribunal, cannot rightfully be enjoined by a writ issuing from another. Dixon, C. J., said: "The practice of the Court of Chancery in former times is well understood. An original bill could

not be sustained either by parties or privies to a former suit, for an injunction to restrain proceedings under a decree in such suit; *Dyckman v. Kernocher*, 2 Paige, 26. And the rule was the same where the new bill was filed either in the same or another circuit, by a stranger to the original suit; *Smith v. American Life Ins. and Trust Co.*, 1 Clarke Ch. 307; *Lane v. Clark*, Id. 309; *Newton v. Douglass*, cited in 1 Hoff. Ch. Practice, 89, n. (2). The proper course was to apply to the court by petition for an order in the original suit. Such is the practice in this State; *Farmers' and Millers' Bank v. Luther*, 14 Wis. 96; *The State ex rel. Mills v. Kispert*, 21 Wis. 387; see, also, *Wilson v. Jarvis*, 19 Wis. 597. The power of the court in which the judgment or decree was rendered, to grant the requisite relief in cases like this, is undoubted. The chancellor might always, either in the court or at chambers, suspend the execution of a final order or decree, on the ground of subsequent matter that would render its execution oppressive or iniquitous; *Spann & Jennings v. Spann*, 2 Hill's Ch. R. (S. C.) 156. In *McCord's Heirs v. McClintock*, 5 Littell, 304, a person not a party or privy to a chancery suit, had been turned out of the possession of land under a writ of possession, issued to carry the decree into effect. He applied to the court in the same suit, and obtained a writ of restitution, by which the possession of the land was restored to him.

The former practice in chancery,

not to interfere, upon a new bill filed to restrain proceedings in equity already pending, is in perfect harmony with the provisions of the code, and fully sustained by the modern decisions; *Dederick v. Hoysradt*, 4 How. Pr. R. 350; *Hunt v. Farmers' Loan & Trust Co.*, 8 Id. 416; *Bennett v. Le Roy*, 14 Id. 178; *Arndt v. Williams*, 16 Id. 244; *Grant v. Quick*, 5 Sandf. 612; *Anthony v. Dunlap*, 8 Cal. 26; *Rickett v. Johnson*, Ib. 34; *Revalk v. Kraemer*, Ib. 66; *Gorham v. Toomey*, 9 Id. 77; *Uhlfelder v. Levy*, Ib. 607." The authorities in California are to the same effect, that one who seeks to enjoin a suit or judgment, must apply to the court which is in possession of the cause; *Uhlfelder v. Levy*, 9 California, 607; *Anthony v. Dunlap*, 8 Id. 26; *Rickett v. Johnson*, Ib. 64."

There are, nevertheless, instances, where it is requisite to enjoin a proceeding in a court of equity, in order to prevent a failure of justice. Such a case may arise where two persons proceed severally in different counties, for the same cause of action. Under these circumstances, the defendant cannot go safely to trial without the risk of having verdicts against him in both suits, and may be compelled to file a bill in one or the other tribunal, for an injunction and interpleader. And the need for such relief may be nearly, if not quite as great, where there is a multiplicity of suits for different causes of action, but depending on the same fact or principle; see *The Erie R. R. Co. v. Ramsey*, 45

New York, 637; *Uhlfelder v. Levy*, 9 California, 607, 515; *English v. Suback*, 4 Id. 31.

In the *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637, Ramsey instituted an equitable proceeding in the Supreme Court, in the sixth district, against the Erie Railway Company, for an injunction and the appointment of a receiver, and the defendants went before another branch of the same court in the first district, and obtained an order enjoining him from the further prosecution of the suit in the sixth district. Ramsey having disobeyed the order, was adjudged by Barnard, J., of the first district, to be guilty of a contempt of court, and to be answerable in the sum of \$5,325, with costs, and to be committed to the common jail until the fine should be paid. This sentence was sustained by the Court of Errors and Appeals, notwithstanding the objection, that if the Erie Railway Company stood in need of equitable relief, it should have applied to the judges who were already in possession of the cause, and not to another though co-ordinate branch of the same tribunal.

Folger, J., said: "In this State, since the adoption of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court, can be but seldom invoked. For there are but few courts, and those inferior, which have only a common law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common law

powers, and they are moreover mostly of co-ordinate jurisdiction. So that it may have been well held, that one court of equitable jurisdiction, may not, as a usual procedure, restrain the proceedings in another court of equal powers. For one, as much as the other, has in most cases the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy equitable or legal, to which he is entitled, and in any proceeding consistent with its established rules and practice, though it would be too much to say that in no case can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one action cognate questions and interests sought to be litigated in many actions, is well established. But is it to be held that the exercise of this jurisdiction is thwarted when the numerous suits are divided among several courts of co-ordinate law and equity powers? The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit to enjoin the parties to the suits in the co-ordinate courts from proceeding therein. An instance of the exercise of one branch of this power, sanctioned by this court, is found in the case of *N. Y. and N. Hav. R. R. Co. v. Schuyler* (17 N. Y. 592). Nor is it without other precedent, that a court of equity, by action instituted before it, may question the

proceedings in another court of equity. Thus, one court of equity has overhauled the decree of another court of equity for fraud, contrivance or covin in the obtaining of it. (*Baudon v. Beecher*, 3 Clark & Fin. 479; *Manatqn v. Molesworth*, 1 Eden, 25.)

If it may entertain an action for that purpose, in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought in question, why may it not, pending the suit before it, restrain by temporary injunction the execution and enforcements of that decree? If it may thus restrain the proceedings in another court of equity to enforce the decree of that court, may it not restrain the proceedings in that court to obtain the decree? We speak of it not as a power usually to be exercised, but as one not beyond the jurisdiction of the court. The affirmative answer to this query is found in the fact that it has done so; *Jackson v. Leaf*, 1 Jac. & W. 229-232; *Clarke v. Ormande*, Jacobs, 546; *Earl of Newberry v. Wren*, 1 Vern. 220, and notes; 1st Am. fr. 3d Lond. ed.; *Vendell v. Harvey*, Nelson, 19-21; *Jones v. Whitney*, Carey, 161; *Booth v. Leycester*, 3 Myl. & Cr. 459; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Crawford v. Fisher*, 10 Sim. 479; *Schuyler v. Pellissier*, 3 Edw. Ch. 191, 192; *Beauchamp v. Huntley*, Jacob, 546.)

But this ground of equitable jurisdiction, viz., that to restrain proceedings in a court at law, is

not removed when the same court is clothed with powers both at law and in equity. Granted, that since the conjunction in this State of law and equity powers in nearly all courts of original jurisdiction, one court may not, as a usual thing, interfere with the proceedings in another court co-ordinate in power. Yet the jurisdiction to restrain proceedings at law remains.

A court, upon its equity side, may enjoin its own suitors proceeding upon its law side. This jurisdiction is preserved and may be exercised. The only question can be, as to the method in which it shall be done. Is the method this alone, that in the action on the law side of the court, the facts be set up by answer, and affirmative equitable relief being prayed for upon them, the action be transformed into an equitable one, and thus there be, though not formally, yet practically, an injunction upon the party plaintiff from enforcing his strict legal right, until there shall be a determination of the claim of the party defendants for equitable relief? In a case in which all parties and all interests necessary to a full and complete determination of the controversy, were or could be brought before the court in the original action in a proper attitude to each other, there could be had such a determination (Code § 274, sub. 2; *Dobson v. Pearce*, 12 N. Y. 156; *Despard v. Walbridge*, 15 N. Y. 374; *Chase v. Peck*, 21 N. Y. 581).

But this is not always practica-

ble. If it be said, as is said, that a court cannot restrain itself, the answer is that a court of equity never sought or claimed to restrain a court at law, but did enjoin the suitors in it. (Willard Eq. Juris. 347; Story Eq. Juris. §§ 875-899.)

If it be said that the court can act upon its suitors by way of restraint in the very action which they are then prosecuting before it, one answer is that all the persons to be restrained and affected by injunction, temporary and perpetual, may not be parties to that action, and so not in the power of the court. (Story Eq. Juris. § 891 b). And another answer is, that a party defendant may sometimes, for immediate or full remedy, need relief against as well a co-defendant in the original action as the plaintiff therein (1 Beav. 171), and that he cannot always have relief against the co-defendant, based upon the allegations of new matter in his own answer, inasmuch as the co-defendant may not in that action have opportunity of taking and contesting an issue upon those allegations, and the transaction out of which the equity arises may be of too complicated a nature to be investigated in a motion in the same court for summary relief. (Willard Eq. Juris. 351; *Decker v. Judson* (per Denio Ch. J.), 16 N. Y. 439-50; *Jones v. Grant*, 10 Paige, 348). So that it may well be, that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to

parties litigant in the action pending before it, without entertaining a cross action, in which other facts shall be presented, and other persons made parties, and in which last action, it may be needful that an injunction order issue, restraining the prosecution of the first. (See *Thursby v. Wills*, 1 Code Rep. 83). And according we find the Circuit Courts of the United States, on the equity side, entertaining a bill and awarding an injunction to restrain proceedings on the law side thereof. And it is held that this may be done before the commencement of the suit at law, pending such suit, or after its decision by the highest law tribunal. (*Parker v. Judges, &c.*, 12 Wheat. 561; *Dunlap v. Sisson*, 4 Mason, 349; *Humphrey v. Leggett*, 9 How. U. S. 297; *Nixdorff v. Smith*, 16 Peters, 132.)

And this difficulty in the way of giving full relief, may chance not only when the first action is one of law, but when it is an action in equity. It is true that it has been said in general terms by courts of chancery, that the court does not enjoin its own proceedings, and that an application to a court to restrain one of its suitors can scarcely be considered as seriously made. (*Medlack v. Cogburn*, 1 Rich. Chy. 477; *McReynolds v. Harshaw*, 2 Iredell, Chy. 196.)

The cases just cited do not assert that there is no jurisdiction to entertain a cross-action, and in it to grant an injunction upon the original action. They hold an injunction in such case irregular.

They do not hold it void. In *Hall v. Fisher* (1 Barb. Chy. 55), an injunction restraining a party from instituting a proceeding in equity to compel an account and payment of profits, was pronounced clearly wrong, because the complainant in the injunction action had an equitable defence to such a proceeding. But it was not held void. *Smith v. Am. Life Ins. and Trust Co.* (Clarke Chy. Rep. 307), and *Lane v. Clark* (Id. 309), do not hold that there is no jurisdiction to grant an injunction. They are to the effect that it is not, as a general rule, a proper mode of obtaining a stay of proceedings. It is true, however, that a court of equity has restrained and does restrain its own suitors. *Drewry on Injunctions*, 105, states it as well settled, that a court of equity will exercise jurisdiction to restrain other proceedings in the same court.

The New York code confers equity powers on all the superior courts of that State, and does away with the distinction between legal and equitable jurisdiction, except as it regards the nature of the relief; *Grant v. Quick*, 5 Sandfords, 612; *Schell v. The Erie Railway Co.*, 51 Barb. 368, and the code also substitutes an order of injunction, for the writ of injunction formerly in use; *The Erie Railway Co. v. Ramsey*, 57 Barb. 449, 45 New York, 637, and permits an equitable defence to be made by plea; *Dobson v. Pearce*, 12 New York, 156. It has, nevertheless, been held that these changes do not abrogate the equit-

able power previously existing in the courts, to restrain proceedings which although regular in form, are contrary to equity and good conscience, and that a judge of any of the superior courts may in the exercise of his equitable jurisdiction, or when sitting as a chancellor, enjoin a legal or equitable proceeding before another judge of the same court, or of any other forum; *The Erie Railway Co. v. Ramsey*. But it was at the same time declared, that such an exercise of jurisdiction is extreme as between equal and co-ordinate tribunals, and should not be resorted to unless the necessity is apparent.

The code of Iowa is substantially the same in this regard as that of New York, and by sanctioning equitable pleas, avoids the necessity for filing a bill in the great majority of cases where it was formerly requisite; see *Rogers v. Gwinn*, 121 Iowa, 58, and like methods of procedure have been introduced in some of the other States.

In Pennsylvania, equity has been incorporated with the common law from the earliest period, and any matter that would be a ground for enjoining the execution of a judgment, may be given in evidence in an action of debt on the judgment, or taken advantage of by a motion to open the judgment, and let the defendant into a defence; see *Jackson v. Summerville*, 1 Harr. 359; *Savage v. Everman*, 20 P. F. Sm. 315.

COURTS OF OTHER STATES.—Proceedings in one State, may, where the exigency of the case

requires it, be enjoined by the tribunals of a sister State; *Dehon v. Foster*, 4 Allen, 545; *Snook v. Snitzer*, 25 Ohio, N. S. 516; *Vail v. Krupp*, 49 Barb. 303. The exercise of such a power is not unfrequently essential to the ends of justice, because a court of equity acts *in personam*, and must have jurisdiction over the parties in order to administer the cause; see *Death v. The Bank of Pittsburg*, 1 Iowa, 382. If a foreign attachment were to be issued in Pennsylvania, on a judgment which had been unconscientiously obtained in New York, by a plaintiff residing in Iowa, the courts of Pennsylvania might afford a partial measure of relief by temporarily enjoining the attorney and the sheriff, and making the order perpetual, if the plaintiff in the attachment did not appear and answer the bill; see *Logan v. Patrick*, 5 Cranch, 288; *Sawyer v. Gill*, 3 Woodbury & Minot, 97; *Hood v. Sebring*, 4 Washington, 472; *Marco v. Low*, 55 Maine, 549; *Death v. The Bank of Pittsburg*; although, in the case last cited, such relief was denied. But such a decree would not be final or conclusive, because the plaintiff in the attachment might still issue an execution in New York, or bring a suit on the judgment in some other State, and complete redress could not be obtained without filing a bill in Iowa against the creditor, and obtaining a decree against him personally that would preclude further controversy; see *Engel v. Scheuerman*, 40 Georgia, 206 *Cage v. Cassidy*, 23 Howard, 109

In like manner, where suits are brought in different States for the same fund or chattel, by persons claiming adversely to each other, as well as to the defendant, he may file a bill of interpleader in the courts of any State where the plaintiffs can be served with process, for the purpose of bringing the controversy within the compass of one proceeding, and avoiding the danger to which he would otherwise be exposed of having to make a double satisfaction.

It has been held, for like reasons, that one who, by making his abode in a State, has become subject to its laws, may be enjoined from evading them through the instrumentality of a suit in a sister State or foreign country; *Vail v. Krupp*, 49 Barb. 303; *Snook v. Snetzer*, 25 Ohio, N. S. 516.

In the case last cited *A. and B.* were citizens of Ohio, and *A.* laid an attachment in another State on the earnings of *B.* These were exempt from execution by the statutes of Ohio, and the courts of that State enjoined *A.*

It was held in like manner, in *Dehon v. Foster*, 4 Allen, 545, that the courts of Massachusetts might, in the exercise of their equitable jurisdiction, enjoin a citizen of Massachusetts from laying an attachment in another State, on the personal property of a debtor against whom proceedings in insolvency had been commenced under the laws of Massachusetts, and thus preventing the assets so levied on, from coming to the hands of the assignee; and that

it was no objection that the attachment was laid before the institution of the proceedings in insolvency, if it was done with knowledge that they were about to take place, and with a view to obtain a preference. Bigelow, C. J., said, "The authority of this court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State, or of other States, or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceed-

ings in a court in this State, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court; 2 Story on Eq. §§ 899, 900; *Mackintosh v. Ogilvie*, 3 Swanst. 365, n.; P. 4 T. R. 193, n.; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 445; *Maclaren v. Stainton*, 16 Beav. 286; *Massie v. Watts*, 6 Cranch, 158; *Briggs v. French*, 1 Sumner, 504, *Dobson v. Pearce*, 4 Duer, 142; S. C., 2 Kernan, 156. All that is necessary to sustain the jurisdiction in such cases is, that the plaintiff should show a clear equity, and that the defendant should be subject to the authority, and within the reach of the process of the court."

JUDGMENTS OF OTHER STATES.—

It is also settled that a suit on the judgment of another State, may be enjoined by the courts of the State where the judgment was obtained, or by the courts of the State where it is sought to be enforced; *M'Jilton v. Lowe*, 13 Illinois, 486; *Engel v. Sheuerman*, 40 Georgia, 206; *Pearce v. Olney*, 20 Conn. 544; *Dobson v. Pearce*, 12 New York, 156. This is entirely consistent with the constitutional provision, that the judgments of each State shall have full faith and credit in every other, which was not designed to preclude any defence or allegation, that could have been made in the original forum consistently with the doctrines of equity and the common law; *M'Jilton v. Lowe*, 13 Illinois, 486; *Pearce v. Olney*, 20 Conn. 544; *Dobson v. Pearce*, 12 New York,

156; *Rogers v. Gwynn*, 21 Iowa, 58.

In *Pearce v. Olney*, 20 Conn. 544, the complainant, having been sued in New York by Olney, for a breach of contract, told the plaintiff's attorney that he was merely an agent, and the attorney thereupon assured him that no further steps should be taken in the cause without his knowledge. Judgment was nevertheless entered by default, and a suit brought upon it against the complainant in Connecticut, who thereupon applied for an injunction on the ground of the false assurance, by which he had been prevented from making defence. The court held that the bill disclosed a sufficient equity, and that the judgment should be perpetually enjoined. Such a decree did not impeach the jurisdiction of the New York court, or conflict with the provisions of the Constitution of the United States. It did not impeach the regularity of the judgment, and merely established that the judgment had been obtained through an undue advantage, by which the party ought not to be allowed to profit. Olney subsequently assigned the judgment to Dobson, who brought an action upon it in New York against Pearce, who pleaded the decree in Connecticut as conclusive of the fraudulent means by which the judgment was acquired. The court held, that the question having been determined by a court in Connecticut, which had jurisdiction of the cause and the parties, could not be reconsidered in any

other tribunal, and that the plea was a good defence to the action. It might formerly have been requisite for the defendant to go into equity for an injunction, but such a defence was admissible under the New York code at law. Johnson, J., said, "the defence is in substance that the judgment sued upon, was fraudulently entered up after assurances on behalf of the plaintiff in that suit to the defendant, that no further proceedings should be taken in it without notice to him, whereby he was induced not to take steps to interpose a defence which in point of fact he could have successfully maintained.

Relief against such a judgment upon these facts, would have been within the power of a court of equity in this State upon a bill filed for that purpose; 2 Story's Eq. Jur. §§ 887, 896; *Huggins v. King*, 3 Barb. 616. The Code, § 69, having abolished the distinction between actions at law and suits in equity, and the forms of all such actions as theretofore existing, an equitable defence to a civil action is now available as a legal defence.

The right of the plaintiff in the judgment was a personal right, and followed his person; and, aside from the fact that he had resorted to the courts of Connecticut to enforce his claim under the judgment, the courts of that State, having obtained jurisdiction of his person by the due service of process within the State, had full power to pronounce upon the rights of the parties in respect to the judgment, and to decree concerning it. It

necessarily follows that the decree of the superior court of Connecticut, sitting as a court of chancery, directly upon the question of fraud, is conclusive upon the parties to that litigation, and all persons claiming under them with notice of the adjudication. The judgment of a court of competent jurisdiction upon a point litigated between the parties, is conclusive in all subsequent controversies where the same point comes again in question between the same parties; *White v. Coatsworth*, 2 Selden, 137; *Embury v. Conner*, 3 Comst. 522. In the State of Connecticut it is quite clear the question of fraud would not be an open question between the parties, but would be considered entirely settled by the decree of the court of that State; and as full faith and credit are to be given by each State to the judicial proceedings of every other State, that is, the same credit, validity and effect as they would have in the State in which they were had, the parties are concluded in the courts of this State by the judgment of the court in Connecticut directly upon the question in issue; *Hampton v. McConnell*, 3 Wheat. 234. The decree of the court of chancery of the State of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this State; but the judgment of the court upon the matters litigated, is conclusive upon the parties everywhere, and in every forum where the same matters are drawn in question. It



is not the particular relief which was granted which affects the parties litigating in the courts of this State; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative here and necessarily prevents the plaintiff from asserting any claim under it. The court acquired jurisdiction of the parties by the commencement of the action and the service of process upon the defendant therein, and his appearance by an authorized attorney, and the withdrawal of the action of debt upon the judgment, did not preclude the exercise of the jurisdiction which had been acquired;" *Dobson v. Pearce*, 1 Duer. 42; 12 New York, 156. These decisions were cited and followed in *Rogers v. Gwynn*, 21 Iowa, 58, and the case of *Cage v. Cassidy*, 23 Howard, 109, is to the same effect.

It has nevertheless been declared in other instances, that an injunction should not issue from a State court, for the purpose of restraining the course of legal proceedings in the courts of a sister State, and that if such relief is requisite, it must be sought in some co-ordinate tribunal, deriving its authority from the same source as that which is in possession of the cause; *Meade v. Merritt*, 2 Paige, 402; *Bicknell v. Field*, 8 Paige, 440, *Burgess v. Smith*, 2 Barb. Ch. 276; see *Peak v. Jenness*, 7 Howard, 512; *Kittidge v. Emerson*, 15 New Hamp. 227; *The Bank of Bellows' Falls v. The R. & B. Railroad*, 2 Wil-

liams, 471, 477. In the case first cited the chancellor said: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of injunction, of restraining proceeding which have been previously commenced in the courts of another State. Not only comity, but public policy forbids the exercise of such a power. If this court should sustain an injunction bill to restrain proceedings previously commenced in a sister State, the court of that State might retaliate upon the complainant, who was defendant in the suit there; and by process of attachment, might compel him to relinquish the suit subsequently commenced here. By this course of proceeding, the courts of different States would indirectly be brought into collision with each other in regard to jurisdiction; and the rights of suitors might be lost sight of in a useless struggle for what might be considered the legitimate power and rights of courts."

This language goes very far, and beyond what reason and the authorities will bear. That the courts of a State, have become legally possessed of a cause, does not preclude the courts of another State from taking equitable jurisdiction of the same cause, although the effect may be to restrain the prosecution of the suit in the original forum. Such a power should be exercised with care, and with a just regard to the comity which ought to prevail among co-ordinate sovereignties; see *The Bank of Bellows'*

Falls v. R. & B. Railroad Co. A court obviously should not take any step that can interfere with the due execution of the laws of a sister State; but it is not less true that a citizen of a State, or one who, though temporarily is subject to its jurisdiction, may be restrained from bringing a suit there or elsewhere, on an instrument which having been obtained through fraud ought to be delivered up, or cancelled.

There can be no doubt of the point actually determined in *Mead v. Merritt*, it being that an executor who is sued in the State where he took out letters testamentary, and where the testator was domiciled, cannot go into a court of equity in another State, for the purpose of giving effect to a set-off, which cannot be made in the original forum.

In *Bicknell v. Field*, 8 Paige, 440, the complainant set forth that the respondent had brought suit against him in New York, upon a judgment alleged to have been recovered in Massachusetts, in December, 1832, under an action commenced by an attachment which had been laid on his goods in that State, but that judgment had been entered *in personam* by the clerk of the court, in August, 1835, fraudulently or through mistake, at the instance of the respondent, and without a trial or appearance; and prayed that an injunction might be issued to restrain the further prosecution of the suit in New York. The chancellor held that as such a judgment rendered against a defendant who is not summoned,

and who does not appear, is a nullity, the complainant had a perfect defence at law, and did not require the aid of a court of equity. Moreover the Constitution of the United States provided that full faith and credit should be given in each State, to the public acts, records and judicial proceedings of every other State. The court could not, therefore, inquire into the regularity of the proceedings in the Massachusetts Court, or investigate the manner in which the record was made up. "It would not be giving full faith and credit to the record of a judgment in a sister State, which record was duly authenticated in the manner prescribed by the law of the United States, if the party against whom that judgment purported to have been obtained, was permitted to allege and show in the courts of another State, that no such judgment was given or ordered to be entered by the court, but that the judgment record was made up, and filed fraudulently by the clerk of the court, and without authority." These points seem to have been well taken, but they are entirely consistent with the doctrine that a bill may be filed in a State, against the plaintiff in a judgment in another State, to establish that it was procured by fraud, and cannot be conscientiously enforced. And there is little doubt that where an officer of a court, or one sitting as judge in an inferior court, colludes with a party to the suit, the fraud may be unravelled by a chancellor; *Stokes v. Knarr*, 11 Wisconsin, 389.

FEDERAL AND STATE COURTS.—An act of Congress prohibits the courts of the United States, from granting an injunction against a suit or judgment in the courts of the several States, *ante*, 1389, and it is established that the State courts, cannot enjoin the proceedings of a national tribunal; *English v. Miller*, 2 Richardson Eq. 320; *Riggs v. Johnson County*, 6 Wallace, 166; *The United States v. Keokuk*, Ib. 514; *Weber v. Lee County*, Ib. 210; *Kendall v. Winsor*, 6 Rhode Island, 453; *Duncan v. Darst*, 1 Howard, 306. This does not necessarily preclude the courts of either jurisdiction, from restraining acts which, though done under color of an authority derived from the other, are yet illegal and void; see *Slocumb v. Mayberry*, 2 Wheaton, 1; *Cropper v. Coburn*, 2 Curtis, 475; and it was held, in the case last cited, that a court of the United States may enjoin a levy on the goods of A., under an execution issued by a State tribunal against B., and that a like power may be exercised by the State courts, when an officer of the United States transcends his powers. This decision is in entire accordance with *Slocumb v. Mayberry*, 2 Wheaton, 1, which determined, that where a surveyor of the customs took possession of the cargo, under a law of Congress authorizing a seizure of the vessel, the act was void, and that a writ of replevin might be issued by the Supreme Court of Rhode Island. Chief Justice Marshall said: "The common law tribunals of the United States are closed against

such applications, were the party disposed to make them. Congress has refused to the courts of the Union, the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, until the case shall have passed through the State courts, and have received the form which may there be given it." But it seems to be established under the recent authorities, that where one claiming to act by virtue of an authority conferred by the United States, detains a citizen, or takes his goods, the State courts cannot afford redress by a replevin, *habeas corpus*, injunction, or any other writ that will disturb the custody or possession of the thing or person; and if, as may well happen, the Federal courts are incompetent to afford redress, the only remedy of the injured party is in an action for damages in a State tribunal; see *Ableman v. Booth*, 21 Howard, 516; *Freeman v. Howe*, 24 Id. 455; *Buck v. Coldbath*, 3 Wallace, 341; *Riggs v. Johnson County*, 6 Id. 166, 196; *Tarble's Case*, 13 Wallace, 397. This is entirely just, as predicated of judicial process, but may be of dangerous consequence when applied to ministerial acts, or acts done by virtue of an alleged authority from the executive. If one commissioned by the National government, or claiming to be employed by it, arrests me, or takes my property, he must produce some writ or authority which is not manifestly void, and if he fails, the State may afford redress, as for a wrong done contrary to her laws, and by an in-

dividual; because a wrong doer might otherwise screen himself, and effectuate his purpose by the presence of an authority from the United States; see *Wilson v. McKenzie*, 7 Hill, 95; *Tyler v. Pomeroy*, 8 Gray, 480; *The Commonwealth v. Downs*, 24 Pick. 227; *The United States v. Wyngate*, 5 Hill, 17; *Olmstead's Case*, Brightly, 269; *The Commonwealth v. Grant*, 3 Wright, 437; *The Commonwealth v. Fox*, 7 Barr, 336. This is the more obvious, because the judiciary acts do not enable a suit to be brought in the Federal courts, for an injury inflicted by an officer of the United States, and leave such torts, like other private wrongs, to the laws of the several States; see *Slocumb v. Mayberry*; *Buck v. Coldbath*, 3 Wallace, 334, 338, 340. If the plaintiff is a citizen of another State, he may proceed in a national tribunal, but this is irrespective of the cause of action. Congress may, no doubt, confer a concurrent or exclusive jurisdiction in such cases on the Federal judiciary, but the fact that they omitted to do so at the outset of the government, and for more than seventy years, was a reason why the courts should have refrained from disturbing a *status* which the Legislature had tacitly approved.

The rule as now established is, that while an action will not lie in the Federal courts, between citizens of the same State, for an unlawful taking under color of an authority from the United States, the injured party may bring trover or trespass in the State tribunals. But he cannot maintain replevin,

nor can he have an injunction to prevent the wrong; see *Freeman v. Howard*, 24 Howard, 455; *Buck v. Coldbath*, 3 Wallace, 341; *Slocumb v. Mayberry*, 2 Wheaton, 1; *Kendall v. Winsor*, 6 Rhode Island, 453.

In general, the power of the courts of the United States to intervene by injunction, is limited to controversies between citizens of different States, and it is immaterial as regards the application of this rule, that the bill is filed to prevent the infliction of an injury by an officer of the government, or under color of an authority from it. But a Federal court may enjoin an abuse of its process, although the parties against whom relief is sought are citizens of the same State as the complainant; *Gue v. The Tidewater Canal Co.*, 24 Howard, 257. This decision was cited and approved in *Freeman v. Howe*, 24 Howard, 460, where the principle was said to be "that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it arose, and is maintained without reference to the citizenship or residence of the parties; see *Buck v. Coldbath*, 3 Wallace, 341; *Ames v. Myers*, 16 Howard, 492; *Pennock v. Coe*, 23 Howard, 117; *Dunn v. Clark*, 8 Peters, 1; *Kendall v. Winsor*, 6 Rhode Island, 453, 462; see 22 Wallace, 280.

The rule that a State court shall not enjoin the proceedings of a national tribunal meets with an exception, where an action is brought in a court of the United States, during a suit which has been commenced in a State court, for an injunction on the ground of fraud, because the tribunal which is already in possession, is entitled to retain it to the end; *Akerly v. Vilas*, 15 Wisconsin 401; *The Home Insurance Co. v. Howell*, 9 C. E. Green, 238. In *The Home Insurance Company v. Howell*, a bill was filed in New Jersey, for the cancellation of two policies of insurance on the defendant's real estate in Illinois, as having been obtained by fraud, and that he might be enjoined from enforcing them by suit. The defendant alleged in his answer that he was a citizen of Illinois, and subsequently brought a suit on the policies in the Circuit Court of the United States for the Northern District of that State. The prosecution of this suit was enjoined by the New Jersey court. The chancellor said, "This court having the power to hear and determine the subject matter in controversy, is fully at liberty to retain it until it shall have disposed of it.

The general rule is, that as between courts of concurrent and co-ordinate jurisdiction (and the Circuit Court of the United States and the State courts are such in certain controversies—such as that involved in this suit, for example—between citizens of different States), the court that first ob-

tained possession of the controversy must be allowed to dispose of it, without interference from the co-ordinate court; *Riggs v. Johnson County*, 6 Wall. 166, 196. Nor does it matter that the policies of insurance were issued in another State, upon property in that State, and that the loss occurred there.

Where a party is within the jurisdiction of this court, so that on a bill properly filed here, this court has jurisdiction of his person, although the subject matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court; *Mead v. Merritt*, 2 Paige, 402." See 22 Wallace, 260.

In *Akerly v. Vilas*, an action was brought in a State court in Wisconsin, to foreclose a mortgage given to secure the bonds of the mortgagor, and also for a personal judgment against him, and the defendant filed an answer, setting up a partial failure of consideration. The plaintiff, who was a citizen of another State, then commenced an action upon the bonds against the mortgagor in the United States court for the district of Wisconsin.

The object of this change of forum was to evade the equitable defence which had been made in the State court, and it was frustrated by an injunction from that tribunal. Dixon, C. J., said: "The

general power of courts of equity whose jurisdiction has once attached, to restrain parties from commencing and prosecuting subsequent actions in other courts for the same object, is unquestioned. If any doubt should exist, it will be effectually dispelled by an examination of the cases cited by the counsel for the defendant. The defendant will be restrained at the instance of the plaintiff, and *vice versa*. The forum or jurisdiction in which the subsequent proceedings are taken, whether domestic or foreign, is immaterial. The injunction goes against the party, and not the court or officer. The doctrine of the English courts is well settled, and we are unable to find any American decision to the contrary. The sole inquiry is whether the ends of justice demand that the power should be exercised. If they do, the court first acquiring jurisdiction will retain the suit for a final determination of the rights of the parties, and restrain them from suing or proceeding elsewhere.

The only question here is, whether there is anything in the relations of the State and Federal courts, which should prevent the application of this general doctrine to a case like the present. Counsel for plaintiff insist that there is; that it will lead to troublesome and unnecessary conflicts, promote litigation, and violate the rules of comity and forbearance which should be maintained between the two jurisdictions. We think differently. It seems to us that no question of

conflict of jurisdiction is involved. This is implied from the nature of the power exercised. No attempt to control or regulate the action of the Federal court or its officers is made. The process is directed to the parties litigating before the court from which it issues, and it becomes a mere question of the power of that court, to regulate and control their conduct in regard to the subject of such litigation.

The argument drawn from the rules of comity would seem to be more appropriately urged in the District Court than here. It is the established, and, we think, correct doctrine of the Federal courts, as to all cases where the jurisdiction of the two judicial systems is concurrent, and no appeal is given, that priority of suit determines the right. Proceedings in the action first commenced, cannot be arrested or affected by those subsequently taken in another court; *Wallace v. McConnell*, 13 Peters, 136. The plaintiff having voluntarily submitted the whole controversy to the courts of the State, cannot complain of the rules of law by which their action is governed, or that he is held to abide their determination; and the rules of comity, if they can be said to have any application, would seem to require that the junior action should be dismissed from the District Court."

It was held in like manner, in *Conover v. The Mayor of New York*, 25 Barb. 513, that the court which first obtains jurisdiction of a cause, may enjoin the parties

from bringing the same case into another court, although the court thus secondarily resorted to, is a court of chancery, or endowed with equity powers.

The courts of the United States may, in the exercise of the jurisdiction, conferred by the Bankrupt Act, enjoin proceedings in the State courts, which would impair the right or title of the assignee, or interfere with the effectual distribution of the estate among the creditors; see *Ex parte Christy*, 3 Howard, 292; *Ex parte Foster*, 2 Story, 131; *Ex parte Eames* Ib. 322.

The inclination of the recent authorities is that an injunction may be pleaded in bar or abatement of a subsequent suit against the complainant for the cause enjoined; *Dobson v. Pearce*, 12 New York, 156; *The Pittsburgh Railroad Company v. The Mount Pleasant Railroad Company*, 26 P. F. Smith, 481. In this instance, the lessees of a railroad filed a bill in the Supreme Court against the lessors, for relief against a forfeiture arising from an alleged breach of the conditions of the lease, and the court enjoined the lessors from interfering with the complainants, in their use and occupation of the road. The lessors subsequently, and while the suit was still undetermined in the Supreme Court, brought an ejectment against the lessees in the Court of Common Pleas. The defendants pleaded the proceeding in the Supreme Court in abatement, but the plea was overruled, and a judgment given for the plaintiff, which the Supreme Court reversed.

Sharswood, J., said: To relieve against forfeiture is one of the oldest and best established functions of a court of equity; Story on Equity Jurisprudence, 5, 1315. Conceding as is earnestly contended, that if the bill of the plaintiffs in the equity cause were dismissed after final hearing, that court would not, upon the cross-bill, proceed to enforce the forfeiture and put the lessor in possession, but leave him to his common law remedy, does it follow that he is not bound to wait until the final decree is entered? Is it possible that there must be such a conflict of jurisdiction as must result, if the determination of the court of equity shall finally be, that the lessees are entitled to be relieved from the alleged forfeiture and maintained in the peaceable possession? After such a decree, shall a sheriff come with a *habere facias possessionem* and put them out? Could not such a decree be pleaded or set up in bar of the common law action? If it could, surely the pendency of the proceeding may be pleaded in suspension or abatement. It is by no means clear that the decree awarding a preliminary injunction, might not have been pleaded or set up in bar. Such an injunction has all the force of a final one temporarily, until it is either dissolved or made perpetual. It is to be enforced while it lasts by all the power of the court in an attachment for contempt. It is to be remembered that the question is not whether the forfeiture here set up, is such a one as a court of equity would relieve

against. The defendant in the equity case might have brought that question to a speedy determination by demurring to the bill, and if it had been in their favor, would have been free to proceed with their common law remedy. The question is one, of jurisdiction with the court of equity, and if such jurisdiction existed and had been invoked, it necessarily precluded the party during its pendency, from instituting a proceeding in another forum involving the same question."

A court obviously ought not to issue an injunction, unless it has jurisdiction of the cause and the parties; and the onus is consequently on him who asks for such relief to show that the case comes under some well defined head of equitable jurisprudence, or that the intervention of a chancellor is requisite for the prevention of an irreparable mischief. Where no such cause is shown, an injunction will not be granted merely to prevent the doing or repetition of an act which is alleged to be contrary to law, especially where the party whom it is sought to restrain, holds an official position, and is proceeding under color or by virtue of an authority conferred by the Legislature; see *Marshall v. The Mayor of Brooklyn*, 8 Paige, 198; 26 Wend. 131.

It was accordingly held in this instance, that as the Court of Chancery had no jurisdiction over the proceedings of a municipal corporation, in the laying out and widening highways, and the right to determine whether the acts of the

commissioners appointed for that purpose were valid, was vested in the Superior Court, an injunction would not be awarded on the ground that the mayor and common council of Brooklyn, had exceeded their authority in opening the street in question, and that the effect of allowing what they had done to stand, would be to throw a cloud upon complainant's title.

It is nevertheless established that a limited and special authority, which transcends the course of the common law, must be strictly followed; and if it is not, a court of equity may intervene to prevent irreparable mischief, and where an adequate remedy cannot be had at law. The rule is well settled as it regards courts of limited and inferior jurisdiction; see 1 Smith's Lead. Cases, 1096, 7 Am. ed.; and applies *a fortiori* to commissioners whose functions are wholly, or for the greater part, executive or ministerial; *The Mayor, &c., of Baltimore v. Porter*, 18 Maryland, 284.

In this instance, an Act of Assembly for the grading and paving of North avenue, in Baltimore county, required damages, as well as benefits, to be assessed upon the owners of adjoining property, and as a preliminary to any proceeding thereunder, that the mayor and city of Baltimore should determine the proposed work to be consistent with the public good. These requirements were disregarded, and the city commissioners proceeded to have the work done as if it was the ordinary case of grading and

paying a street lying wholly within the limits of the city of Baltimore. The court held, that all the proceedings of the city commissioners in the premises were *coram non judice* and void, and that one whose land was about to be sold to pay the tax imposed for such grading, was entitled to an injunction to restrain the sale. Goldsborough, J., said: "The counsel for the appellant insisted that a court of chancery has no jurisdiction to grant the relief asked for in the bill; the only remedy being in a court of law, by an appeal from the proceedings of the city commissioner, under the Act of 1856, or by *certiorari*, and the case of *The Methodist Church v. The Mayor and City Council of Balt.*, 6 Gill, 391, was referred to in support of this position. But that case is unlike the present. There the street commissioners were acting within the scope of their authority, and if the allegations of the bill were true, the acts complained of were but irregularities, subject to be reviewed on appeal by the tribunal appointed by law for that purpose. Here the city commissioner acted without any lawful authority. His acts are not merely irregular, but void. In 8 Howard, 543, the Supreme Court said: The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal.

The principles on which a court of equity interposes by injunction to arrest the illegal proceedings of

public functionaries, are stated by Lord Chancellor Cottenham, in *Frewin v. Lewis*, 4 Mylne & Craig, 19 Eng. Ch. Rep. 249, cited with approbation by Mr. Justice Story, in 2 Story's Eq. sec. 955 a. In *Holland's Case*, 11 Md. Rep. 186, the jurisdiction of a court of chancery was maintained under circumstances, and upon grounds which completely cover this case."

A court of equity does not, however, readily arrest the progress of public works by an injunction, nor unless the right is clearly with the complainant, and the injury will be irreparable, see *Holmes v. Jersey City*, 1 Beasley, 299; *Cross v. The Mayor*, 3 C. E. Green, 305.

EXECUTIONS. In general a court of equity will not enjoin a levy on the property of one man, under a writ against another; *Lewis v. Levy*, 16 Maryland, 85; *Freeland v. Reynolds*, Ib. 416; *Purdy v. Irwin*, 18 California, 300; *Winch's Appeal*, 11 P. F. Smith, 424; *Watkins v. Logan*, 3 Monroe, 20; *Peyon v. Clarke*, 2 Rhode Island, 67. This is not merely because the injured party has a legal remedy against the purchaser or sheriff, but because the equity which issued, can control the process. But this rule is not universal, and may yield where the right of the complainant is equitable, or where allowing the execution to proceed would produce irreparable mischief, or throw a cloud on title; *Key City v. Munsell* 19 Iowa, 305; *Dyer v. Armstrong*, 5 Indiana, 437; *Watson v. Sutherland*, 5 Wallace, 74; *McCreery v. Sutherland*, 23 Maryland, 471; *Ford v. Rigby*, 10 Cali-

fornia, 449, If a rare and curious chattel or valuable picture belonging to A. is seized under a judgment against B. a court of equity may enjoin the sheriff.

The principle is the same with that on which a court of equity may compel the specific performance of a contract for the sale of a chattel which has a specific use or value; see vol. 1, 1095; and was not unfrequently applied to inhibit the sale of slaves, until it could be ascertained whether the title was in the party against whom the writ issued, or the party who asked to enjoin the sale; *Ames v. Myers*, 16 Howard, 492; *Gould v. Hill*, 18 Alabama, 457; *Swire v. McWhorter*, 27 Mississippi, 442.

An injunction may also be awarded where property held in trust is levied on for the debt of the trustee, and a sale for value and without notice will preclude the equitable owner; and it has been held that where a judgment creditor of the husband seizes the separate estate of the wife, a chancellor may, if her title is unquestionable, enjoin the execution of the writ; *Smith v. The Bank*, 4 Jones Eq. 303; *Bridges v. McKeenan*, 14 Maryland, 258; *McCann v. Taylor*, 10 Id. 418; *Calhoun v. Cozzens*, 3 Alabama, 498; *Hunter's Appeal*, 4 Wright 194; *Lyon's Appeal*, 11 P. F. Smith, 15; see *Winch's Appeal*, 11 P. F. Smith, 424.

It is well settled that partners have an equity to prevent the misappropriation of the partnership assets, by a sale under a judgment and execution against a member of

the firm; *Cropper v. Coburn*, 2 Curtis, 465; *ante*, 408; see 1 American Lead. Cases, 5 ed. 579; and a landlord may for a like reason enjoin the sale of growing crops for the debt of a tenant to whom he has leased the land on shares; *Martin v. Jewell*, 37 Maryland, 530.

In administering this equity the court may enjoin the sale, or suffer it to take place, and prohibit the sheriff from delivering the property to the purchaser until he has established his title at law, or through a bill in equity; and the latter course is usually adopted where the property of the firm is taken in execution for the debt of a partner. But the question is to some extent one of circumstances, and the levy may be set aside as vexatious and frivolous, if it appears from the pleadings or evidence, that the defendant in the execution will be indebted to the firm on a settlement of the partnership accounts, or that the assets of the firm are not sufficient to pay the partnership creditors; see *Blanchard v. Coolidge*, 22 Pick. 153; *Cropper v. Coburn*, 2 Curtis, 465; *More v. Ord*, 15 California, 204.

In *Cropper v. Coburn*, Curtis, J., said: "The first question is, whether this court is restrained from granting the injunction prayed for by that clause of the fifth section of the act of March 2d, 1793, 1 Stat. at Large, 334, which provides, "nor shall a writ of injunction be granted to stay proceedings in any court of a State."

The gist of the complainant's

bill is that, under process against Hemsley, the creditor and the sheriff have taken property in which he has no equitable interest whatever; and that the aid of a court of equity is needful to ascertain that he has no interest therein, and to protect the real owner.

It must be admitted that an attachment on *mesne* process, out of a State court, which the sheriff is authorized by that process to make, is a proceeding in a court of a State, within the meaning of this act of Congress; for the word "proceedings" may properly include all the steps taken by the court, or by its officers under its precepts, from the institution of the suit to the close of the final process which may issue thereon.

But it is equally clear that an attachment or *mesne* process, which the sheriff was not authorized by that process to make, is in no sense a proceeding of the court from which such process issued. Thus, if a sheriff under a writ of attachment against the property of A., should take his body, or the property of B., this would not be a proceeding of the court, but a mere trespass, for which any appropriate remedy may be instantly sought in any court having jurisdiction. And accordingly it was held, in *Slocumb v. Mayberry*, 2 Wheat. 1, that though the State courts could not interfere with seizures made by officers of the United States for breaches of laws of the United States, yet, where, under authority to seize a vessel, an officer seized the cargo with the vessel, the owner might

at once bring replevin in a State court. As Chancellor Kent has expressed it, in 4 Com. 410, "if a marshal of the United States, under an execution in favor of the United States against A., should seize the person or property of B., then the State courts have jurisdiction to protect the person or property so illegally invaded; and it is to be observed that the jurisdiction of the State courts in Rhode Island was admitted by the Supreme Court of the United States, in *Slocumb v. Mayberry*, upon this very ground." Yet this is but the converse of the question we are considering; for the State courts can no more interfere with the proceedings of the courts of the United States than the latter can with the former; *McKine v. Voorhies*, 7 Cranch, 279. Property attached on *mesne* process which does not authorize its seizure, is not in the custody of the law, and such attachment is not a proceeding of the court out of which the process issues.

The real question is, therefore, whether on a writ against Hemsley alone, the sheriff was authorized to attach the property of an insolvent firm, of which Hemsley was a member, in which property, it is admitted by the demurrer, he had no equitable interest. The manner in which individual creditors may attach or levy on the property of a firm in which their debtor is a partner, has given rise to much discussion, and to some diversities of decision in the different States. The decisions are collected in 1 American Leading Cases—

Hare and Wallace—578, 5 Am. ed. It would be useless here to examine them, or display those diversities. The writ of attachment in the case under consideration is governed by the laws of Massachusetts; and in this State, since the case of *Pierce v. Jackson*, 6 Mass. R. 242, the law has been, as it respects personalty, that only the interest which may remain to the debtor after payment to the partnership debts, and of any balance he may owe to the firm, can be attached by his creditor; *Allen v. Wells*, 22 Pick. 453. Accordingly, it was held in *Blanchard v. Coolidge*, 22 Pick. 155, that where a partner had no interest in the stock except a share of expected profits, and there had been no profits, he had no attachable interest, and trover would lie against the attaching officer. The case of *Peck v. Fisher*, 7 Cushing, 386, points out the distinction, as held in Massachusetts, between real and personal estate. This makes the validity of the attachment depend upon the ultimate interest of the debtor; and as it is admitted in this case he had no such interest, and that nothing would pass by a sale of it, it follows that the attachment was unlawful.

I am aware that in some other States the tenancy in common which exists at law among copartners, is alone considered at law; and that a court of law will execute its process on partnership property, as if the partners were tenants in common, merely leaving the purchaser and the other partners or the creditors of the firm

to adjust their relative rights in a court of equity. But, as I understand, this has not been the law of Massachusetts in reference to personal estate; and a creditor who attaches or levies on property of a partnership in which his debtor, though a member of the firm, has no substantial interest, is a trespasser.

This being so, it is argued that the complainants should have resorted to an action at law, by which they had a complete remedy. But it must be remembered that, though it is now admitted by the demurrer, Hemsley has no interest, when the bill was filed it did not appear that it might not be necessary to have an account taken to ascertain this fact. Indeed, it may still prove to be necessary; because, if the demurrer be overruled, the defendants may answer, and deny what they now, for the purposes of the demurrer, admit.

When it is necessary to take such an account, which a court of law has only very inadequate means of doing, and which, in trespass or trover, can only be taken by and before a jury in Massachusetts—*Whitewell v. Willard*, 1 Met. R. 216—there is not an adequate remedy at law; and if equity has jurisdiction on this ground, it is not defeated by an admission made by the defendant in the course of the suit, which renders an account unnecessary. If it were, the defendant could admit the plaintiff out of court.

In general, the franchise of a railway, turnpike, or canal company, cannot be taken in execution and

sold under a judgment, and if the sheriff makes such a levy it may be set aside or restrained by an injunction; see *Leedom v. Plymouth R. R. Co.*, 5 W. & S. 265; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27; *Ammant v. The Turnpike Road Co.*, 13 S. & R. 210; *Gue v. The Tidewater Canal Co.*, 24 Howard, 257. It was accordingly held in the case last cited, that where the marshal of a circuit court of the United States, seized and advertised for sale a house and lot, certain canal boats, and a wharf belonging to a canal company chartered by the State of Maryland, under a judgment against the corporation, he might be enjoined from proceeding to carrying the writ into effect. It was held not to be an objection to such relief, that the complainants and the marshal were both citizens of the same State, because the proceeding being ancillary and supplementary to the suit out of which it arose, might be maintained without reference to the citizenship or residence of the parties; *ante*, 1403.

DISSOLUTION OF INJUNCTIONS.—It seems to have been held at one period, that an injunction must be dissolved on the coming in of an answer, which explicitly denies the equity of the bill, however clearly it may be sustained by the affidavits filed by the complainant *Hoffman v. Livingston*, 1 Johnson Ch. 211; *Couch v. Ulster Turnpike Co.*, 4 Id. 26; *Cowles v. Carter*, 4 Iredell Eq. 105; *Perkins v. Hollowell*, 5 Id. 24; *Green v. Phillips*, 6 Id. 223; *Hardy v.*

Summers, 10 Gill & Johnson, 316; *Stoutenburgh v. Peck*, 3 Green Ch. 446; *Edmondson v. Jones*, 19 Georgia, 19; *Harris v. Sangston*, 4 Maryland Ch. 394; *Mahone v. The Central Bank*, 17 Georgia, 111; *Greenin v. Hoey*, 1 Stockton Ch. 137; *Vervain v. Older*, 4 Halsted Ch. 98; *Wright v. Grist*, 1 Busbee Equity, 203; *Eastburn v. Kirk*, 1 Johns. Ch. 444; *Roberts v. Anderson*, 2 Id. 202; *Kinsler v. Clark*, 2 Hill Ch. 617; *Jones v. Cowles*, 26 Alabama, 612. This course of decision is obviously fallacious, because the right may ultimately prove to be with the complainant, and it may then be too late to redress the injury resulting from the dissolution of the injunction. It is accordingly established, under the recent course of decision, that a chancellor is not bound to give implicit credence to the answer, and may notwithstanding anything that it contains, continue the injunction until the hearing; although this course should not be adopted, unless there is reason to apprehend irreparable mischief if the restraint be withdrawn; *Stotesbury v. Vail*, 2 Beasley, 390; *Poor v. Carleton*, 3 Sumner, 70; *Troy v. Norment*, 2 Jones Eq. 318; *Sinnickson v. Johnson*, 2 Green. Eq. 374; *The Warren R. R. Co. v. The Clarion Land Co.*, 4 P. F. Smith, 28; *Miller v. McDougal*, 44 Mississippi, 682; *Brown v. Haskins*, 40 Id. 183; *Robertson v. Anderson*, 2 Johnson, Ch. 202; *James v. Lemley*, 2 Iredell Eq. 278; *Chetwood v. Brittan*, 1 Green Ch. 438; *Nelson v. Robinson*, 1

Hempsted, 464; *Cox v. The Mayor*, 8 Georgia, 728; *Crutchfield v. Danilly*, 16 Id. 432; *Semmes v. The Mayor*, 19 Id. 471; *Fleischman v. Young*, 1 Stockton Ch. 620.

In *Poor v. Carleton*, Story, J., said: "The main distinctions which seem to be supported by the authorities, or at least by the weight of authority, are these. In the first place, in cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. This doctrine is, as I think, fully borne out by Lord Hardwicke in *Potter v. Chapman* (Ambler R. 99; S. C., 1 Dick. R. 146); by Lord Talbot, in *Gibbs v. Cole*, 2 P. Wms. R. 255; by Lord Kenyon, in *Strachmore v. Bowes*, 12 Dick. R. 673; S. C. 1 Cox, R. 263; 2 Bro. Ch. R. 166; by Lord Eldon in *Norway v. Rowe* (19 Ves. R. 153); and *Peacock v. Peacock*, 16 Id. 49. A doubt, too, in point of law, will furnish a sufficient ground against dissolving an injunction; and was so ruled in *Maxwell v. Ward* (11 Price R. 17). Indeed, Mr. Chan-

cellor Kent, in *Robertson v. Anderson* (2 John. Ch. R. 202), laid down the proposition generally, that the granting and continuing of injunctions must always rest in sound discretion, to be governed by the nature of the case.

"It is true, that it was said by Lord Eldon, in *Clapham v. White* (8 V. R. 35, 37), that 'if the answer denies all the circumstances, upon which the equity is founded, the universal practice as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer; and that is carried so far, that except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose.' This is strong language; but many qualifications must be engrafted on it, as will be manifest from the learned chancellor's own decision in *Peacock v. Peacock* (16 Ves. R. 49), and *Norway v. Rowe* (19 Id. 144), on which I shall presently comment; and indeed, as his own exceptive words, 'in the few excepted cases' clearly import. I confess that I should be sorry to find that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of dissolution of a special injunction is one, which, after the answer

comes in, is addressed to the sound discretion of the court. In ordinary circumstances, the dissolution ought to be ordered, because the defendant has *prima facie* repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify, but demand the continuation of the special injunction. This, upon the principles of courts of equity, which always act so as to prevent irreparable mischiefs and general inconvenience in the administration of public justice, ought to be the practical doctrine; and I am not satisfied, that the authorities, properly considered, do establish a contrary doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice."

This decision was followed in *Clum v. Breuer*, 2 Curtis, 506; and a denial of the complainant's title in the answer, held to be insufficient to prevent the award of a preliminary injunction; while a similar view was taken in *Jones v. Lemly*, 2 Iredell Eq. 278; and said to be peculiarly applicable, when the defendant relies solely on his own naked allegation, as to matters, which, if true, might have been corroborated by proof; see *Purnell v. Daniel*, 8 Iredell Eq. 9; *McBayer v. Hardin*, 7 Id. 1; *Ashe v. Johnson*, 2 Jones Eq. 149; *Troy v. Norment*, 1b. 318; *Peterson v. Matthis*, 3 Id. 31.

It was held in like manner, in *The Warren R. R. v. The Clarrion Land Co.*, 4 P. F. Smith, 28, that on a motion to dissolve an

injunction, the answer is only regarded as an affidavit. Such, also, is the rule in England, under the 15 & 16 Victoria, c. 86, § 59; *ante*. The same point may be found in *Delger v. Johnson*, 44 California, 182.

In *Poor v. Carleton*, the bill was filed to enjoin the transfer of negotiable securities, but the doctrine is not less applicable, where relief is sought on equitable grounds, against proceedings at law, especially where the matters alleged by the complainant, are exclusively within the jurisdiction of chancery; *Chetwood v. Brittan*, Green Ch. 438, 452; *Fleischman v. Young*, 1 Stockton Ch. 620; *Brown v. Edsall*, 1b. 256. To dissolve the injunction in such a case, on the defendant's oath, without weighing the proofs on the other side, may be equivalent to a denial of justice; see *Quackenbush v. Van Reper*, Saxton, 476; *Brown v. Edsall*; *Murray v. Elston*, 8 C. E. Green, 127.

A different view prevails in North Carolina, where an injunction, staying the execution of a judgment, will be dissolved on the coming in of the answer, unless it confesses the equity of the bill, or is so unfair, evasive, or wanting in fulness, as to be subject to exception; *Capehart v. Mhoon*, 1 Busbee Eq. 30. Pearson, J., said: "The injunction is to stay execution upon a judgment for a debt recovered at law. This class of injunctions differ very essentially from injunctions to prevent irreparable injury, as to stay waste, in regard to which very dif-

ferent considerations are involved. The distinction is a plain one; and yet, as we had occasion to say in *Purnell v. Daniel*, 8 Ire. Eq. 9, it does not seem to be sufficiently attended to on the circuits. In the one, the defendant in equity has established his right by the judgment at law; and the only question is, should the plaintiff in equity be allowed to keep him out of his money until an alleged equity is settled? In the other, the question of right is open, and there is the further consideration that to remove the injunction would be to allow the thing about which the parties are in dispute, to be done before the dispute is heard, when the defendant cannot be put in *statue quo*—for, if a tree is cut down, it cannot be made to grow again. “Hence the principles regulating the dissolution of injunctions of the latter class are governed by considerations wholly different from those applicable to the former; see *Lloyd v. Heath*, 1 Busbee Eq. 39.” In *Lloyd v. Heath*, the court accordingly refused to dissolve an injunction against waste, although the answer denied the allegations of the bill.

The injunction will not be dissolved where the answer is evasive; *Rembert v. Brown*; *Little v. Marsh*, 2 Iredell Eq. 18; *Thompson v. Mills*, 4 Id. 390; *Monroe v. McIntyre*, 6 Id. 65; *Moore v. Hylton*, 1 Devereux Eq. 429; *Everly v. Rice*, 3 Green Ch. 553; *Collaway v. Jones*, 17 Georgia, 277; nor where the defendant does not speak from his own knowledge;

Everly v. Rice, 3 Green Ch. 553; *Roberts v. Anderson*, 2 Johnson Ch. 202; *Ward v. Van Bokkelen*, 1 Paige, 101; *Rodgers v. Rodgers*, 1b. 426; *Ashe v. Johnson*, 2 Jones Eq. 447; *Nelson v. Robinson*, 1 Hempsted, 464; *Poor v. Carleton*, 3 Sumner, 70, 78; *Norton v. Wood*, 5 Paige, 249; nor where it confesses the allegations of the bill, and seeks to avoid them by new matter; *Judd v. Hatch*, 31 Iowa, 401; *Simpson v. Hart*, 14 Johnson, 63; *Vathier v. Zane*, 6 Grattan, 246; *Merwin v. Smith*, 1 Green Ch. 182; *Brooks v. Gillies*, 12 Smedes & Marshall, 538; *Rembert v. Brown*, 17 Alabama, 667; *M’Namara v. Irwin*, 2 Dev. & Bat. 13, 19; *Skinner v. White*, 17 Johnson 357; *Wilson v. Mason*, 2 Jones Eq. 5; *Cornelius v. Post*, 1 Stockton Ch. 196. So it is not sufficient that some of the allegations of the bill are denied, if there are others which are sufficient to sustain the injunction; *Sherrell v. Harrell*, 1 Iredell Eq. 194; *Jackson v. Jones*, 25 Georgia, 93.

Where the bill is filed for discovery, in aid of a defence at law, the injunction will be dissolved as of course on the coming in of the answer; *King v. Clark*, 3 Paige, 76; *Grafton v. Brady*, 3 Halsted; *Yates v. Monroe*, 13 Illinois, 212, but this does not apply to bills for discovery and relief.

In general an injunction against several defendants, will not be dissolved until all have answered; *The Baltimore and Ohio Railroad Co. v. Wheeling*, 13 Grattan, 40; *Wisham v. Lippincott*, 1 Stock-

On the behalf of the countess, it was insisted by the Solicitor-General, Mr. Lutwiche, Mr. Cowper, and Mr. Talbot, that the guardianship, being devised to three, without saying "and to the survivor of them," the same did not survive; that it is but a bare authority, and no interest, in regard no profit could be made thereof; that, if a power were given to three, and one of them should die, the survivors could not execute such power; that, if two were made committee of a lunatic, on the death of one of them the commitment would determine; that this was a trust annexed to the person, and not assignable, nor was it reasonable it should survive, forasmuch as the testator might think it proper to trust three, but not to invest a smaller number with a charge of that importance.

Also it was said, that, if the infant earl should die without issue under age, in such case the late earl by his will had given an annuity of 500*l.* per annum to Mr. Justice Eyre, which made it improper that he alone should be intrusted with the person of the infant earl, who would be a gainer on his dying without issue and under age; that, the will having appointed three guardians to the infant, it was the same thing as if the testator had appointed those three jointly, and then it was plain, that, if one should die, the survivors could not act; that, according to *Auditor Curle's case* (11 Co. 2 b), where an office is granted to two, on the death of one of the grantees, the office determines.

And though it might be attended with some inconvenience were such guardianship or authority to determine on the death of one of the persons intrusted, yet it must be allowed to have been in the power of the testator to have prevented this inconvenience, by limiting the guardianship to the survivor by express words: Salk. 465.

It was, moreover, urged, that this was a matter of trust; for every guardianship was a trust;¹ that the Crown, as **parens patriæ*, was the supreme guardian and superintendent [*647] over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing as to take away an infant under thirteen years of age, from so careful a mother as the countess was; that the tender calls of nature were on the mother's side; and then there were two physicians (Dr. Robinson and Dr. Friend), who both testified that the infant earl was of a tender and sickly constitution; so that at least the Court might refuse to grant this in a summary way, or otherwise than upon a bill.

Also, with regard to the servants, it was represented to be a very hard thing to turn away such as the countess had experienced to be good servants, and to take persons in their room whom she had no experience of; particularly that Dr. Stubbs, the governor, came in at first with the approbation of Mr. Justice

¹ See *Duke of Beaufort v. Berty*, 1 P. Wms. 704; *Frederick v. Frederick*, 1 P. Wms. 721.

Eyre, and that he was a man of learning, probity, and piety, and a clergyman.

On the other side, it was said, that this guardianship was not devised to three jointly, but to three until the infant earl should come to twenty-one; that a guardian had not only a bare authority, but also an interest, for he might bring a writ of ravishment of ward, or might make a lease during the minority of the infant, as was determined in the case of *Shopland v. Ryder*;¹ so that guardians had an interest coupled with their authority, and consequently the office would survive.

It was true it could not be granted over: no more could the office of executorship; but yet there could be no question but that, if there had been two executors, and one should die, the other would take the whole executorship as survivor.

And as to the objection, that there was no profit in the guardianship, and therefore it should not survive, the same way of reasoning would hold in the case of an executorship, for that was barely a trust, and no ways profitable; notwithstanding which, being a legal interest, it would survive. It was likewise said, that in case where three guardians were appointed, if this were [648] supposed to be but *a joint authority, and consequently not to survive, it would prove a great inconvenience, and in a good measure frustrate the intention of the person appointing them.

As to what was held in *Auditor Curle's case* (viz.), where an office has been usually granted to two, and one of them dies, that this is a determination of such office, the reason must be supposed to be, because they both make but one officer, as in the case of the sheriffs of Middlesex.

That with regard to the 500*l.* per annum given to Mr. Justice Eyre, in case of the infant's death without issue and under age, that could be no objection in case of a testamentary guardian appointed by the party himself, whatever it might be where the guardian was to be appointed by the Court; for, where the testator himself says that J. S. shall be guardian of his son, and by the same will also declares that the said guardian shall have the whole estate in case the child shall die within age, surely that would be good; much more shall the devise in our case, which is but a small part of the estate.

Then, as to the objection of hardship from the guardians being empowered to impose servants, governors, &c., who, when put upon the young lord by such guardian, would probably not regard the countess, as having no dependence upon her, this might be as well turned the other way (viz.), that if they were put in by the mother, they would have no regard to the guardian, who yet was intended by the will to be in loco parentis, and to supply the father's place.

That Dr. Stubbs, the governor, might be a good scholar and a

¹ Cro. Jac. 55, 98.

pious man, and yet it would not necessarily follow that he was a proper governor to attend the young earl to court, or to noble families, or at the exercises of dancing and riding, which it was fit his lordship should be acquainted with.

Besides, it was of great consequence, in regard such servants are apt to flatter their young masters, and to entertain their thoughts with such things as would be rather pleasing than useful to them.

Lastly. With respect to the tenderness of the young *lord's constitution, that was, however, of late grown stronger, and [649] he being now upwards of twelve years of age, this was the proper crisis for forming his mind, and instilling into him a taste of those noble qualities and that spirit which became a person of his high station, in order to make him useful to his country; and this being the proper time, surely it was reasonable to trust Providence in these cases, and to send the young nobleman to some public school.

LORD CHANCELLOR MACCLESFIELD.—The father, by the statute,¹ has a right to dispose of the guardianship of his child until twenty-one, and, having done so here, it will be² binding, unless some misbehaviour be shown in the guardian, in which case, it being a matter of trust, this Court has a superintendency over it.

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms that it shall go to the survivor, there seems to be no colour for it; because, where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and it would be mischievous, and of very ill effect, if, where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do anything; and yet this must be the consequence if a guardianship devised to several should be taken to be one joint naked authority; such construction would make the Act of little force. A guardian has an authority coupled with an interest, and may bring a writ of ravishment of ward on the infant's being taken from him; and though it is true that the damages recovered shall, by the statute, go towards the benefit of the ward, yet the declaration must lay it ad dampnum of the guardian, the plaintiff.

The reason of *Auditor Curle's case*,³ where on the office of auditor being granted to two, without saying "and to the survivor," such office, on the death of one, *was held to be determined, [650] was because, in such case, both made but one officer, as the two sheriffs of Middlesex make, as to their office, but one person. In the present case, here is a plain right placed and

¹ 12 Car. 2, c. 24.

² See *Dillon v. Lady Mountcashell*, 4 Bro. P. C. 366, Toml. ed.

³ 11 Co. 2 B.

vested in Mr. Justice Eyre, as the surviving guardian, and who, every one is assured, will well execute such trust, which it will be impossible for him to do without being allowed to place and choose the governor, gentleman, &c., to attend upon and take care of this young nobleman.

And, though Dr. Stubbs may be a good, learned, and pious man, yet he may not be so fit to attend the young earl to all places; for instance, to courts, places of exercise and diversion, &c., at which it may be proper for his lordship to appear.

But I must differ from Mr Justice Eyre, as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery.¹

Wherefore, per Cu., discharge Dr. Stubbs from being governor, as also Mr. Bennett from being gentleman, and deliver the infant into the hands of his guardian. Mr. Justice Eyre, who desired the young earl might dine with him. But the Lord Chancellor said, that this was in confidence, that the Judge should return him to his mother, the countess, at night; for that, as yet, the Court would not make any order touching the custody of the earl's person.

Afterwards, on the Great Seal's being taken from the Earl of Macclesfield, and placed in the hands of three Lords Commissioners, on the 18th of March, 1724, Mr. Justice Eyre (lately made Lord Chief Baron of the Exchequer) exhibited his petition to the Lords Commissioners, setting forth the former proceedings; and that the infant earl, who was now just fourteen years of age, and had been married to Lady Susannah Noel, daughter to the Countess of Gainsborough, was detained from the petitioner; that such marriage was *without the consent or privity* of the said Lord Chief Baron, the surviving guardian. Therefore the petitioner thought it his duty to lay *these things before the [651] Court, praying that the custody or tuition of the infant lord might be granted to him, and that the Court would make such order touching this matter as they should think proper.

Upon this the Dowager Countess of Shaftsbury petitioned the Lords Commissioners, that the order of the late Lord Macclesfield, declaring the right of guardianship to belong to the Lord Chief Baron Eyre, and directing the person of the infant earl to be delivered to the said Lord Chief Baron might be set aside.

Also, the infant earl petitioned the Lords Commissioners, insisting, that the guardianship of his lordship, given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions, the Court ordered a sequestration, unless cause, both against the Countess (dowager) of Shaftsbury, and against the Countess of Gainsborough, for their contempt in

¹ Few, at the present day, would entertain this singular notion of the Lord Chancellor.

contriving and effecting this marriage without the consent of the guardian and without applying to the Court. And the person of the infant earl was ordered to be restored by the Countess Dowager of Shaftsbury to the Lord Chief Baron, it being the opinion of the Court, that though the declaration made by the late Lord Chancellor, that the right of guardianship did belong to the Lord Chief Baron, as surviving guardian, and the order made thereupon was ever so erroneous, yet that the same was a good order until reversed, and, consequently, it was a contempt to break it.

On the 15th May, the three Lords Commissioners, (viz.), Sir Joseph Jekyll, Master of the Rolls, Mr. Baron Gilbert, and Mr. J. Raymond, having heard this matter solemnly argued by counsel on both sides, gave their judgment, which was delivered by the Lord Commissioner Jekyll, that the Court were all of opinion the sequestration against the Countess of Shaftsbury ought to be absolute.

*LORD COMMISSIONER JEKYLL.—The marriage of a ward without the consent of the guardian is a ravishment of [*652] the ward (— Inst. 440), and aggravated in this respect, that, after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher.

By the statute of Westminster, 2 cap. 35, it is enacted that if one be guilty of ravishment, either of a male or female ward, if the ward be restored, though not married, the ravisher shall be punished with two years' imprisonment; but if the ward be not restored, or if he be restored and be married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life, or by abjuring the realm, at the discretion of the Court where he is tried; so that a ravishment of a ward became an offence not only against the guardian, but against the king; and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment, or by abjuring the realm, this shows the greatness of the offence, by the grievousness of the punishment.

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this Court, especially the latter, it being notorious that a Court of equity entertains no greater jealousy of, nor shows more resentment against, anything, than the unlawful marriage of infants.

In the case of the marriage of a lunatic (viz.), that of Mr. Packer's marrying Mrs. Ash,¹ the Court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time; and infants and lunatics may be compared together, both of these being unable to take care of themselves.

In the case where an infant is committed by the Court to the

¹ See Packer v. Wyndham, Prec. Ch. 412.

custody or care of any one, such committee gives a recognisance that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances; so that, [*653] if the infant marries, *though without the privity, or knowledge, or neglect of the committee, yet the recognisance is, in strictness, forfeited, whatever favour the Court upon application may think fit to shew such committee, when he appears not to have been in fault.

In Lord Somer's time, Mr. Goodwin married an infant (Mrs. Knight), and was committed, and this commitment was followed by an Act of Parliament for dissolving the marriage.

So, on Sir Edward Hannes's daughter and heir, who was an infant, being inveigled from her guardian, Dr. Waugh, and married to one Willis, though Mrs. Hannes was not taken from a guardian assigned by the Court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by the Master of the Rolls, Sir John Trevor, and the order afterwards confirmed by Lord Harcourt; and, as this Court punishes the instruments where such marriage is had without the consent of the guardian, so, if there be only an apprehension that the infant will be married unequally, either by the guardian or by his neglect, a Court of equity will interpose, and send for the infant, and commit him to the custody of a proper person, or relation, in order to prevent such danger: as was done in the case of the infant Lady Catharine Annesley, by Lord Chancellor Harcourt, and likewise in another case (viz.), that of Mr. Vernon, of Staffordshire, by Lord Macclesfield.¹

But the present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested, and where the guardianship of him is devised by a peer of the realm (viz.), by the will of the late Lord Shaftsbury.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian:

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent; and, for that reason, there was no express provision* against it in [*654] the order; but still this prohibition is implied (viz.), that no person, without the leave of the guardian, should marry this infant; besides, by the same reason that these words ought to be inserted, the order should likewise have provided that no person should take away or ravish this ward from the guardian, &c., all which things are surely implied; but, further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage; forasmuch as the birth of the noble lady to whom Lord Shaftsbury is married, and also her quality, are equal to those of

¹ See Lord Raymond's case, Ca. t. Talb. 58; Smith v. Smith, 5 Atk. 304.

her husband ; and she has had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue, and quality.

Resp. Admitting all this to be so, yet it may be reasonably supposed, that, if the infant earl had staid till he had attained his age, and could have made a jointure and settlement, in such case his Lordship might have had a better portion.

But, in reality, though there be no disparagement, yet this is only by way of extenuation, and can never be urged as a justification ; for, it is the marriage without the consent of the guardian that constitutes the offence ; so that, such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward, without the guardian's consent, married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree ; for which see the statute of Merton, cap. 6 & 7, 2 Inst. 89—92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage, having been once solemnised and perfected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the *ward ; [*655] but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

Object. This marriage is by the Countess, the mother of the infant earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature ; by the express words of the Act of Parliament, the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant Duke out of their custody, and their complaint was received ; upon which the Court would have proceeded against the mother, but the guardians could not make out their right of guardianship by reason of some defect in the instrument under which they claimed.

So, that, all these objections being answered, the Court are of opinion, that the sequestration against the Countess Dowager of Shaftsbury ought to be made absolute.

As to the case of Lady Gainsborough, that seems to differ ; and here the question is, whether the Countess of Gainsborough's con-

senting that her daughter should be married to the infant earl, be not a contempt?

8 Edw. 3, p. 52. The case was a writ of ravishment of ward, which was brought against four men and a woman; the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter, upon which Hirle, C. J., gave the rule, that the woman was equally guilty with the four men of the ravishment of the ward, the marriage of the infant, without the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court [*656] of the infant, yet have those been punished who have married the ward without the consent of the guardian, as appears from the above-cited case of Mrs. Hannes, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes, the father's personal estate, and for an allowance of maintenance for the infant.

Whereas, in the principal case, the decree goes something further, as it directs that the will of the late Earl of Shaftsbury should be performed, part of which will is, that the infant earl should be under the care and guardianship of the persons named therein.

In 3 Co. 38 (*Ratcliffe's case*), it was resolved, that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward against any one for taking away his heir-apparent, male or female, and for marrying such heir; and that it is not material of what age such heir then was; and as the ancestor might bring such action for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear that the late Earl of Gainsborough left any testamentary guardians of his children; so that the Countess was guardian of them by nature; the marriage of her daughter belonged to her; consequently it is to be presumed that she married her daughter to the infant earl; at least, if she did not, she may purge herself by oath.

But it is material that the Lord C. B. Eyre, the guardian of the infant earl, has not, in his petition, made out any direct charge, or prayed anything against the Countess of Gainsborough; and, possibly, the Court may not be bound, *ex officio*, to punish for a ravishment of a ward where there is no complaint.

The Court has the care, but not the guardianship of infants; and the Lord C. B. Eyre is not a guardian appointed by the Court,¹ but by the will of the father, in which respect the Court is the less concerned.

[*657] *And though the stat. 12 Car. 2, c. 24, says, that a testamentary guardian may maintain an action of ravish-

¹ See *Goodall v. Harris*, 2 P. Wms. 562.

ment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that, in this case, forasmuch as the testamentary guardian has not complained of or prayed any redress against Lady Gainsborough, the Court will do nothing against her, but discharge the order of sequestration with respect to her.¹

And now we come to the petition of the infant Earl of Shaftsbury, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them, by bill, answer, and proofs.

Resp. In this case here are a bill and answer, and both the will and the devise of the guardianship are set out by the bill; whereupon the decree says, that the trust of the will shall be performed, one of which said trusts is the guardianship of the infant.

It is not material that the earl was defendant, for so it was in the case of *Mrs. Hannes*, who was married to Mr. Willis without the consent of the guardian; and this Court may upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard that the care of all infants is lodged in the king as pater patriæ, and by the king this care is delegated to his Court of Chancery.

In *F. N. B. 282*, the king is bound, of common right and by the laws, to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the king's protection; for which reason it is, that idiots and lunatics, who are incapable to take care of themselves are provided for by the king as pater patriæ; and there is the same reason to extend this care to infants.

This is the reason given in the writ de idiotâ inquirendo, *which the king issues out to take care of him who regimini sui ipsius et bonorum, et terrarum suarum minimè [*658] sufficit, which reason also appears in the writ de lunatico inquirendo; and in 4 Rep. 123, b. (*Beverky's case*), infants, as well as idiots, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.

In like manner, in the case of charity, the king pro bono publico, has an original right to superintend the care thereof, so that, abstracted from the statute of Eliz. relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities.

Also in the case of *Lord Falkland v. Bertie*,² the Lord Somers, in delivering his opinion, takes notice, that several things are under the care and superintendency of the king, as he is pater patriæ, and instances in all charities, idiots, lunatics, and infants.

¹ See *Mr. Herbert's case*, 3 P. Wms. 116.

² 2 Vern. 823.

Indeed, several Acts of Parliament have made alterations in some cases of this nature, which so far stand altered, and no further; but unless there be express words in an act of Parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one Act that has taken away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots, and lunatics. Since the statute which took away the Court of Wards, the jurisdiction of wardship¹ returns to the Court of Chancery: and it appears by the Register 21, b. 198, that a writ may issue out of this court to remove the guardian of an infant, and to put another guardian in his stead.

The law is particularly favourable to, and careful of an infant's interest; and though the infant himself cannot bring an account against the guardian, until his coming of age, yet a third person [*659] may bring a bill for an *account against the guardian, even during the minority of the infant.²

So in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age.

Lord Somers has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus, in the case of Lord Tenham and Barrett,³ there was no bill depending in this Court, but only a petition, desiring that Lady Tenham, the mother, being a Papist, might not have the guardianship of the infant, determined on petition against the mother: upon which an appeal was brought to the House of Lords,⁴ before whom it was never objected, nor once thought of, that this Court could not, on a petition only, determine the right of guardianship: and on the appeal the Lords also determined the right against the mother.

Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity: no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

But in the last place it is objected, that, upon the wording of this will the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying, and to the survivor of them: and that this is a joint personal confidence wherewith three are intrusted, wherefore, by the death of any one, the guardianship is determined; and to prove that a

¹ 2 Vern. 242.

² See *Pomfret v. Lord Windsor*, 2 Vcs. 484.

³ See 9 Mod. 40; 14 Vin. Ab., p. 172, note to Ca. 1; 2 Eq. Ca. Ab. 16 nom. *Reynolds v. Lady Tenham*.

⁴ *Lady Teynham v. Lennard*, 4 Bro. P. C. 302, Toml. edit.

guardianship is personal, it has been urged, that it is not assignable, nor will it go to executors or administrators.

Resp. I admit a guardianship is not assignable, neither will it go to executors or administrators; but for all that, it is coupled with an interest, and is not a naked authority. I admit, also, it has been said, that where a *naked authority is given to two, if one dies, the survivor cannot act; but the same [*660] book, viz., 1 Inst. 112, 113, says, that where an authority is coupled with an interest, it does survive. In the case of *Gardiner v. Sheldon*,¹ (Vaugh. 182^o), the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet the case of a guardianship devised to two is strictly like the case of an administration granted to two (especially where the debts amount to as much as the assets); for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship: it will not go to his executors or administrators, but to the surviving administrator;² such an administrator is accountable to the creditor for everything, as much as the guardian is to the infant; such an administrator can make no profit.

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in his own name, may make leases³ during the minority of the infant, and may grant copyholds⁴ even in reversion, as dominus pro tempore.

A guardianship is not properly an office, nor to be resembled (for instance) to the office of a parkership; for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land inclosed therein, and the owner of the land may determine such office by disparking the park or killing the deer; and whereas in Poph. 204, it is said, that where the Lord Grey committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 Phil. & Mar. cap. 8,⁵ which says, "that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his life-time, or by his will, or by any act in his life time has appointed the same, shall be subject to the pain of two *years' imprisonment, or to the payment of such fine as the Court shall appoint." So that, [*661] by that Act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee

¹ Quære, *Bedell v. Constable*.

² *Adams v. Buckland*, 2 Vern. 514; *Hudson v. Hudson*, Ca. t. Talb. 127.

³ 2 Roll. Abr. 41, pl. 4; but a lease by the testamentary guardian will be valid only during the minority of the ward: *Roe d. Parry v. Hodgson*, 2 Wils. 129; *Shaw v. Shaw*, Vern. & Scriv. 607.

⁴ 2 Roll. Abr. 41, pl. 3.

⁵ Repealed by 9 Geo. 4, c. 31.

had not the like interest as the guardian has: he had but a bare authority.

As to *Audilor Curle's case*,¹ that depended upon the statute of the 32 Hen. 8, cap. 46; but in the principal case, when the now infant earl was so very young as not to be above a year old, and the testator had appointed him three guardians, it was hardly probable that the testator himself could imagine that all those three guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians, would be to affirm, that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father, the less likelihood there would be that they all should live till the child arrive to twenty-one.

LORD COMMISSIONER GILBERT.—The late Earl of Shaftsbury, the plaintiff's father, by his will, dated December 10th, 1710 appoints Sir Robert Eyre, Sir John Croply, and Jasper Stanhope, Esq., afterwards Lord Stanhope, guardians of the present earl, till his age of twenty-one years. Sir Robert Eyre preferred his bill in this Court, and proved the will, and the Court ordered the same to be performed; Sir John Croply and Lord Stanhope died, and there happening a dispute between the Countess of Shaftsbury and my Lord Chief Baron Eyre concerning the guardianship, on the 28th of February, in the 9th of the King, the Court declared the right of guardianship to be in my Lord Chief Baron, and that nothing should be done in relation to the care and education of the said earl, without the direction of my Lord Chief Baron. My Lord Chief Baron, the 22nd of March last, preferred his petition to this Court, setting forth that the Earl of Shaftsbury was [*662] married to the Lady *Susannah Noel, daughter to the earl of Gainsborough, without his privity or consent; upon which, and the affidavits thereunto annexed, the Countess of Gainsborough and Lady Shaftsbury, as likewise the earl, were ordered to attend; and the Countess of Shaftsbury likewise preferred her petition to discharge the order of the 28th of February in the 9th of the King; and in this case there have been four questions made:—

1. Whether the Court has jurisdiction to declare the right of guardianship in this case?

2. Whether the Court could declare it by petition, or whether it must be by bill?

3. Whether this be a legal declaration of the right of guardianship; (that is), whether it will survive or not?

4. Whether these ladies, or either of them, are in contempt of the Court?

First, Whether the Court has jurisdiction?

Now, touching the wardship at law, there was a two-fold jurisdiction.

The first was, when the tenures were in being; and there, till the Court of Wards was erected, the whole jurisdiction of the king's wards, where the lands were held in chivalry, was under the jurisdiction of this Court.

So likewise, in relation to subjects, this Court determined touching the wardships of the body, who was the prior, and who was the posterior lord.

For the wardship of the body of the heir went to the lord who had the prior homage; and that was determined in the Court of Chancery, where several lords applied for the writ of ravishment, which was an original writ.

But this sort of guardianship was a sort of dominion of masters over servants and vassals, and was introduced among the Gothic nations, to breed them to arms; and it was a great burthen upon the people, and is fallen now with the tenures.

But the Crown has another jurisdiction, and that is as pater patriæ, as a father over his children.

The king has a right to take care of infants, lunatics, and idiots, that cannot take care of themselves; and this *care cannot be exercised otherwise then by appointing them [*663] proper curators or committees.

So Fleta, cap. 9, fol. 4, de Tutelis, speaking of infants, "Quidam sub custodia parentum et proximorum consanguineorum, et illis dantur custodes de jure gentium."

So Bracton, treating of this subject, lib. 2, cap. 38, fol. 86: "Nunc autem dicendum, &c., de illis qui minores sunt et infra ætatem, et quos oportet esse sub tutelâ et curâ aliorum, et quod se ipsos regere non norunt, et quorum quidam debent esse sub custodiâ dominorum cum terris et tenementis, quæ sunt de feodo, eorum, quidam sub custodiâ parentum, et proximorum consanguineorum ut prædictum est. Et quibus dantur custodes aliquando, de jure de antiquo feoffamento, et aliquando curatores ab homine."

Thus Staunford, in his Exposition of the King's Prerogative, p. 37: "The king is the protector of all his subjects, and of all their goods, lands, and tenements; and, therefore, of such as cannot govern themselves, nor order their lands and tenements, his grace (as a father) must take upon him to provide for them, that they themselves and their things may be preserved;" and he quotes Fitzherbert, 232, that the king is bound of right to defend his subjects, their goods and chattels, lands and tenements; and that every one is in the protection of the king who has not forfeited it by some offence. Now, how can the infants be protected by the Crown, but by assigning them proper guardians where it is disputable?

Lord Coke says, in *Beverley's case*,¹ that the king shall have the protection of their goods and chattels, as well as of their lands, and compares it to the use of an idiot.

¹ 4 Rep. 126.

Nobody has ever doubted the jurisdiction of this Court in the case of idiots and lunatics; and indeed I should have thought this point had been at peace as to the infants, when it was settled by Lord Somers, in the case of *Lord Fulkland v. Bertie*.¹

There are since innumerable precedents, wherein this Court [*664] has determined touching the guardianship of *infants, as in the case of *Freeman* and *The Bishop of Oxford*, the 5th of July, 1719, where the Bishop of Exeter, surviving guardian to the father's will, applies to the Court, and the infant is sent from Oxford to Cambridge.

And in *Vernon* and *Vernon's case*, 10 Geo. 1, several orders were made upon petition, and among the rest, one upon petition, that the infant was conversant with the daughter of the guardian, that he should be immediately sent for, and ordered forthwith to Eton School.

And in *Anesley* and *Anesley's case*² it was ordered to take the infant from the mother, and a sequestration against the Duke of Buckingham and the mother for not producing the infant.

Now, as the king has the protection of infants, I don't see any other protection can be than by assigning them their guardians; and where should that protection be exercised but in that Court where care is taken of all persons under natural disabilities?

The very notion of natural allegiance seems to be founded on this protection that is due from one born here, though he goes into a foreign country and lives under and takes oaths to another prince. And why? Because it is a debt of gratitude due for the protection which the infant receives at his first breathing vital air, since care is supposed to be taken of him, by appointing proper guardians to manage him and his affairs.

And I presume that the law that the next of kin, to whom the inheritance should not descend, should be guardian, was taken up originally as a rule of reason in this Court, and by usage came to be the law of the land; for I have looked into the books of the civil law, and all the foreign feudists, and their rule is, that he that has the right of succession has the guardianship; *ubi successioneis emolumentum ibi et tutelæ onus esse debet*. 28 Edw. 1, cap. 1, seems to be only an affirmance of the common law.

There are often disputes who are the next of kin, or who is the proper guardian. This must be determined somewhere; and [*665] where can it be determined but in *this Court, where all persons under disability are protected?

The second question is, whether the Court can declare the right of guardianship by petition, or whether it must be by bill?

'Tis said, that if the right of guardianship could be determined by petition it must be determined by affidavits, where the contrary party has not the liberty to cross-examine.

'Tis agreed, that in all cases where it is necessary for the crown immediately to interpose, it must be determined upon order; for

¹ 2 Vern. 833.

² Cited Ridg. 149; 8 Mod. 214.

otherwise, there can be no provision for the infant during the time of the dispute.

So there is a necessity in some cases, that it should be determined upon petition.

But in this case, who in fact are guardians, has been determined already in a cause instituted by bill and answer; and so there can be no dispute touching the fact; and so the right is properly determined upon petition.

The third question is, whether this be a legal declaration of the right of guardianship; that is to say, whether it will survive or not? And here it has been argued, that the guardianship is a naked authority, and so cannot survive.

But 'tis agreed, that if it be an authority coupled with an interest it will survive.

Indeed, in the civil law they looked upon it to be a naked authority; but yet, where there were several guardians, and one only gave security, it was executed by him alone. See Vinus, tit. 24, De Satisfactione Tutor et Curator.

But if it were an authority, it is not like an authority to do a single act where it must be done by them all, because it is the will of the party that authorizes them all, and so one alone can't execute it.

But in this case the authority must, from the nature of the thing, be joint and several; for one alone must receive the money of the infant, and not meet altogether for that purpose.

*And were it an authority, or were it not, it is to be construed joint and several; else the more guardians were [*6;6] appointed for the security of the infant, he would be the less secure, because upon the death of any one of them the guardianship would be at an end.

But no doubt, with us, it must be reckoned an interest.

For the law has appointed remedies, both droitural and possessory, to recover the guardianship

First, Droitural.—And that was the writ de custodiâ terræ et hæredis: and Fitzherbert has compared the droitural and possessory action, in the title De Custodiâ Terræ et Hæredis, fol. 133.

The Statute of Merton, c. 6, provideth, that, in the writ of right of ward, the plaintiff shall recover the value of the marriage.

Secondly, Possessory.—And that, at common law, was the action of trespass; and in this, at common law, he could only recover damages for his ward, and not the ward itself.

The Statute of Westminster, 2, c. 35, gives a writ of ravishment of ward, in which the plaintiff recovered the body of the heir, and not damages only.

And by the Equity of Westminster, 2, c. 24, a writ of ravishment lay for the guardian in socage, as a writ in consimili casu.

Everybody will allow the guardian in chivalry had an interest; and if the guardian in socage would have the writ in consimili casu, he must have an interest also.

And a man may as well have an interest of honour, which every person has in relation to his family, as an interest of profit.

And it appears, in 3 Co. 37 (*Ratcliffe's case*), that the father had an action of trespass for taking away his son and heir quare filium et hæredem rapuit, though he was not in propriety of speech counted the guardian; for the heir was looked upon as part of the family. But the father, however, had an interest in the son, and so it was trespass to take him away.

But the father had not a writ de custodia terræ et hæredis, [*367] *because the father was no guardian. Nor was there any need of a droitual action, because he was always in possession of his son; and so an action of trespass lies for the marrying his heir apparent, whether he be within age or of full age, because it is an injury to marry and destroy the hopes of his family by an improvident marriage: Fitz. Abr. tit. Garde, 32.

And this lies even against the lord, for the father had the custody against the lord; for the father, being tenant in chivalry, could breed his son to arms; but no collateral ancestor had the custody against the lord.

And, therefore, this makes the difference that is mentioned in *Ratcliffe's case*, that a collateral ancestor may have a writ of ravishment against any person that ravishes consanguineum et hæredem; (that is) his heir apparent, because that is an injury to himself.

But the action does not lie against the feudal lord, because he had a right to marry him.

And every man may be said to have an interest in his heir-apparent, because nothing imports him more than to continue his name in proper representatives.

But the father at common law could not appoint a guardian, because the law had appointed a guardian, whether the father was tenant in chivalry or in socage.

The first law that gave the father the power of appointing, was 4 & 5 Phil. & Mar. c. 8. The words of the statute are, "that nobody shall take away any maid or woman-child unmarried, being within the age of sixteen years, out or from the possession, custody, or governance, and against the will of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child, by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education, or governance of such maid or woman-child."

This gives an authority to appoint the custody of a female child for a special purpose. He that takes away the female child, and marries her or deflowers her, is an offender with that statute.

[*369] *So, this being a custody for a special purpose, it was properly enough construed to be a naked authority.

Therefore I take the case in Poph. 204, to be good law, that, when two persons are appointed guardians by authority of this statute, and one of them dies, it will not survive, because that

statute gives an authority to a special purpose, to make the ravisher criminal within that law.

But the 12 Car. 2, c. 13, gave the father a power, by deed executed in writing, or by act executed in his lifetime, or by his last will and testament, to appoint the custody and tuition of his child or children till the age of twenty-one years; and such disposition of the custody to be as good and effectual against all and every person claiming the custody of such child or children as guardians in socage or otherwise; and the persons to whom such custody shall be disposed, to have a writ of ravishment of ward or trespass.

This statute was formed by Sir Matthew Hale, and, when wardships were taken away, introduced the testamentary guardians; and this testamentary guardian, by the rules of the civil law, was to take place before all others.

But our testamentary guardian is not a naked authority, but is made after the model of a guardian in socage, and, by consequence, an interest passes to the guardian.

And the Act (Rights), given to the guardian in socage, are given by this law.

But 'tis said, that every interest is assignable, transferable, or devisable, and that the guardianship is not; and therefore it is a naked authority and not an interest.

Every interest of profit is assignable, because it is the nature of property, that the person who is the owner should have dominion over it, so as to assign or transfer it.

But the guardian in socage has no interest of profit: it is an interest of honour, and for the honour of the family committed to his next of kin, and therefore is inherent to the blood, and can't be assignable.

*Because a stranger could not have that interest to take care of the ward, nor have it at heart. [*669]

The guardian in socage was accountable to the infant when he came to the age of fourteen, and he could not transfer that account to another.

The testamentary guardian, as is said, is formed after the manner of guardian in socage, and comes instead of him, and is in loco parentis.

Therefore, though it be not assignable, nor transferable, yet it is such an interest as shall survive.

The fourth question is, whether the ladies, or either of them, are in contempt of the Court.

And it is very plainly sworn upon the Lady Shaftsbury, that she has seen him married and bedded.

The mother's being present in this case, is a plain evidence of assent.

And the mother can't marry her child without the consent of the testamentary guardian.

For the father, who had the power over his child by law, has placed it under the power of the testamentary guardian.

Therefore it is taken out of the power of the mother.

But it is objected, that this Lord Shaftsbury has married the Lady Su-annah Noel, a lady of birth, quality, and fortune, and therefore is married without disparagement, and that this will be no contempt of the Court.

When the ward is put under the protection of this Court by the testamentary guardian, it is a contempt of the Court to marry him without the consent of the guardian.

It is a breach of filial duty for children to marry without the consent of the parent.

The testamentary guardian is in loco parentis, and he having put the ward under the protection of the Court, it is then a contempt to marry him without the guardian's consent, and the contempt being in marrying him without the consent of the [670] guardian, an improvident marriage *is only an aggravation of the offence, if that had been the case.

There is nothing in the objection, that the mother has the natural power over her son, and that *jura sanguinis nulla lege civili possunt dirimi*.

For the father, whilst living, was the head of the family: he had power over his child, and he might dispose of him by law. And it is the duty even of the mother to pay that respect to the memory of her deceased husband, as not to marry her son without the consent of the guardian appointed by the father.

And when the child is by the guardian put under the protection of this Court, it will be a contempt even of the mother to marry him without the consent of the guardian.

As to the Lady Gainsborough, this contempt is not sworn upon her.

For an order for sequestration in the case of a peer, or a commitment in the case of a common person, is a judicial act of the Court, and therefore must be founded on a proper affidavit, as I apprehend.

The order is the judgment of the Court, the sequestration or commitment is but the execution of it.

And therefore the judgment is to be founded upon truth, and not upon conjecture only.

For if she be examined upon subsequent interrogatories, this will not make good the determination of the Court by a matter *ex post facto*.

Wherefore he agreed with Lord Jekyll in toto, as did also Lord Commissioner Raymond.¹

No part of the jurisdiction of equity is more important or beneficial than that which is exercised over infants, whether it be in guiding or controlling the acts of their guardians or of themselves, limiting and, when necessary, even abrogating entirely the natural and legal rights

¹ See 2 P. Wms. 125.

and authority of a father. The principal case is often referred to, on account of the important investigation which this branch of the law then received by the distinguished Judges who decided it.

Passing over the different species of guardianships, discussed with so much learning in the principal *case, some of which have been [*671] either abolished by statute, have fallen into disuse, or have become of little practical importance, such as guardianship in chivalry, guardianship in socage, guardianship by custom, guardianship by the appointment of the spiritual Courts, guardianship by election, and guardianship under stat. 4 & 5 Phil. & Mar. c. 8 (as to which the reader is referred to the notes of Mr. Hargrave, Co. Litt. 88, b.), it may be laid down as indisputable that the father is by nature and nurture the guardian of his children during their infancy (*Ex parte Hopkins*, 3 P. Wms. 152, 154; *Stileman v. Ashdown*, 2 Atk. 480; *Wellesley v. Duke of Beaufort*, 2 Russ. 21).

A father, not only when living at home, but when residing abroad has a right to direct the custody of his children in this country (*Re Emily Suttor*, 2 Fost. & Fin. 267; but when it appeared that a father had, under some misapprehension, directed his child to be in the custody of a person, not a relative, a Court of law refused an habeas corpus, to remove the child from the care of her near relatives, pending an application to the father for directions. *Ib.*

The law of this country gives to the father the custody of the children and the control over them, not for his own gratification, but on account of his duties with reference to the public welfare, it has therefore been held that contracts by a father to give up to his wife the custody and education of their children, are contrary to public policy, and will not be enforced in equity against the husband, even although the husband may have been guilty of adultery and cruelty to his wife: *Hope v. Hope*, 8 De G. Mac. & G. 731; *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & Jo. 249; unless he has been guilty of such gross misconduct as to unfit him to have custody and control of his children, as for instance, where he has criminally assaulted a daughter: *Swift v. Swift*, 34 Beav. 266.

In the recent case of *Hamilton v. Hector*, 6 L. R. Ch. App. 701, a wife intended to proceed in the Divorce Court for a separation and had filed a bill against her husband to set aside a certain appointment. By a deed of compromise, it was (amongst other things) agreed that proceedings should be stayed; that the two elder children, subject to such powers as were conferred upon the trustees, should remain at such schools as the husband, with the consent of the wife, should from time to time direct; that the holidays should be passed by them at such places as the trustees, having regard to the wishes of the husband and wife, should direct; and, further, that it should be lawful for the trustees, if necessary for the welfare of the two elder children, to remove

[*672] them from the custody or control of the *husband, or from the school at which they might be. The two children were at schools chosen by the husband. A dispute, however, having arisen as to where the two children were to pass their midsummer holidays, the trustees directed the first four weeks to be passed with the wife and the rest with the husband. Upon a bill being filed by the wife, asking that the husband might be restrained from preventing the two children from passing the first four weeks of the holidays with the wife, it was held by Lord Romilly, M. R. (and it seems difficult to come to any other conclusion, having regard to *Vansittart v. Vansittart*, 2 De G. & Jo. 249), that the agreement was against the policy of the law, as being a renunciation by the father of his parental duties, and made no order. Lord Hatherly, L. C., however, reversed the decision of the Master of the Rolls, upon the ground that "under the deed, at least so far as it had been acted upon, the father retained the sole control, except during the holidays,"—and that the agreement he had entered into, being reasonable, might be enforced.

But it seems that if a deed were actually executed by the father, it would not be rendered absolutely void, by reason of its containing provisions by which he abandoned his right to the custody of his children (*Vansittart v. Vansittart*, 2 De G. & Jo. 249; *Walrond v. Walrond*, 1 Johns. 18); and a trustee will be appointed under such a deed by the Court (*Re Matthews*, 26 Beav. 463; and see *Swift v. Swift*, 34 Beav. 266; *S. C.*, Ib. (L. J.) 731; and a legal and proper covenant therein will be enforced: *Hamilton v. Hector*, 13 L. R. Eq. 511.

And it seems in accordance with the observation of Lord Commissioner Jekyll, in the principal case, that, after the death of the father, without appointing a testamentary guardian, the mother is also their guardian by nature and nurture: *Villareal v. Mellish*, 2 Swanst. 533; *Mellish v. De Costa*, 2 Atk. 14; *Roach v. Garvan*, 1 Ves. 158; *Mendes v. Mendes*, 3 Atk. 624; 1 Ves. 91; *In re Race*, 26 L. J. N. S. (Q. B.) 169; *S. C.*, nom. *The Queen v. Clarke*, *Re Alicia Race*, 7 Ell. & Bl. 186.

Testamentary Guardian.—An important power was, by 12 Car. 2, c. 24, conferred upon the father, of appointing, even although he be a minor, by deed or will, guardians for his legitimate children; these are usually termed testamentary guardians.

By the late Statute of Wills (1 Vict. c. 26), the power of making a will is taken from minors, who can, therefore, it seems, now only appoint guardians for their children by deed.

The power of appointing a testamentary guardian for children [*673] *does not extend to illegitimate children: *Sleeman v. Wilson*, 13 L. R. Eq. 36.

Where a will contains simply an appointment of a guardian, but no disposition of personal property, or an appointment of an executor, it

is not entitled to probate: *Lady Chester's case*, 1 Ventris, 207; 3 Keb. 30: *In the goods of Francis Morton*, 12 W. R. (Prob.) 320.

No power was given to the mother of appointing a testamentary guardian, and the appointment of one by her husband supersedes her guardianship by nature and nurture. She may, however, be appointed a testamentary guardian.

But although a mother has no legal power by will to appoint a guardian for her children, yet the Court will have regard, in the appointment of a guardian, to the expression of her wishes, especially when there has been a similiar indication of the father's wishes: *Re Kaye*, 1 L. R. Ch. App. 387.

A testamentary guardian will not be disabled from exercising the office from having been a witness to the execution of the deed by which he was appointed: *Morgan v. Hatchell*, 19 Beav. 86.

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children, and a grant made to the latter will be revoked, and a fresh grant made to the testamentary guardian: *In the goods of Louisa Morris*, 2 Sw. & Tr. 360.

The office of testamentary guardian, as decided in the principal case, where there are more than one, goes to the survivor; and although, as it also appears there, it does not determine on the marriage of a male, it does on the marriage of a female ward: *Mendes v. Mendes*, 1 Ves. 91.

The religious tenets of the persons appointing, or of the persons appointed, testamentary guardians will not be any obstacle to the validity of the appointment. Thus, an appointment by a Jew (*Villareal v. Mellish*, 3 Swanst. 538), or of a Roman Catholic (*Talbot v. Earl of Shrewsbury*, 4 My. & Cr. 672), or of a Dissenter (*Corbett v. Tottenham*, 1 Ball & B. 59), will be valid.

As to what amounts to an appointment, since express words are not necessary, see *Mendes v. Mendes*, 1 Ves. 89; 3 Atk. 619; *Selby v. Selby*, 2 Eq. Ca. Ab. 488, pl. 22; *In re Park*, 14 Sm. 89; *Miller v. Harris*, 14 Sm. 540.

A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward: *Mathew v. Brise*, 14 Beav. 341. But they may lose all right to make any claim against him or his estate by acquiescence: *Sleeman v. Wilson*, 13 L. R. Eq. 36.

In a petition under the Settled Estates Act, (19 & 20 Vict. c. 120), for *a sale of property to which an infant is interested in remainder, the consent of the testamentary guardian of the infant [*674] is not sufficient, and a guardian must be appointed for the purpose of consenting on behalf of the infant. *In re R. James, Deceased*, 5 L. R. Eq. 334.

Scotch testamentary tutors are not testamentary guardians, according to 12 Car. 2, c. 24: *Johnstone v. Beattie*, 10 C. & F. 42; *Scott v. Bentley*, 1 K. & J. 281, 284; *Stuart v. The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

In cases relating to the care of infants, the benefit of the infant being the foundation of the jurisdiction and the test of its proper exercise, there ought on this subject to be a perfect reciprocity of action between the Courts of England and Scotland, although as to judicial jurisdiction the two countries are to each other independent foreign countries: *Stuart v. The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

Guardian appointed by a Stranger.—Although a mere stranger has no legal right to appoint guardians for an infant during the life of his father (see *Ex parte Hopkins*, 3 P. Wms. 152; *Powel v. Cleaver*, 2 Bro. C. C. 510), nevertheless, a father may act in such a manner as to render an appointment by a stranger effectual. Thus, where a person confers a benefit upon the father, or upon the children, for their maintenance or otherwise, upon condition that the father gives up the guardianship of them, if he accepts the benefit himself, or commits the care of his children to the guardian nominated by the stranger, he will not afterwards be allowed to *prejudice their interests* by asserting his legal rights, either by interfering with their education or enforcing the delivery up to him of their persons. Thus, in *Colston v. Morris*, Jac. 257, n., the testator left a sum of money to the infant, and gave and committed, so far as it was in his power so to do, the guardianship, custody, care, tuition, management, and education of the infant to the trustees; and he gave a legacy to the father, on condition of his not interfering with the management and direction of the trustees respecting the education of the infant. The cause having been heard by Sir J. Leach, V. C., it was declared by the decree, that, on the father undertaking to give up and abandon all interference with the management and direction of the trustees in the education and management of the infant, such undertaking to be given in the manner and form approved by the Master, he should be entitled to the benefits given to him by the will; but in case he should refuse to give such undertaking, then it was declared that he was not entitled to them; and it was declared, *that, in the event of his giving such undertaking, the [*675] trustees were entitled to the guardianship, custody, or tuition and management of the infant during her minority; and in that case the Master was to approve of a proper scheme for the education and bringing up of the infant, according to the meaning and intent of the testator, as expressed in his will, regard being had to her rank and expectations in life: Reg. Lib. A. 1818, fol. 1444. The father entered into a recognisance not to interfere in the education of the infant as directed by the decree, and the decree made on further directions or-

dered the costs of so much of the suit as related to his recognisance to be paid out of his legacy: Reg. Lib. A. 1820, fol. 889.

So in *Potts v. Norton*, 2 P. Wms. 109, n., at the Rolls, 24th April, 1792, the testator by his will left considerable legacies to the infant children of his brother, and also an annuity to the brother himself, making it his particular request to his brother, that he would commit the education of the children to his the testator's executors, and revoking the gift of the said annuity in case the brother should refuse to comply. Several of the children were taken from the brother by the executors, *without any objection being made, and were placed by the executors at different schools, and the brother received his annuity.* Upon an application to the Court for maintenance for the infants, it was ordered, that the Master should inquire whether the brother was willing to commit the education of the children to the executors; and in that case the Master was to inquire what was proper to be allowed for their maintenance. The Master reported that the brother had appeared before him, and consented thereto; and this report was afterwards confirmed, and certain sums allowed for their maintenance. The brother having afterwards taken away two of the children from the schools where they had been placed, the executors, by petition, prayed that he might be ordered to replace them. The brother appeared to the petition, and insisted that he had never given his consent that the care of his children should be taken from him; and it was strongly insisted on his behalf, that the Court had no jurisdiction to take a child from his parent without the parent's consent. But his Honor said he would not go into this question while the Master's report of the brother's consent remained in force; the brother must make such application as he should think fit, to take off the effect of that proceeding; but for the present his Honor ordered the brother to replace the children.

So, in *Blake v. Blake*, Amb. 306, Lord Hardwicke says, "The grandfather had no power to appoint *guardians of his grandson, [*676] it being a right vested in the father; but any one can give his estate on what conditions he pleases; and the father has in this case submitted to the will. There are instances where a grandfather has given his estate to his grandchild, and appointed guardians of his estate and person; and if the father did not submit to the will, the Court has made the father's opposition work a forfeiture of his son's estate. But if there is any gift to the father in the will, and he submits to it, the Court directs and appoints a guardian on his submission. In the present case, the Court has interposed after the father had waived his parental right; therefore, here is no ground to alter what was done with the consent of all parties."

In *Powell v. Cleaver*, 2 Bro. C. C. 499, J. P. by will gave considerable benefits to his sister, her husband, and their infant children, upon the express condition that his executor should have the care, guardianship,

tuition, and management of the persons of the infants during their minority. The father, during the testator's life, permitted the children to be brought up by and at his expense, and after his decease he took the benefits conferred upon him by the will, acquiesced in the arrangement of the guardianship, and not only yielded the management of his sons to the executors, but called for and received the maintenance provided for them. Afterwards, the father preferring another person to the gentleman appointed by the executors, for superintending the education of his eldest son, resumed his right of guardianship over him. But Lord Thurlow said, that the Court would take care that the child should be properly educated for his expectations, and that it must be laid before the Court how the son was disposed of.

Lord Eldon, with reference to this case, has observed, "that it was contended that the bounty given to the father had put him to his election, and he could not, after receiving the legacy, withhold compliance with the condition for the education of his children; but that argument could not sustain the jurisdiction. The father, not knowing that he was making the election, was at full liberty to pay back the money. But Lord Thurlow's opinion went upon this, that the law imposed a duty upon parents, and, in general, gives them credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred in which the father was unable or unwilling to execute that duty, and, further, was actively proceeding against it, of necessity the state must place somewhere a superintending power over those who cannot take care of themselves, and [*677] have not the benefit of that care which is presumed to be generally effectual. In those cases there was a struggle between the feelings of the father and a due attention to the interests of the child, upon the condition that his education should be conducted in the manner prescribed, which was the course of maintenance and education the best calculated to promote his happiness in the state in which that fortune would place him. But Lord Thurlow took upon him the jurisdiction, on this ground, that he would not suffer the feelings of the parent to have effect against that duty which, upon a tender, just, and legitimate deliberation, the parent owed to the true interests of the child; and his Lordship separated the person of the child from the father; always taking care that the separation shall not have a greater effect than the case requires, and that the intercourse shall be as frequent and full as the case requiring the separation will permit:" 10 Ves. 63.

In *Lyons v. Blenkin*, Jac. 245, a grandmother by will made a provision for her grand-daughters, by a devise of real estate, and a gift of pecuniary legacies, the management of which, during the minority of her grand-daughters, she committed to their aunt M. B., with a discretionary power to apply the issues and proceeds towards their maintenance and education; and she appointed her daughter M. B. executrix,

and also guardian of her said grandchildren. During the testatrix's lifetime, the infants were committed to the care of the testatrix by their father, and the expenses of their education were defrayed by her. After her death they continued to reside in the same manner, under the care of their aunt M. B., who, three years afterwards, married. The infants were of the respective ages of nineteen, fourteen, and twelve, and had been educated by their aunt in the Baptist persuasion, which she and her husband professed. The father, it appears, was a Unitarian minister, having formerly been a Baptist, and had, upon the death of the infants' mother, married again, and his income, independent of that arising from his wife's property, appears to have been very limited. About this time, some difference having arisen between the father and M. B., he required that his daughters should be delivered up to him, and called for an account of their fortunes, and in November, 1819, filed a bill in their names, as their next friend, against M. B. and her husband, praying the accounts, and insisting that his daughters ought to be placed under his care, and that, not being of ability to maintain them, a proper sum should be allowed to him for that purpose. Lord Eldon having declined to decide the question upon habeas corpus *a petition was presented by the father, praying that the infants might be restored to him. Lord Eldon, however, refused the [*678] application. "It is always," observed his Lordship, "a delicate thing for the Court to interfere against the parental authority; yet we know that the Court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit. In the case of *Powel v. Cleaver*, the principles on which the Court proceeds were fully discussed. In a case of this kind this Court would not feel itself at liberty to deliver back the infants to the custody of their father, and for the reasons I shall notice. It has been stated that he is a dissenting minister. I mention that again, guarding myself against its being supposed that his bearing that character furnished the least ground why he should not have the care of his children; but it furnishes this observation, that his situation in life leaves him without the means of so educating them as they ought to be educated, regard being had to their fortune and estate. The father objected to the aunt, because she married; she objected to delivering over the children to their father, because their mother died, and the father had taken another wife; but the circumstance that decides me about not removing the children is this, that, although the testatrix could not impose the terms of appointing a guardian where the father was living, yet the father, by his consent, might enable the guardian to act; and by his consent, it appears that he has enabled the guardian to act, and, by such consent, these children have, with very little interruption, continued under the care and guardianship of the aunt. All their habits have been acquired under the roof of their aunt—all their connections have been formed

under their aunt; and it appears to me that the father has so far given his consent to this course of education, as to preclude him from saying that he shall now be permitted to break in and introduce a new system of education, which cannot be consistent with the system to which they have been habituated, and where so much depends upon the quantum of supply for the purpose which the discretion of this lady may lead her to apply, if the testatrix has left her the discretion of regulating the means for their education.

"It, therefore, does appear to me that the testatrix, by the benefits she has given these children out of her property, has purchased the power of educating them in the way and under the control and guardianship which she has pointed out and the parent has consented to; and I cannot help thinking that, unless this gentleman can bring before the Court some complaint on the ground of improper conduct, he must be [*679] *taken to have given his consent to the course of education which has been pursued."

In *Fagnani v. Selwyn*, Jac. 268, n., a settlement was made on an infant (whose father was dead and whose mother resided abroad), on condition of her being under the care of the settlor, who had for some years maintained and educated her at his own expense only. It was referred to the Master to consider whether he should be appointed guardian, taking the settlement into consideration.

The class of cases which have just been considered may at first sight seem to be contradictory to the principle laid down in other cases, that it is contrary to public policy that a father should transfer his parental duties, as to the custody and education of his children, to another (see ante, p. 671), but that principle seems to have been laid down and acted upon in cases where the Court was called upon to enforce against the father an executory contract entered into by him with his wife to give up to her the custody and control of his children; but the other class of cases depend upon another principle, viz., that when a father has not merely entered into an executory contract with reference to the transfer to another of the custody and education of his children, but he has actually given them up to another, or accepts benefits on the faith that they will be given up, the Court will not allow the father to assert his legal rights over his children to their prejudice.

But the Court will not deprive a father of the custody of his children merely because a person makes an offer to *maintain them*, even although it might be for the benefit of the children that such offer should be acceded to. Thus, in a case heard in private before Lord Eldon, in August, 1821, the mother of the infants who was possessed of a considerable property, settled to her separate use, was living separate from her husband, whose income was small. A petition was presented by the mother, in the name of herself and the infants, praying that they might be placed with her, or that it might be referred to the Master to

approve of a plan for their education, and to appoint a proper person to have the care of them, the mother offering to provide for their maintenance out of her separate income. It was urged as one of the grounds in support of the petition, that the father's income was not sufficient to enable him to give the infants an education suitable to their situation in life, and to their expectations, and that it would therefore be for their benefit that their mother's proposal should be acceded to. On this part of the case the Lord Chancellor said, "that there were cases where, without any provision antecedently made, the Court would remove a child from the parent; . . . but wherever the *Court had interfered against the father, upon pecuniary considerations, they had been solid considerations,—not merely expect- [*680] tations. In all the cases which his Lordship remembered, there had been some immediate irrevocable provision, by which the child could be brought up in a manner suitable to its future prospects. The Court had there said, that it would not permit the father wantonly and capriciously to deprive the child of that benefit: as in *Powel v. Cleaver*, where benefits were given to a child on condition that he should be educated in a particular manner, the father was not allowed to defeat the gift. So in the case of the young lady whom Mr. George Selwyn had provided for But the Court could not interfere upon a mere offer;" Jac. 264, and see *Hill v. Gomme*, 1 Beav. 540; Cr. & Ph. 250; *In re Fynn*, 2 De G. & Sm. 451; *Clavering v. Ellison*, 3 Drew. 451; 3 Jur. N. S. 277; 26 L. J., N. S. (Ch.) 335.

Ward of the Court—Guardian by Appointment of the Court.—The jurisdiction of the Lord Chancellor to appoint guardians for infants is undoubted, although Mr. Hargrave, in a learned note, attempted to show that it was not, as far as yet appears, of ancient date; and that, though unquestionable, yet it seems at first to have been a usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. See Co. Litt. 88, b, n. 16.

This opinion of Mr. Hargrave is controverted in a very able note of Mr. Fonblanque, who comes to the conclusion, "that the superintendence and protective jurisdiction of the Court in the case of infants, is a delegation of the duty of the Crown; that its general jurisdiction was not even suspended by the statutes of Henry 8, erecting the Courts of Wards and Liveries. That the case of idiots and lunatics is distinguishable; the jurisdiction exercised in Chancery as to the first, being the grant of an interest, and in the latter, the delegation of a power conferred by Parliament;" 2 Fonb. 232. Lord Eldon, in *De Manneville v. Manneville*, 10 Ves. 63, has observed, "that Mr. Fonblanque has stated the principle very correctly; for in *Buller v. Freeman* (Amb. 301), Lord Hardwicke, professing not to go upon guardianship, and disclaiming wardship, puts it upon this: that the Court represents the King as *parens patriæ*." And see *Powel v. Cleaver*, 2 Bro. C. C.

499; *Wellesley v. Duke of Beaufort*, 2 Russ. 21; 2 Bligh. N. S. 124.

The Court of Chancery has jurisdiction over the custody of the children of English subjects, though such children were born and are resident abroad; *Hope v. Hope*, 4 De G. Mac. & G. 328; *S. C.*, 19 Beav. 237; *S. C.* 8 De G. Mac. & G. 731.

[*681] *If a bill be filed *relative to an infant's estate or person*, the Court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of a testamentary guardian, immediately becomes a ward of the Court: *Butler v. Freeman*, Amb. 303; *Hughes v. Science*, 2 Eq. Ca. Ab. 756, pl. 14, Macphers. App. 1.

An order in Chancery on petition, constituting a guardian of an infant, makes that infant a ward of Court: *Stuart v. The Marquis of Bute*, 9 Ho. Lo. Ca. 440; *S. C.*, *Marquis of Bute v. Stuart*, 2 Giff. 582.

Where money belonging absolutely to a young lady under age was paid into Court under the Trustee Relief Act, and an order upon a petition under that Act for payment of part of the dividends to her testamentary guardian for her maintenance, was made upon an application at Chambers, it was held by Sir W. Page Wood, V. C., that the infant was thereby made a ward of Court. *In re Hodge's Settlement*, 3 K. & J. 213, and see *Darcy v. Maddock*, 4 Ir. Ch. Rep. 40, *In re Lloyd's Trusts*, 2 I. R. Eq. 507.

And an order in Chambers for the maintenance of an infant out of the income of a legacy, upon a summons taken out in her name by her guardian has been held, without suit, to constitute the infant a ward of the Court: *In re Graham*, 10 L. R. Eq. 530.

The payment, however, into Court under the 32d section of the Legacy Duty Act of a legacy bequeathed to an infant. (*Re Hillary*, 2 Drew. & Sm. 461), or of purchase-money belonging to an infant under the Lands Clauses Act (*Ex parte Brewer*, 2 Dr. & Sm. 552), will not constitute such infant a ward of Court.

The Court must have some property of the infant's, in order to exercise its jurisdiction. "It is not, however," as observed by Lord Eldon, "from any want of jurisdiction that it does not act (where it has no property of an infant's), but from a want of the means to exercise its jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant:" *Wellesley v. The Duke of Beaufort*, 2 Russ. 21.

But the Court can upon petition, although an infant has no property, appoint a guardian under the Marriage Act (4 Geo. 4, c. 76, s. 17), to give consent to a marriage (*In re Woolscombe*, 1 Madd. 213; *In re Spencer*, 2 Ph. 247); but where the petition is not for such purpose,

and an infant has no estate real or personal, no guardian will be appointed, as the Court has no object of which it *can take notice [*682] (*Ex parte Becher*, 1 Bro. C. C. 556). Where, therefore, for any cause it is desirable to make an infant a ward of the Court it is the common practice to settle some money or other property upon him. See further, as to the practice under this Act, 2 Dan. Ch. Pr. 1208, 5th ed.

The Court, although no suit be pending, will appoint a guardian, upon the petition either of the infant himself, or of some other person in his behalf, without a bill having been filed (*De Costa or Villareal v. Mellish*, 2 Atk. 14; 2 Swanst. 533; West's Rep. 299; *Ex parte Ricarda*, 3 Atk. 518; *Ex parte Birchell*, 3 Atk. 813; *Ex parte Salter*, 2 Dick. 769; 3 Bro. C. C. 500; *Ex parte Mounfort*, 15 Ves. 445; *Ex parte Wheeler*, 16 Ves. 266; *Ex parte Myerscough*, 1 J. & W. 151; *Ex parte Angell*, 13 Sim. 258; *In re Christie*, 9 Sim. 258); even where a testamentary guardian has been appointed, if he declines to act (*Ex parte Champney*, 1 Dick. 350; *O'Keeffe v. Casey*, 1 S. & L. 106); and, as was done in the principal case, where there are conflicting claims for the guardianship, they may be settled upon petition (see *Teynham v. Lennard*, 4 Bro. P. C. 302, Toml. edit.; *Ex parte Jordan*, 1 Dick. 294; *Ex parte the Earl of Ilchester*, 7 Ves. 348); and where there is no suit relative to the infant's property, a guardian will be appointed for the person and estate of the infant, and he does not thereby become a ward of the Court; where a suit is pending, a guardian for the person only will be appointed, as the Court will manage the estate, and, as before observed, the infant then becomes a ward of the Court.

Although a father has no right, under 12 Car. 2. c. 24, to nominate guardians for his natural children, the Court will generally appoint those whom he has selected (*Peckham v. Peckham*, 2 Cox, 46; *Ward v. St. Paul*, 2 Bro. C. C. 583); and will not allow the mother to remove them from their residence with their guardians, although she will be allowed reasonable access to them: *Ord v. Blackett*, 9 Mod. 116.

In nearly all cases formerly there was a reference to approve of a proper person or persons to be appointed guardian or guardians: Seton on Decrees, 277, 1st edit. Where, however, the property of the infant was very small, the Court would at once appoint a guardian without a reference: see *In re Jones*, 1 Russ. 478, where the infant's property consisted of a pension of 15*l.* during minority; *Ex parte Jackson*, 6 Sim. 212, where the infant was entitled to freehold property of the value of 80*l.* a year. The report of the Master could not be excepted to, as it would be confirmed or varied by the Court on petition, as it seemed fit: *Price v. Shaw*, 2 Dick. 732; *Ex parte Nicholls*, 1 Bro. C. C. 877.

Under the new practice of the Court, where a suit has been insti-

[*683] tuted, guardians are appointed *at Chambers: Smith's Ch. Prac. 965, 7th ed.; 2 Dan. Ch. Pr. 1196, 5th ed. And a guardian may be now appointed without suit, by a summons in Chambers: Ib. 966.

And by 3 & 4 Vict. c. 90, the Court is intrusted with certain powers for the care and education of infants convicted of felony.

Formerly, although the Court would appoint a guardian of the *estate and person* of an infant, it would not appoint a receiver of the rents and profits of his property unless a bill were filed. See *Ex parte Mountfort*, 15 Ves. 445, in which case Lord Eldon said, that a very serious question would arise, whether, if a receiver appointed by petition should embezzle the rents, he should have jurisdiction to commit him to the Fleet. It was not, however, necessary for the bill to pray for a receiver: 2 Madd. Ch. Pr. 290; but see 2 Seton on Decrees, 705, 3rd ed., and cases there cited.

This rule, however, has been frequently relaxed in modern practice, and receivers as well as guardians have been appointed on summons without suit. The more usual course, however, is to appoint a guardian of the person and estate without a receiver: 2 Dan. Ch. Pract. 1196, 5th ed.

The Court will appoint a guardian, notwithstanding the infant, being fourteen years of age, and entitled to real estate, has by deed appointed a guardian for himself: *Curtis v. Rippon*, 4 Madd. 462; *Coham v. Coham*, 13 Sim. 639.

A guardian to an infant defendant of unsound mind, not so found by inquisition, should be appointed by the Court of Chancery, and not under the jurisdiction in lunacy (*Pidcock v. Boulbee*, 2 De G. Mac. & G. 898); indeed it seems to be doubtful whether there is any process in lunacy by which a legal guardian can be appointed: *In re Brown*, 1 Mac. & G. 201.

Where two or more guardians are appointed by the Court, the office, upon the death of one of them, does not, as in the case of the testamentary guardianship, survive, but there must be a new appointment (*Bradshaw v. Bradshaw*, 1 Russ. 528); the survivors, however, will be appointed without a reference (*Hall v. Jones*, 2 Sim. 41).

The Court will not ordinarily appoint a married woman to be sole guardian: *Re Kaye*, 1 L. R. Ch. App. 387.

And where a female, appointed by the Court a guardian, even if she be the mother of the infant, marries, it is of course to make a reference to appoint a guardian; but she may be reappointed: *Anon.*, 8 Sim. 346; *In re Gornall*, 1 Beav. 347.

Jurisdiction exercised by the Court over Guardians of different Kinds.]

[*684] —*Over Father.*—So great is the power with which the Court *is intrusted, that, even during the life of the father, it will, when necessary, interfere between him and his children. One instance, viz., upon

the appointment of a guardian by a stranger, has been already considered. This jurisdiction was, in the well-known case of *Wellesley v. Duke of Beaufort*, 2 Russ. 1, treated by Lord Eldon as not admitting of a doubt. "I apprehend," said his Lordship, "that, notwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found to be absolutely necessary that such a jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the Judge, that he is to look most strictly into the merits of every case of this kind, and with the utmost anxiety to be right. It has been questioned, whether this jurisdiction was given to this Court upon the destruction of the Court of Wards (which, however, it is impossible to say could have been the case when we recollect the nature of the jurisdiction), or whether it is to be referred to circumstances and principles of a different nature, more especially, whether it belongs to the king as *parens patriæ*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them. With respect to the doctrine, that this authority belongs to the king as *parens patriæ*, exercising a jurisdiction by this Court, it has been observed at the bar, that the Court has not exercised that jurisdiction, unless where there was property belonging to the infant to be taken care of in this Court. Now, whether that be an accurate view of the law or not; whether it is founded on what Lord Hardwicke says in the case of *Butler v. Freeman* (Amb. 303), 'that there must be a suit depending relative to the infant or his estate' (applying, however, the latter words rather to what the Court is to do with respect to the maintenance of infants), or whether it arises out of a necessity of another kind, namely, that the Court must have property in order to exercise this jurisdiction; that is a question to which, perhaps, sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this Court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically *only where it has the means of doing so; that is to say, by its having the means of applying property for the use and main- [*685] tenance of the infants.

"That such has been the doctrine of this Court for a long series of years, no one can deny. The law makes the father the guardian of his children by nature and by nurture. An Act of Parliament has given the father the power of appointing a testamentary guardian for them. One should think that the guardian so appointed must have all the au-

thority that Parliament could give him, and his authority is, perhaps, as strong as any authority that any law could give. But it is above a century ago since, in the case of *The Duke of Beaufort v. Berty* (1 P. Wms. 703), the Lord Chancellor of that day (Lord Macclesfield) determined that the statute guardian was subject to all the jurisdiction of this Court. The Lord Chancellor, in effect, said, 'I will not place the statute guardian in a situation more free from the jurisdiction of this Court, than the father is in.' So that he applied the acknowledged jurisdiction over the father, as a justification for interfering with the testamentary guardian. The former jurisdiction he stated as the acknowledged law of the Court; and he went further, for he added, 'that, if he had a reasonable ground to believe that the children would not be properly treated, he would interfere, upon the principle, that, *preventing justice was preferable to punishing justice.*'"

In accordance with these principles, where *the father is insolvent*, his character is bad, or he has deserted his children, or is endangering their property, and neglecting their education, the custody of the children will be committed to a person *to act as guardian* (for a guardian cannot be appointed during the father's life; and a receiver will, it appears, be appointed in some cases, where there is no opposition, without a suit. See *Kiffin v. Kiffin*, cited 1 P. Wms. 705; *Ex parte Mountford*, 15 Ves. 445; *Wilcox v. Drake*, 2 Dick. 631; *S. C.*, Jac. 250, n.; *Re England*, 1 Russ. My. 499.

In *Creuze v. Hunter*, 2 Cox, 242, a petition was presented, stating the entangled state of Mr. Hunter's property, and that he was an outlaw, and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to maintenance by the will of his grandfather; and prayed that Mr. Hunter might be restrained from taking his son abroad, or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband. Affidavits were filed on both sides, imputing very improper conduct to both father and mother. Upon [*686] *the petition first coming on, Lord Thurlow, C., threw out, that he would not allow the colour of parental authority to work the ruin of the child; and afterwards ordered that the father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose.

The jurisdiction of the Court being questioned by the counsel for Mr. Hunter, the Lord Chancellor observed, that he knew there was such a notion, but he was of opinion that the Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child; and that, whenever a case was brought before him, he would act upon this opinion: if the House of Lords thought differently, they might control his judgment; but he certainly

would not allow the child to be sacrificed to the views of the father, See *S. C.*, 2 Bro. C. C. 500, n., Belt's edit.; Jac. 250, n.; *Ex parte Warner*, 4 Bro. C. C. 101; *Skinner v. Warner*, 2 Dick. 779; and in *Allen v. Coster*, 1 Beav. 202, where the father and mother were guilty of misconduct, of the worst kind, the guardianship of the infants was committed to other persons, but a liberal allowance was made to them in order to support their parents.

Where the character of the father is good, although he may be poor or insolvent, his children will not be taken from him; *Kilpatrick v. Kilpatrick*, Macphers. 143; *In re Curtis*, 28 L. J. (Ch.) 458.

And even where a man was not able to maintain his children, and his character was such that the Court would not have appointed him a guardian, the Court would not interfere by the appointment of a guardian, where the grandmother, not having any property to settle, only offered to undertake and covenant to maintain them, although it would have been most beneficial to the infants to have been taken out of the custody of their father; *In re Fynn*, 2 De G. & Sm. 457. And see *Lord Westmeath's case*, Jac. 251, n.

In cases where the father is not insolvent, but is guilty of immorality of such a nature as is likely to contaminate the morals of his children, should they be permitted to reside with him, or if his general language and conversation be such as is likely to corrupt their minds by irreligious and atheistical notions, the Court has not hesitated, in exercise of its jurisdiction, to remove the children from their father. Thus, in *Shelly v. Westbrooke*, Jac. 266, n., a petition was presented by the infant plaintiffs, stating, that their father, having deserted their mother, and unlawfully cohabited with another woman, their mother had returned to her father's house, who assisted her in maintaining them, and had lately died. It was then stated, that the father avowed [*687] himself an atheist, and that, since his marriage, he had written and published a work, in which he blasphemously derided the truth of the Christian revelation, and denied the existence of a God as Creator of the universe; and that, since the death of his wife, he had demanded that the children should be delivered up to him, and that he intended, if he could, to get possession of their persons, and educate them as he thought proper. Their maternal grandfather had lately transferred 2000*l.* Four per Cents. into the names of trustees, upon trust for them, on their attaining twenty-one or marrying with his consent, and in the meantime, to apply the dividends for their maintenance and education. Lord Eldon, by order, restrained the father and his agents from taking possession of the infants, or intermeddling with him, until further order; and it was referred to the Master to inquire what would be a proper plan for the maintenance and education of the infants; and also to inquire with whom and under whose care the infants should remain during their minority, or until further order. "With respect,"

observed his Lordship, "to the question of jurisdiction, it is unnecessary for me to add to what I have already stated. After the example of Lord Thurlow, in *Orby Hunter's case*, I shall act upon the notion that this Court has such jurisdiction, until the House of Lords shall decide that my predecessors have been unwarranted in the exercise of it. . . .

This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood; in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effects of those principles; conduct, nevertheless, which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation. I consider this, therefore, as a case in which the father has demonstrated that he must and does deem it to be matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct, in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community.

"I cannot, therefore, think that I should be justified in delivering [*688] *over these children, for their education exclusively, to what is called the care to which Mr. Shelley wishes it to be entrusted.

. . . Much has been said upon the fact that these children are of tender years. I have already explained, in the course of the hearing, the grounds upon which I think that circumstance not so material as to require me to pronounce no order. I add, that the attention which I have been called upon to give to the consideration, how far the pecuniary interests of these children may be affected, has not been called for in vain. I should deeply regret if any act of mine materially affects those interests. But to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance."

In *Wellenley v. The Duke of Beaufort*, 2 Russ. 1, the habits of the father whose children were taken from him were profligate, and his language often profane, and he cohabited in his own house in open adultery with the wife of another man. This case, on appeal, was affirmed in the House of Lords: 2 Bligh N. S. 124; 1 Dow. & C. 152: see Sugd. Prop. 187.

So where it was established to the satisfaction of the Court that the father of children of from ten to two years old was to be considered as guilty of an unnatural crime, the Court not only refused to give possession of the children to the father, but even after he had escaped conviction by the witnesses not appearing against him, would not allow the children to have any intercourse with him; and even if they had

been with him, it would have felt it to be proper to remove them : *Anon.*, 2 Sim. N. S. 54.

If a father be living in a state of habitual drunkenness, incapacitating himself from taking care of his children's education, he is not to be looked upon as a man of such reason and understanding as to enable him to discharge the duty of a parent; and if such a case were to occur again, as it has occurred before, the Court would take care that the children should not be under the control of a person so debased himself, and so likely to injure them. Per Lord Eldon, in *Wellesley v. The Duke of Beaufort*, 2 Russ. 30. And in *De Manneville v. De Manneville*, 10 Ves. 62, his Lordship said, that he had removed a child from its father, upon considerations such as these: the father was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant, and he thought it not inconsistent with a due attention to parental authority so abused, as to call in the authority of the king as *parens patriæ*. See *Warde v. Warde*, 2 Ph. 786, and *Thomas v. Roberts*, 3 De G. & Sm. 758; where a father, who having for four years abandoned his wife and his child, a ward of Court, and who labored under religious delusions, such as rendered him totally *unfit to superintend the education of his child, was restrained from interfering with his custody, and [*689] there was a reference to approve of a proper person to act as a guardian.

Where a father is guilty of gross ill treatment and cruelty towards his children it is a sufficient cause for the Court to supersede his authority as a parent. Thus, in *Whitfield v. Hales*, 12 Ves. 492, upon the authority of Lord Eldon's opinion in *De Manneville v. De Manneville* (10 Ves. 52), Lord Erskine, upon petition made an order referring it to the Master to appoint a guardian, and a proper allowance for the maintenance of infants whose father, the plaintiff in the cause, was in possession of the estate. The petition was supported by affidavits of gross ill treatment and cruelty towards the infants by the father; on account of which a prosecution had been instituted, under which he was imprisoned. The application was not opposed.

But the Court has refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living; or to order him to permit the mother to have access to the child, where no misconduct on his part was shown with reference to the management and education of the child. Thus, in *Ball v. Ball*, 2 Sim. 35, where a lady and her daughter, who was about fourteen years of age, presented a petition, stating that the father was living in habitual adultery with another woman, on account of which a divorce had been obtained in the Ecclesiastical Courts, and praying that the daughter might be placed under the mother's care, *she offering to maintain her at her own expense*, or that the mother might be permitted to have access to her at all convenient times, Sir Anthony Hart, V. C., dismissed the petition. "This

Court," said his Honor, "has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of the common law right over the custody of his children. . . . Some conduct of the father, with reference to the management and education of the child, must be shewn to warrant an interference with his legal right." This decision of Sir Anthony Hart is certainly a harsh one, although, perhaps, he may have been right, as the mother did not offer to make a provision for, but only to maintain the child; but it is clear that access would have been allowed to the mother had the children been wards of the Court. See *Anon.*, Jac. 264, n., where Lord Eldon said, that, as the children were wards of the Court, and therefore under its protection, and recollecting that children ought to be brought up in dutiful *obedi-
[*690] ence and warm affection towards both parents, he would not allow the father to take them so out of access as not to have opportunities of nourishing those feelings. If any complaint was made of want of access, it might be remedied.

Even where children are taken from the custody of the parent, access or communication with him will, if proper, be permitted. See *Wellesley v. The Duke of Beaufort*, 2 Russ. 43: in which case, when it was referred to the Master to consider under whose care and custody the children should be placed, Lord Eldon observed, "that into whatsoever hands the children might fall, it would be their duty to consult the interest and happiness of the children, by allowing filial affection and duty towards their father to operate to the utmost."

The jurisdiction of the Court over infants has been much increased by a humane statute, which enables the Court to give the custody of children under a certain age to the mother, and thus enable her, when ill-treated by her husband, to assert her rights as a wife, without the fear of losing what is naturally so dear to her as a mother—the society of her children.

By this statute (2 & 3 Vict. c. 54, s. 1), it is enacted, "that after the passing of this Act, it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of *any* infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian, after the death of the father, *if he shall see fit*, to make order for the access of the petitioner to such infant or infants at such times, and subject to such regulations, as he shall deem convenient and just; and if such infant or infants shall be *within the age of seven years* to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just."

By the 4th section it is provided, "that no order shall be made by virtue of this Act, whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant, or access to any infant."

The object of this Act was very clearly laid down by Lord Cottenham, in the case of *Warde v. Warde*, 2. Ph. 786, where, upon an application by a wife (who had obtained a sentence of divorce against her husband) for the custody of her children, the conduct of her husband *appeared to be such as clearly to render it improper that he should have the custody of the eldest girl, a child of eleven [*691] years old, the Court made an order for the delivery of all the children' (two of whom were under seven years of age) to the mother, his Lordship holding it unnecessary to consider whether he would have made the same order with respect to the second child, who was a boy of nine years old, if his case had stood alone, as the effect of children being brought up in different custodies would be likely to create factions in the family. "The object," said his Lordship, "of the Act and of the promoters of it, and that which I think appears upon the face of the Act itself, was, to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave to him of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children, up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the Court the power of interfering; and when the Court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon, and would interfere. When the parties, therefore, are considering the suggestion which I have thrown out, I wish them to bear in mind that this is not, as in *Wellesley v. The Duke of Beaufort*, (2 Russ. 1), a question merely as to the general jurisdiction of this Court to interfere with the legal rights of the father, but that I have now an absolute authority over the children under seven years of age, and a larger power than the Court then had with regard to children above that age."

The statute does not, as a condition of the interference of the Court, require that the wife should have obtained, or be entitled to obtain a divorce a mensa et thoro. Thus, in *Ex parte Bartlett*, 2 Coll. 661, where it appears that the conduct of the husband had been in general

harsh and unkind to his wife, and that he had struck her in the face with the back of his hand, in consequence of which she left his house, upon a petition being presented by the wife, by her next friend, praying that the husband might be ordered to deliver to her two of her children, a boy and girl, who were under the age of seven years, and that

[*692] *she might have access to the others, four in number, Sir J. L. K. Bruce, V. C., was of opinion, that she was only entitled to the custody of the youngest child, a daughter, under the age of two years, but not later than the age of seven years, and that she should have access, under proper regulations, to the other children, and that the husband should, at convenient seasons, have access to the daughter. See also *Re Curtis*, 28 L. J. (Ch.) 458.

Where the mother of an infant under seven years of age, and having custody of it, is living separate from the father, and has a good defence to a suit by him for restitution of conjugal rights, the Court may make an order continuing to the mother the custody of the infant, such a case, although not within the letter, being within the equity of the statute 2 & 3 Vict. c. 54: *Re Tomlinson*, 3 De G. & Sm. 371.

But the Court has refused to make any order under the Act against a husband, where the wife had left him without sufficient cause (*In re Taylor*, 11 Sim. 178) or where her past conduct had been bad, or her morals such as were likely to be injurious to the training of the child: *Re Winscom*, 2 Hem. & Mill. 540.

So likewise the Court refused to make an order against testamentary guardians, where the wife was ignorant of managing her house and income, and of non-domestic habits, had married a second time, and concealed such marriage from the testamentary guardians, and was without the means of contributing anything to the support of the children: *Shillito v. Collett*, 8 W. R. (V. C. K.) 683.

It is not necessary to name a next friend of the petitioner, on the petition of a married woman, under the stat. 2 & 3 Vict. c. 54, for access to infants in the custody of the father (*Re Groom*, 7 Hare, 38), even where the application is made in forma pauperis: *In re Hakewill*, 3 De G. Mac. & G. 116. And see *Page v. Page*, 16 Beav. 591.

It seems that if independently of the Act of 2 & 3 Vict. c. 54, the Court can exercise jurisdiction upon the petition of a mother having the custody of her infant child, for the continuance of such custody, it may do so although the petition is entitled in the matter of the Act as well as in the matter of the infant: *Re Tomlinson*, 3 De G. & Sm. 371.

For the other cases on 2 & 3 Vict. c. 54, see Morgan and Chute's Chancery Statutes and Orders, 7, 4th ed.

Jurisdiction exercised over testamentary guardians and guardians appointed by the Court.—As in the case of a father, so in that of a testamentary guardian, the Court will interfere, if his conduct be improper

(*Duke of Beaufort v. Berty*, 1 P. Wms. 704; although *it will not do so ordinarily, as in the case of guardians appointed by it- [*693] self: *In re Goode*, 1 Ir. Ch. Rep. 256. And it seems to be the better opinion, that a testamentary guardian cannot be *actually removed* from his office, though upon a proper case being made out, he will be *suspended*, and a proper person will be appointed to *act as guardian*, and to superintend the maintenance and education of the infant (*Foster v. Denny*, 2 Ch. Ca. 327; *S. C.*, 1 Eq. Ca. Ab. 260, pl. 3; *Ingham v. Bickerdike*, 6 Madd. 275). So on the bankruptcy or insolvency of a testamentary guardian, a proper person will be appointed to have the care of the person of the infant: (*Smith v. Bate*, 2 Dick. 631; *Heysham v. Heysham*, 1 Cox, 179;) and orders are frequently made, regulating the conduct both of testamentary guardians and guardians appointed by the Court (*Roach v. Garvan*, 1 Ves. 160; *Spencer v. Earl of Chesterfield*, Amb. 146; *O'Keefe v. Casey*, 1 S. & L. 106; *Ex parte The Earl of Ilchester*, 7 Ves. 381); but, as was decided in the principal case, the pecuniary interest which a testamentary guardian may have in the death of the ward, will be no ground for superseding him: *Morgan v. Dillon*, 9 Mod. 135; *Dillon v. Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit.; *Corbet v. Tottenham*, 1 Ball & B. 59.

The marriage of a female testamentary guardian does not determine the guardianship: *Roach v. Garvin*, 1 Ves. 160; *Dillon v. Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit. But in *Jones v. Powell*, 9 Beav. 345, it was said by Lord Langdale, M. R., that, although the Court does not ordinarily interfere with a testamentary guardian, it has an undoubted control over *any allowance directed to be paid to him*; and if such a guardian, being a feme sole, marries, it seems right to see what ought to be done. It might probably be the most beneficial thing to continue the feme covert guardian; but it ought in some way or other to appear. In that case, therefore, on a petition for increased maintenance, he thought that he must require it to be shown by affidavit, that it would be for the benefit of the infants to continue to reside with their mother, who was one of their testamentary guardians, notwithstanding her second marriage.

In general, the testamentary guardian, or guardian appointed by the Court, will be entitled to the custody of the infant's person, but the Court, as in the principal case, will exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or that she may have access to him: *Ex parte The Earl of Ilchester*, 7 Ves. 380; *Wright v. Naylor*, 5 Madd. 77; *Talbot v. The Earl of Shrewsbury*, 4 My. & *Cr. 672, 683; for "though," as Lord Eldon observes, "the effect of the [*694] appointment of a guardian is to commit the custody of the guardianship, this Court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the

reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest, it is important to observe, that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings towards the parent; the best and most important duty imposed upon the guardian by the deceased parent:" *Ex parte The Earl of Ilchester*, 7 Nes. 381. In *Courtois v. Vincent*, Jac. 268, access to her children was allowed to the mother of illegitimate children, although a guardian was appointed by the Court. Access will also be allowed to the friends of a deceased parent: *Hunter v. Macrae*, Macphers. 112.

It seems that every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal: *The Stuart v. Marquis of Bute*, 9 Ho. Lo. Ca. 440.

The guardian will be allowed to regulate the mode and select the place for the education of his ward, whose obedience will be enforced by the Court. See *Hall v. Hall*, 3 Atk. 721, where a boy was compelled to return to Eton, and *Tremain's Case*, 1 Stra. 173, where, "being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, and the Court sent a messenger to carry him from Oxford to Cambridge; and upon his returning to Oxford there went another tam to carry him to Cambridge, quam to keep him there."

Where the guardians differ as to the mode of education, the Court will decide: (*Duke of Beaufort v. Berty*, 1 P. Wms. 702; and see *Stuart v. Marquis of Bute*, 9 Ho. Lo. Ca. 440); and in the appointment of guardians by the Court, much weight will be given to the wishes of the deceased father: (*Campbell v. Mackay*, 2 My. & C. 34); of which parol proof was received in *Anon.*, 2 Ves. 56, but rejected in *Storke v. Storke*, 3 P. Wms. 51.

Although the father may have appointed a testamentary guardian, if he has by his will desired that some one else should have the custody of his children, his wishes as to the custody will be complied with. Thus in *Knot v. Cottee*, 2 Lh. 192, a father appointed his wife and two other persons guardians of his children; and in the event of his wife dying before his son should attain twenty-one, or the daughters should attain that age or marry, then he recommended that the surviving guardian *or guardians should place the children or such of them [695] as should be minors at the death of his wife, under the care of his cousin Mary P., to be assisted by their aunt Sophia B. Upon a contest between those ladies and the surviving testamentary guardian, in reference to the custody and management of the children after the mother's death, it was held by Lord Cottenham, C., that the Court was bound to give effect to the recommendation, but not further than might be consistent with preserving the testamentary guardian the general

superintendence and control over the children and their fortunes, which, by virtue of his office, it was his right and duty to exercise. "I see no objection," said his Lordship, "to leaving the immediate custody of the children with Miss P., who, being with the children, may be better able to judge what they actually want; but that there should be no change of residence, and no change of governess, without communication with the testamentary guardian. I think it will be better not to give him the control, but to give him information, in order that he may, if he thinks there is a case for it, come to the Court for direction; and also, that half-yearly accounts should be rendered to him, as to the mode in which the allowance has been expended for the benefit of the children; for I think that is a right which he has as testamentary guardian. This, I think, will give him as much control and superintendence as the testator intended he should have, while it will give effect to the expressed wish of the testator, as to the persons to whom the immediate care of the children should be intrusted." See *Duke of Beaufort v. Berty*, 1 P. Wms. 706; see also *Hartley v. Smith*, 10 W. R. (L. J.) 763; reversing *S. C.*, Ib. (V. C. S.) 750.

The wishes of the father, whether expressed or implied, as to the religion in which his children are to be educated, will be attended to by the Court; and the Court will not control a guardian in bringing up a child in a different faith from that of the Established Church, if it be the religion of the father. Thus, in *Talbot v. The Earl of Shrewsbury*, 4 My. & Cr. 672, where a Roman Catholic father, whose wife was a Protestant, had appointed a *Roman Catholic priest sole testamentary guardian* of his children, Lord Cottenham refused to interfere with the discretion of the testamentary guardian as to the faith in which he educated his wards. "In the first place," said his Lordship, "I find this child born of a Roman Catholic father, who, though he married a Protestant lady, did not, on that marriage, enter into any stipulation as to the faith in which his children should be brought up. I find the father, who had the power of regulating the method of bringing up his children, and of extending *that power after his death, appointing, as a testamentary guardian, a clergyman of the Roman Catholic [*696] Church, and I think it impossible that the father could more distinctly indicate his wishes as to the faith in which his child should be brought up. Although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the Court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith. When, therefore, a Roman Catholic father appoints a Roman Catholic guardian, there can be no doubt as to the father's intention; and if I were to interfere with the exercise of the guardian's discretion as to the faith in which the child should be educated, I should be doing an act of very great injustice. Nothing can be more dear to a father than regulating

the religious education of his child; and if I were to interfere in the manner which is desired, I should adopt a course to induce those dissenting from the Established Church to suppose that this Court would interfere to control the education of their children." See *In re Cornwallis*, minors, 2 Ir. Jur. N. S. 148; *In re Browne*, a minor, 2 Ir. Ch. Rep. 151; *In re Kellers*, 5 Ir. Ch. Rep. 328; *Davis v. Davis*, 10 W. R. (V. C. K.) 245.

Where the father has not left or expressed any direction or instruction as to the religion in which his infant children are to be educated, the Court will presume that his wishes were that they should be educated in his own religion: *Re North*, 11 Jur. 17; *In re Newbery*, 1 Law Rep. Eq. 431; 1 Law Rep. Eq. App. 263; *Re Austin*, 34 L. J. N. S. (Ch.) 192, 499; *Austin v. Austin*, 34 Beav. 257; *Hawksworth v. Hawksworth*, 6 L. R. Ch. App. 539.

No pecuniary benefit will, it seems, induce the Court to interfere with the course of religious education pointed out by the father. The religious faith in which a child is to be brought up will not be a matter of barter in the Court. See *Talbot v. Earl of Shrewsbury*, 4 My. & Cr. 672, 686, 688, 689.

Where a father has acted in such a manner as altogether to abdicate during his lifetime the duty of controlling the religious education of his children, and has intrusted it to his wife, a person of a different religion, and appointed her testamentary guardian, the Court has not treated as imperative the directions of the father's will that the children must be brought up in his own faith: *Hill v. Hill*, 10 W. R. (V. C. W.) 400; *In re O'Malleys*, minors, 8 Ir. Ch. Rep. 291; *In re Garnett*, 20 W. R. (L. C. Ir.) 222.

The circumstance, moreover, that children have for several years after the father's death, been brought up in a particular faith, is one [*697] which should have weight with the Court as to those of the children who are of age to have formed opinions upon religious subjects. Thus, where an infant was brought up till he was fifteen in a faith different from that professed by his father and his testamentary guardian, and even contrary to the express injunctions of his father, as the infant expressed a preference for the faith in which he was educated, the Court undertook to see and converse with the infant before making any order with reference to his religious education: *Witty v. Marshall*, 1 Y. C. C. 68; and see *Stourton v. Stourton*, 8 De G. Mac. & G. 760; 3 Jur. N. S. 527; 26 L. J. N. S. (Ch.) 354; where the child was nine and a half years old, but was prematurely instructed by his mother, with regard to the matters in difference between her religious faith and that of his deceased father. *In re Meade*, 19 W. R. 313; *In re Fallons*, minors, 5 Ir. Ch. Rep. 339 cited; *In re Kellers*, minors, 5 Ir. Ch. Rep. 328.

But where a child is too young to have formed any religious impressions or feelings of a permanent character, the Court will follow the

general rule, and order the child to be educated in the faith of the father, although the mother may have brought the child up in a different faith. See the recent case of *Hawksworth v. Hawksworth*, 6 L. R. Ch. App. 539, where the child was about eight years and a half old, and it was said that the case of *Stourton v. Stourton* carried the principle of examining into the feelings and the religious opinions of a child quite as far as the Court can safely go.

Where an order had been made by the High Court of Judicature in the north-western provinces of India, for the removal of a minor from the custody of her mother, a Mahomedan, who was educating her in the Mahomedan faith; it appearing that the question really involved the religious education of a ward, special leave was given to appeal from the decision of the High Court, without prejudice to any application to the Court below by the mother, as she might be advised to make, to have access, at suitable times to her daughter. *In re Skinner*, 3 L. R. P. C. 451. And see *Camilleri v. Fleri*, 5 Moo. P. C. C. 161, from Malta, where a similar order was made, giving leave to appeal against an order for the removal of children from the custody of their parents. Eventually, in the former case, nom. *Skinner v. Orde*, 4 L. R. P. C. 60, as it appeared that the father, a British subject, was a professed Christian, and married according to Christian rites, and that the daughter had been brought up as a Christian by her mother until she had contracted a Mahomedan marriage, the Privy Council made an order, affirming the decision of the Courts *in India, by which the infant was removed from the custody of her mother and [*698] placed under a Christian guardian.

A mere verbal contract by the husband before marriage, that the children shall be brought up in a particular religion, is not, it seems, binding on the husband, and will not be enforced in equity: *In re Browne*, a minor, 2 Ir. Ch. Rep. 151.

It will be observed that in the case of *Talbot v. The Earl of Shrewsbury*, a Roman Catholic priest had been appointed sole testamentary guardian; nor is there anything in our law which may prevent a dying father from committing the care of his children to the regulator of his conscience. In other countries it has been found advisable to legislate upon this subject. Thus it appears in the Institutes of the Laws of Spain by Asso and Manuel, "that bishops, monks, and religious persons cannot be guardians." Though, "if the Clergy are relations of the pupil or minor, and pray the appointment within four months, they are eligible:" Asso and Man. Inst. by Johnstone, p. 8.

In general, the Court will not allow its wards to be taken out of its jurisdiction. And in *Mountstuart v. Mountstuart*, 6 Ves. 363, Lord Eldon is reported to have said, that the Court never makes an order for taking an infant out of the jurisdiction. And see *Stuart v. The Marquis of Bute*, 9 Ho. Lo. Ca. 440. And in *De Manneville v. De*

Manneville, 10 Ves. 52, his Lordship restrained a father from removing his child to a foreign country.

Exceptions, however, are sometimes made to the rule; but Lord Cottenham has observed, that such exceptions are and ought to be very rare, and that, since he had held the Great Seal, he had had reason to lament that the rule had not been more strictly adhered to: 2 My. & Cr. 32.

But in such cases the Court will always take security for the return of the ward, if a stay of some duration will be for its benefit, for its proper education. In *Jeffrys v. Vanteswarstwarth*, Barnard. Ch. Rep. 141, 144, two young ladies, wards of the Court, whose nearest relations resided at Dantzic, applied for leave to pay them a visit. Lord Hardwicke referred it to the Master to consider what would be a proper time for them to stay there, and what security should be given for their return into England within that time, and that they should not marry without the leave of the Court.

In an anonymous case, Jac. 265. n., on the petition of the father of infant wards of the Court, who, being appointed to a situation in the king's service, was about to reside abroad for several years, Lord Eldon, after much hesitation, ordered that he should be at liberty to take them [*699] abroad with him, undertaking to bring them, *or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided; and see *Logan v. Fairlie*, Jac. 193; *Stephens v. James*, 1 My. & K. 627; *De Weever v. Rochport*, 6 Beav. 391; *In re Levinge*, 6 Beav. 392, n.; *In re Daly*, 6 Beav. 393, n.; *Hart v. Tribe*, 19 Beav. 149. In *Lethem v. Hall*, 7 Sim. 147, an infant, a native of Ireland, whose father (then afflicted with mental and bodily infirmity) and sisters were resident there, was desirous that he might be in his native country, and near them, was allowed to be placed at the University of Dublin during his minority, or until further order of the Court, the guardians entering into a recognizance, to be approved of and certified by the Master, to bring the infant within the jurisdiction whenever they should be required so to do, and that the allowance should be paid to them; and the fact of the infant's having been so placed at the university, and his continuing there, was to be, from time to time, verified by affidavit. In *Biggs v. Terry*, 1 My. & Cr. 675, Lord Cottenham made an order, that an infant, of the age of eighteen, might be at liberty to go abroad for a short period to visit his father, on satisfactory security being given that he should be restored to the jurisdiction within a limited time.

When the health of the ward imperatively requires another climate, the Court will allow a removal there (see *Wyndham v. Ennismore*, 1

Kee. 467); but when the ward's state of health does not require a permanent residence abroad, he will be allowed to remain their only so long as it will be beneficial to him: see *Campbell v. Mackay*, 2 My. & Cr. 81, where Lord Cottenham observed, that, "independently of the well-established rule of the Court, and the principle on which it proceeds, he was convinced that scarcely anything could be more injurious to the future prospects of English children, and particularly of English boys, than a permanent residence abroad; without the proper opportunities of attending the religious services of the Church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land."

*Although the Court will, under special circumstances, allow an infant ward to go out of the jurisdiction, yet it will never [*700] compel his removal: *Dawson v. Jay*, 3 D. G. Mac. & G. 764; *S. C.*, 2 Sm. & G. 199; and see *Stuart v. The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

The Court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. But the Court refused to discharge an order by which guardians had been appointed over the children in this country; and merely reserved to the foreign guardian, the exclusive custody of the children to which he was entitled by order of the Court of his own country: *Nugent v. Velzera*, 2 L. R. Eq. 704.

The clandestine removal of a ward of Court from the custody of the person with whom such ward is residing, under the authority of the Court, is, in its nature, a criminal attempt, and privilege of Parliament will be no protection against an attachment for it. Thus, in *Wellesley v. Duke of Beaufort*, 2 Russ. & My. 639, a member of the House of Commons who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who, on being personally examined by the Court, admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

It is a contempt of the Court to remove an infant out of the jurisdiction, even when he has enlisted in the army, without the leave of the Court (*Rochford v. Hackman*, Kay, 308; *Harrison v. Goodall*, Ib.

310, note (a); but where it appeared to be beneficial to the infant, he has been allowed to remain in the army. *Ib.*

As it is obviously impossible for the court of Chancery, with the number of wards which it has under its care, to be aware of their conduct, it requires the guardians, from time to time, to give general information of what is taking place. If, for instance, a ward of the Court goes out of the jurisdiction, or from extravagant habits gets into difficulties, it becomes the duty of the guardians at once to apply to the Court in Chambers, where such assistance will be afforded as will extricate the ward from his difficulties, and put him in a better course of conduct: *Kay v. Johnston*, 21 Beav. 538.

[*701] A solicitor is bound to give to the *Court any information which may lead to the discovery of the residence of a ward of the Court, whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks: *Ramsbotham v. Senior*, 8 L. R. Eq. 575; *Burton v. Earl of Darnley*, *Ib.* 576.

Marriage of Ward of Court.—In the case of wards of the Court whether male or female, even when they have parents living, or guardians, it is necessary to apply to the Court by petition, for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable, and that the settlement proposed is proper (*Smith v. Smith*, 3 Atk. 305; *The Earl of Plymouth v. Lewis*, 2 Dick. 861; *Wellesley v. The Duke of Beaufort*, 2 Russ. 29); and the Court will prevent, as far as it can, a clandestine marriage, by ordering that the ward shall not be married without leave of the Court, and that the person desirous of marrying the ward shall not have access, by letter or otherwise. *Pearce v. Crutchfield*, 14 Ves. 206; and see *Beard v. Travers*, 313; in which case Lord Hardwicke observed, “that, in cases relating to clandestine marriages, hearsay evidence and declarations are no defective proof, but have weight with the Court, especially when uncontradicted by anything on the other side.”

And the guardians or father of an infant seeking a clandestine marriage with a ward of the Court, will be ordered not to suffer the marriage to take place without the consent of the Court. In *Lord Raymond's case*, Ca. t. Talb. 58, the testamentary guardians of Lord Raymond presented a petition to Lord Chancellor Talbot, stating that their ward was seduced by Mr. Chetwynd, in order to marry his daughter Mrs. Mary Chetwynd, who was much inferior to him in family and fortune, and that they had been forced to keep him close in their custody for some time, to prevent their marrying; wherefore, they in

general terms prayed the assistance of the Court. It seems that Mr. Chetwynd had only consented to the marriage. The Lord Chancellor made an order, preventing the marriage. "In order," said his Lordship, "to strengthen the guardians' hands, I order that the Lord Raymond shall continue in their care and custody, and that they do not permit him to marry without the consent of the Court. As to Mr. Chetwynd, the match not having *taken effect, there is no necessity of looking so minutely into the affair in order to cen- [*702] sure him. He would have done well not to have consented to this marriage, unless the guardians had done so too. But it has been said, that it would be cruel and unnatural in a father not to suffer his daughter to marry to her advantage, and she would have reason to blame him for it ever after. Now, to prevent that charge upon Mr. Chetwynd, I order him not to suffer his daughter to marry the Lord Raymond without the consent of the Court; which prevents any imputation or charge upon Mr. Chetwynd from the lady, or any one else; since, if there be any fault in it, it will fall upon the Court, and I shall be very willing to bear it."

Where a guardian connives at an intended marriage of a ward, the Court will interfere against the guardian by committing the ward, even in the case of a testamentary guardian, against whom the Court proceeds with some reluctance, to the care of others. See *Vernon v. Vernon*, cited ante, 653, 664, where an order was made upon petition, that an infant who was conversant with the daughter of the guardian should be immediately sent for, and ordered forthwith to Eton School. And in *Toombes v. Elers*, Dick. 88, Lord Hardwicke took the care of the infant from her testamentary guardian, and ordered that she should not marry without the leave of the Court. In *Lord Shipbrook v. Lord Hinchinbrook*, Dick. 547, Lord Thurlow referred it to the Master, to appoint a guardian in the room of Mrs. Donaldson, the infant's mother, and ordered that she should continue with Mrs. Donaldson until further order; and that she should be restrained from giving her consent to the marriage of the infant, without leave of the Court; and that the infant should not be married without the leave of the Court. The order also restricted her from receiving any letters or messages, &c., from one Leoni, a Jew singer; and see *Foster v. Denny*, 2 Ch. Ca. 237; *Roach v. Garvan*, 1 Ves. 157; 1 Dick. 88; and in *Smith v. Smith*, 3 Atk. 307, a gentleman who had been corresponding with a young lady, a ward of the Court, was ordered to "produce such letters as contained a promise of marriage, but not billet-doux, or letters of civility."

Formerly there was a disinclination on the part of the Court to sanction the marriage of an infant ward, where it was impossible for him by reason of his infancy to settle his real estate so as to go along with his title, and to make a provision for his younger children (*Honywood v. Honnywood*, 20 Beav. 451); but infants are now enabled by 18 & 19

Vict. c. 43, with the approbation of the Court of Chancery to make binding settlements of their real and personal *estate on marriage: *Ex parte Dalton*, 3 Sm. & G. 331; 6 De G. Mac. & G. 201, 205; *In re Strong*, 5 W. R. 107.

The person who, although an infant (*Edes v. Brereton*, West., Ca. t. Harl.w. 348), marries a ward of the Court without obtaining leave, and also those who contrive and assist at the marriage, are guilty of a contempt of Court, and may be committed to close confinement in prison (*Herbert's case*, 3 P. Wms. 116; *Hill v. Turner*, 1 Atk. 515; *More v. More*, 2 Atk. 157; *Butler v. Freeman*, Amb. 301; *Stevens v. Savage*, 1 Ves. jun. 154; *Stackpole v. Beaumont*, 3 Ves. 89; *Winch v. James*, 4 Ves. 386; *Priestly v. Lamb*, 6 Ves. 420; *Millet v. Rowse*, 7 Ves. 419; *Pearce v. Crutchfield*, 16 Ves. 48; *Ball v. Coutts*, 1 V. & B. 292; *Birkett v. Hibbert*, 3 My. & K. 227; *Baseley v. Baseley*, 4 C. & F. 378; *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Martin v. Foster*, 7 De G. Mac. & G. 98; *Gynn v. Gilbard*, 1 Dr. & Sm. 356; *Re Tweedale's Settlement*, Johns. 109, 111); and the contempt is equally great, although the father of the ward be alive (*Butler v. Freeman*, Amb. 301), and whether the marriage be valid or invalid, (*Salles v. Savignon*, 6 Ves. 572; *Bathurst v. Murray*, 8 Ves. 74; *Re Walker*, L. & G. t. Sugd. 299). "I do not admit," says Lord Eldon, "that, as there is no marriage, there is no contempt. The endeavour to marry is a contempt:" *Warter v. Yorke*, 19 Ves. 453.

If it is found that the marriage of a *female* ward is invalid, a valid marriage will be ordered, and all intercourse will in the meantime be restrained (*Bathurst v. Murray*, 8 Ves. 74; *Re Walker*, L. & G. t. Sugd. 299; *Hodgens v. Hodgens*, 4 C. & F. 323). This course may be adopted for the sake of morals, in the case of a male ward: *In re Murray*, 3 D. & War. 83. But where a *male* ward has been led into a marriage derogatory to his rank, which has turned out to be invalid, a different practice has prevailed. Thus in *Warter v. Yorke*, 16 Ves. 451, although it appears that the woman who had gone through the ceremony of marriage, with an infant ward of the Court, was pregnant, Lord Eldon, upon the Master's report, pronounced an order, that, on the part of the infant, a suit should be instituted in the Ecclesiastical Court, for nullity of the marriage, at the expense of the infant's estate, and the parties to the transaction were to be restrained from all intercourse, personal, by correspondence, or otherwise, with the infant. And see *Bathurst v. Murray*, 8 Ves. 74.

It seems that, although the parties contriving or assisting at a marriage are not aware that the infant is a ward of the Court, their ignorance, although it may be urged in mitigation of the offence (*More v. More*, 2 Atk. 157; *S. C., Barnard. C. C. 404), will not be sufficient to acquit them of contempt of Court. Thus, in *Mr. Herbert's case*, 3 P. Wms. 116, it appears that the guardianship of Mr.

Herbert had been committed, in a cause depending in the Court, to the custody of Sir Thomas Clarges, as his guardian appointed by the Court. The parson who married Mr. Herbert, when about eighteen years of age, to a common servant maid, and one Williams, who pretended to be his guardian, urged that they did not know that Mr. Herbert was a ward of the Court, and not knowing it, could not be guilty of a contempt. But Sir J. Jekyll, M. R., held, that they were guilty of a contempt. "The commitment," said his Honor, "of the wardship to Sir Thomas Clarges was an act of the Court, and in a cause then depending, of which every one at his peril is concerned to take notice, in the same manner as of a *lis pendens*. Surely it may be as well presumed every one is apprised of the proceedings of this Court, as that all executors should be presumed to take notice of all judgments, even in the inferior Courts of law, and, therefore, are not to pay bonds before such judgments, but at their peril. In the case of the writ of ravishment of ward brought by any subject, it is no excuse for the defendant to say he did not know the party was a ward of the plaintiff's; and if this be so in a private case, *à fortiori* will it hold, where the public justice of the Court is concerned. Besides, where the marriage of an infant is encouraged without the concurrence of his real guardians or relations, the consequences of such marriage ought to be at the peril of all those who are instrumental therein. If actual notice of the infant's being a ward of the Court were necessary, then these offences would be continually practised with impunity; for it would be an easy matter to put other people, not really privy to the acts of the Court (in committing the guardianship of the infant), to transact and bring about the marriage; for which reason, if the circumstances of the marriage are suspicious (as in the present case they unquestionably are, where one acts as guardian of the infant, who never appears to have known him before, and acts, too, not for the benefit, but to the prejudice, and probably to the ruin of the infant), in such case I say all the parties to the transaction ought to be severely censured for example sake, and to deter others from the like offences." See *King v. Harwood*, 2 Lev. 32; 1 Vent. 178; *Nicholson v. Squire*, 16 Ves. 259; *Martin v. Foster*, 7 De G. Mac. & G. 98. In *Salles v. Savignon*, 6 Ves. 572, although the bill, the object of which was to make the lady a ward of the Court, was only filed on the day of her marriage, Lord Eldon held, that the marriage in *fact* was sufficient to ground a contempt of Court. [*705]

Although the communication of the fact of a contempt having been committed by the marriage of a ward of the Court be not made to the Court until some years after the marriage, there is no doubt but that the Court has jurisdiction, and may feel it a duty to punish that contempt: *Ball v. Coultts*, 1 V. & B. 302. "Yet it would not," Lord Eldon there observes, "be a very wholesome exercise of discretion to visit

that offence strongly, if, upon attention to circumstances, that have occurred in the course of six, seven, or eight years, it is not very strongly called upon to vindicate the jurisdiction; and in these cases, where it is exercised really for the benefit of the party, the Court ought to look with great attention to all the circumstances of each case;" *Ball v. Coutts*, 1 V. & B. 302.

And the Court will restrain proceedings taken in the Ecclesiastical Court against the ward or his guardian by a person who married the ward in contempt of the Court. Thus, in *Hill v. Turner*, 1 Atk. 515, an infant ward of the Court, whose mother had been appointed his guardian, with an allowance of 100*l.* a year for his maintenance, being made drunk at an alehouse near the Fleet Prison, was drawn in to marry a woman in mean circumstances and of bad character; and upon an application to the Court, the wife was committed to the Fleet. The infant's mother, as he had no sufficient estate to maintain a wife until he came of age, put him out an apprentice to a merchant in Holland, upon which the wife immediately instituted a suit in the Ecclesiastical Court for alimony and for restitution of conjugal rights, and obtained a sentence there, that the husband should cohabit, and if not, that he should pay alimony; and an order was likewise made upon the guardian to pay the sum of £10 to the wife towards alimony, and afterwards a monition to the guardian to pay a further sum as an increase of alimony; and a sentence of excommunication was pronounced against her for not obeying the monition, and also against the infant husband for not receiving his wife. Lord Hardwicke, however, ordered that the wife who had seduced the infant by ill practices to marry her while he was under the care of the Court, and in contempt thereof, should be restrained from proceeding in the Spiritual Court against the petitioner, the guardian of the infant, for payment of alimony; and that she should also be restrained from proceeding there against the infant himself for restitution of conjugal rights and alimony; and on motion or other application to be made to the Spiritual Court on behalf of the infant or his guardian, or either of them, to absolve them or either of them *from the sentence of excommunication awarded against [*706] them or either of them, his Lordship ordered that the wife should consent thereto in the Spiritual Court, to the end that such sentence or sentences might be effectually removed out of the way.

The punishment for the contempt of Court by marrying or aiding in the marriage of a ward of the Court, is, as before observed, commitment to prison, by way of punishment; and in the principal case, Lady Shaftsbury being a peeress, a sequestration was issued against her. But it seems that privilege of Parliament will not shield a person from being committed for contempt of Court. See *Mr. Long Wellesley's case*, 2 Russ. & My. 639.

In *Ex parte Mitchell*, 2 Atk. 173, one Mitchell, who was a justice of

the peace and a barrister, having formerly been a solicitor, was, under very aggravating circumstances, guilty of a flagrant contempt of Court, by contriving the marriage of a ward of the Court; he was committed a close prisoner to the Fleet, was struck out of the commission as justice of the peace, and was, *by his own submission*, prohibited from practising at the bar. And Lord Hardwicke said, that had Mitchell continued a solicitor, there would have been no difficulty; for the ready and proper way would have been to have struck him off the roll of solicitors. And see *Buller v. Freeman*, Amb. 301.

Punishment, however, for the offence is not the only object of the commitment, as it is frequently made use by the Court as the means of compelling the husband to make a proper settlement (*Ball v. Coultis*, 1 V. & B. 300); and in cases where there are mitigating circumstances, the husband, upon petition, offering to make a settlement approved of by the Master, may obtain his discharge (*Stevens v. Savage*, 1 Ves. jun. 154; *Stackpole v. Beaumont*, 3 Ves. 89); but the husband will not, in a flagrant case, be discharged, upon his offering to execute a proper settlement until the Court considers him sufficiently punished (*Bathurst v. Murray*, 8 Ves. 79; *Baseley v. Baseley*, 4 C. & F. 378): nor, if the Court has ordered that he should be indicted for a conspiracy in procuring the marriage (*Priestly v. Lamb*, 6 Ves. 424); at any rate, until he has either been acquitted, or upon being found guilty, has suffered the punishment awarded for his crime (*Millet v. Rowse*, 7 Ves. 419).

And in *Bathurst v. Murray*, 8 Ves. 74, Lord Eldon said, he should use the animadversion of the Court to compel the father, if a man of property, as he was represented by the affidavit of his son, and unless he should show that he was not implicated, to make such provision as might have been expected upon marriage *properly contracted; as Lord Thurlow wished to do in a case where the husband's [*707] father was a man of considerable property in the city; but it could not be made out that he was a party concerned in bringing about the marriage.

Settlement on Marriage of a Ward of Court.—Where the marriage takes place *by the leave of the Court*, a settlement will be directed to be made. As to the nature of the settlement generally made, see *Martin's Conveyancing*, by Davidson, Vol. 4. pp. 728, 740, 2nd ed.

It is difficult, perhaps, to lay down any rule upon the subject, as so much depends upon the circumstances of the parties; but, in general, notwithstanding the consent of a female ward and her guardians (*Gordon v. Irwin*, 4 Bro. P. C. 355, Toml. edit.), her property will not be settled entirely upon the issue of her first marriage: as provision will be made for her issue by a future marriage; see *Winch v. James*, 4 Ves. 386; *Wells v. Price*, 5 Ves. 398; *Millet v. Rowse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 76; *Halsey v. Halsey*, 9 Ves. 471; *Long v. Long*, 2 S. & S. 124; *Rudge v. Winnall*, 11 Beav. 98; but it seems,

where there has been an antenuptial settlement upon a ward under age, if, after she attains her majority, she comes into Court and consents to it, the Court may confirm it without a reference (*Leeds v. Barnardiston*, 4 Sim. 538, and *Re Anne Walker*, L. & G. t. Sugd. 326; *Day v. Day*, 11 Beav. 35).

In general, a female ward of the Court *when of age* may make whatever settlement of her property she pleases; she can, however, only effectuate this by consenting personally in Court, or under a commission for the purpose. Where this is not done, her property will not be discharged from the protection of the Court, except by the order of the Court; and, consequently, until such proceeding, she and her property must always be considered as having the protection of the Court still around her. Per Lord Eldon, in *Austen v. Halsey*, 2 S. & S. 123, n, in which case his Lordship referred it to the Master, to inquire whether a settlement made before marriage upon a ward who had attained twenty-one was a proper settlement.

Where proposals for a settlement on the marriage of a ward have been entertained by the Court, the parties will not be allowed to defeat the intention of the Court, by deferring the marriage until the ward comes of age. Thus, where a female infant had been made a ward of the Court, and in contemplation of her marriage, terms for the settlement of her property, and that of her intended husband (which were for the benefit of the intended husband and wife and the issue of the *marriage), had been approved by the Master, and his approval [*708] had been confirmed by the Court, it was held not to be competent to the husband and wife, by delaying the marriage till after the wife had attained her majority, and entering into fresh settlements, to defeat the settlement of the Court: *Hobson v. Ferraby*, 2 Coll. 412.

So, likewise, in *Money v. Money*, 3 Drew. 256, proposals of marriage with an infant ward of the Court, not being such as the Court would approve, were made six months before her marriage. The parties waited till she attained her majority, and a few days afterwards, a settlement was executed pursuant to new proposals made a very short time before her majority. The terms of the settlement appear to have been pursuant to the instructions; and, in fact, the wish of the ward's mother, and were such as the Court would not have approved of. It was held by Sir R. T. Kindersley, V. C., that the jurisdiction of the Court over the ward had not ceased, and ordered the settlement to be rectified, so as to make it what the Court, looking at the position of the parties, would have made.

An improper settlement, though the marriage takes place after a female ward comes of age, will be reformed, unless she consent to it. Thus, in *Long v. Long*, 2 S. & S. 119, a lady entitled to a fund in court married the day after she came of age. After the marriage a settlement of her property was made on her and her husband for their

lives, and on the children of the marriage absolutely; but the wife never consented in Court to a transfer of the fund to the trustees, After the husband's death, and the birth of a child, the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife; see also *Re Hoare's Trust*, 4 Giff. 254; 11 W. R. (V. C. S.) 181.

An improper settlement will be varied or rectified by the Court after the lapse of a considerable length of time, subject nevertheless to the due protection of the rights and interests of persons who have come into esse since the time of the marriage: *Cave v. Cave*, 15 Beav. 227. So where, on the marriage of a ward, no clause against anticipation was attached to her separate life estate which she afterwards incumbered, it was held by Sir J. Romilly; M. R., that the settlement could not be rectified to the prejudice of her incumbrancers: *Blackie v. Clarke*, 15 Beav. 595.

Where a female ward of the Court marries *after* she is of age, the Court cannot, except in such cases as have been before mentioned, *enforce a settlement: (*Longbottom v. Pearce*, 3 De G. & Jo. 545 n.; *White v. Herrick*, 4 L. R. Ch. App. 345, overruling [*709] *Biddle v. Jackson*, 26 Beav. 282; 3 De G. & Jo. 544); but if any property belonging to her is in the power of the Court, it will not part with it, unless the wife waives her equity to a settlement. See *Lady Elibank v. Montolieu*, and *Murray v. Lord Elibank*, ante, Vol. 1, p. 424, and note.

Where the marriage takes place *in contempt* of the Court, the nature of the settlement will depend in a great measure upon the fortune, position, and conduct of the husband. If the case be that of a beggar marrying a ward of the Court for the sake of her fortune, the court is in the habit of not permitting him to touch that fortune, which was his object; but it has never gone the length, that, if this species of indiscretion has occurred, which the Court must punish by commitment, but which brings together persons of equal rank and fortune, and as considerable a settlement is made by one as by the other, of giving no attention to an equivalent provision made by the husband for the wife and issue: *Ball v. Coutts*, 1 V. & B. 303.

The almost invariable rule in modern practice, in case of a marriage with a ward, in open contempt of the Court, is to frame the settlement in such a manner as to exclude from it altogether all marital estate and interest, and the rule would only be departed from in cases where it could be clearly shown that the departure would be clearly for the benefit of the lady: *Wade v. Hopkinson*, 19 Beav. 613, 619; *Hodgens v. Hodgens*, 4 C. & F. 323; *Baseley v. Baseley*, Ib., p. 378, n.; *Field v. Brown*, 19 Beav. 176; *Field v. Moore*, 7 De G. Mac. & G. 691.

Where the husband was ignorant at the time of the marriage that

his wife was a ward of the Court, and there are "alleviating circumstances" attending the contempt, the settlement will be more favourable to the husband : (*Richardson v. Merrifield*, 4 De G. & Sm. 161.)

The mere fact, however, of marriage with a female ward of Court, without the Court's consent, will confer upon the Court a jurisdiction to decline, during the joint lives of the husband and wife, to part with a fund in its own power and custody belonging to the ward, even upon the application of the husband and wife and upon the consent of the wife in Court, until such settlement should have been made thereof as should appear advisable and proper under the circumstances of the case : *Martin v. Foster*, 7 De G. Mac. & G. 98 ; *Biddles v. Jackson*, 3 De G. & Jo. 544 ; 26 Beav. 282 ; *Gynn v. Gilbard*, 1 Dr. & Sm. 356. It seems, however, to be doubtful whether the Court in such a case would have [*710] power to correct or enforce * a settlement against the wishes both of the husband and wife : *Martin v. Foster*, 7 De G. Mac. R. G. 98, 101. See Vol. 1, pp. 468, 469, and cases there cited.

It may be here mentioned that when a proper case is made out, the legislature has annulled marriages where infants have, by fraud, misrepresentation, or violence been induced to go through the ceremony of marriage. See cases collected in the report of the proceedings in Field's Marriage, annulling Bill, 2 H. L. Cas. 48.

The Court has no jurisdiction to compel a male ward, with whom a marriage had been solemnised without its consent, on attaining his full age to execute a settlement of his estate so as to exclude his wife from all participation in the property : *In re Murray*, 3 D. & War. 83.

A settlement made by an infant ward does not, independently of the stat. 18 & 19 Vict. c. 43, derive validity from the sanction of the Court, which it would not otherwise have. Thus the real estate of an infant ward would, unless she attained her majority, descend to her heir, notwithstanding it was agreed on her marriage to be put in settlement : *Savill v. Savill*, 2 Coll. 72. So where a man married a female ward of the Court without leave, and under an order of the Court a settlement was afterwards made, by which the husband covenanted to convey all the real estate of the wife to trustees upon trusts, excluding him and giving his wife a power to devise. It was executed by the wife, *but not acknowledged by her*. On her death during coverture, having made a will devising the property, it was held by Sir John Romilly, M. R., that the wife's heir-at-law was not bound by the incomplete settlement, and that therefore her will was ineffectual to disinherit him : *Field v. Moore*, 19 Beav. 176 ; and see *Barrow v. Barrow*, 4 R. & J. 418.

As a man on marriage becomes entitled to a woman's personal estate not settled to her separate use, his covenant to settle it will be binding upon her as well as upon him. But in a case where a female ward, entitled to leaseholds for her separate use, made a settlement under the order of the Court, giving a power of sale to trustees, it was held, that

a sale made by the trustees during her minority was not valid: *Simpson v. Jones*, 2 Russ. & My. 365. However, by 18 & 19 Vict. c. 43 (explained by 23 & 24 Vict. c. 83), infants are now enabled, with the approbation of the Court of Chancery, to make binding settlements on marriage of their real and personal estate, whether it be in possession, reversion, remainder, or expectancy. See Morgan and Chute's Chancery Acts and Orders, 233, 4th edit., *Re Olive*, 11 W. R. (V. C. K.) 819.

*The Court has no power under 18 & 19 Vict. c. 43 to make a settlement *after* marriage upon an infant. When, therefore, [*711] an infant married woman, *not being a ward of Court* filed a petition for a settlement of her property, it was held that the Court had no jurisdiction to order a settlement to be made. *In re Potter*, 7 L. R. Eq., 484. See remarks on *Wortham v. Pemberton*, 1 De G. & Sm. 644, ante, vol. 1, p. 446.

As to confirmation by a woman after the death of her husband of a voidable settlement made upon her marriage, while an infant. See *Davies v. Davies*, 9 L. R. Eq. 468.

Maintenance.—In general, where infants are interested, in property, either under wills or settlements, there are powers for their maintenance and advancement inserted, upon which the trustees can apply, either the whole or a part of the income or capital of such property for the benefit of the infants (3 David. Conv. 130, 556, 2nd ed.); and it will be their duty to exercise such powers *bona fide*, and for the end designed by the testator or settlor: *Talbot v. Marshfield*, 3 L. R. Ch., App. 622, varying the decree of *Malins*, V. C., 4 L. R. Eq. 661; *Roper-Curzon v. Roper-Curzon*, 11 L. R. Eq. 452.

In order that the necessity of inserting such powers in all instruments should be dispensed with, it has been enacted by 23 & 24 Vict. c. 145, that "In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently, on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income, by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen. Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were

part of the income arising in the then current year" (sec. 26). This power, however, cannot be exercised if it is expressly negated by the instrument creating the trust, and only *subject to such limitations and variations, if any, as are contained in such instrument (sec. 32). The Act does not empower any trustees to deal with or affect the rights of any persons soever, except to the extent to which they might have dealt with or affected such rights, if the instrument under which the trustees are empowered to act had contained express powers for such trustees so to deal with or affect such rights (sec. 33). Moreover, the provisions of the Act extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of the Act (28th August, 1860), or under a will or codicil confirmed or revived by a codicil executed after that date (sec. 34). See observations in 3 David: Conv. 193, 2nd ed.

Even before the passing of this Act, a trustee could safely advance out of the interest of a legacy left to an infant, sufficient to maintain him, if his parent were unable so to do, because the Court of Chancery would do the same upon an application being made to its jurisdiction. And in taking his accounts, the trustee would be allowed to set off the gross amount of the maintenance against the gross amount of interest, although in some years the amount allowed for maintenance exceeded the amount of interest in those years: *Carmichael v. Wilson*, 3 Moll. 79; *Edwards v. Grove*, 2 De G. F. & J. 210, and see *Lee v. Brown*, 4 Ves. 369; *Sisson v. Shaw*, 9 Ves. 288; *Maberlay v. Turton*, 14 Ves. 499; *Ex parte Darlington*, 1 B. & B. 240; *Cotham v. West*, 1 Beav. 380, or a ruling, *Andrews v. Partington*, 3 Bro. C. C. 60; *Sisson v. Shaw*, 9 Ves. 288; *Prince v. Hine*, 26 Beav. 634.

In cases arising out of instruments before the Act came into operation, where there was no power conferred upon the trustees; in cases subsequent to, but not strictly arising within its provisions; and in other cases where, from peculiar circumstances, trustees cannot venture to act upon their own responsibility, it becomes necessary for them to apply to the Court of Chancery. The Court ordinarily acts upon the principle, that a father is bound to maintain his children, and will not, if he be of ability to maintain them, make him any allowance out of their property for that purpose (*Fawkner v. Watts*, 1 Atk. 408; *Jackson v. Jackson*, 1 Atk. 513; *Butler v. Butler*, 3 Atk. 60; *Darley v. Darley*, 3 Atk. 399; *Stocken v. Stocken*, 4 My. & Cr. 98); notwithstanding there be a provision for their maintenance (*Mundy v. Earl Howe*, 4 Bro. C. C. 224; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Andrews v. Partington*, 3 Bro. C. C. 60; 2 Cox, 223; *Hamley v. Gilbert*, Jac. 354; *Thompson v. Griffin*, 1 Cr. & P. H. 317).

[*713] The result of the authorities *appears to be this, that where the trust property is derived from the bounty of a stranger, the

father, if of sufficient ability, is not entitled to have the income applied to the maintenance of his children (*Thompson v. Griffin*, Cr. & P. 317); but if the trust property is the subject of marriage settlement, and therefore the creation of the trust is matter of contract, then, if the language of the settlement is so framed as to express a trust to apply the income, or any part of the income, in maintaining the children, although the quantum of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children, applied for that purpose, without reference to his ability to maintain them (*Mundy v. Earl Howe*, 4 Bro. C. C. 224; *Meacher v. Young*, 4 My. & Cr. 95; *Ransome v. Burgess*, 3 L. R. Eq. 773; *White v. Grane*, 18 Beav. 571). But if the language of the settlement expresses merely a power so to apply the income, or any part thereof, then the father is not so entitled. Per Kindersley, V. C., in *Ransome v. Burgess*, 3 L. R. Eq. 780, and see *Thompson v. Griffin*, Cr. & P. 317.

And where a father provides a fund, of which he makes a voluntary settlement after marriage upon his wife and children, and creates a discretionary trust for maintenance of the children out of the income of the fund, and afterwards maintains them himself without calling for any contribution from the income of the fund, neither he nor his trustee in bankruptcy, will be entitled to receive any portion of the accumulations of the income which might have been so applied: *In re Kerison's Trusts*, 12 L. R. Eq. 422.

Where the question turns upon the ability of the father to maintain a child, the rule is not laid down upon the father's absolute insolvency only, but maintenance is given where the father is not in such circumstances as to be able to give the child such an education as is *suitable to the fortune which he expects*. Per Lord Thurlow, in *Buckworth v. Buckworth*, 1 Cox, 81. And see *Ex parte Williams*, 2 Coll. 740. And in *Jervois v. Silk*, G. Coop. Rep. 52, an allowance of 1400*l.* a year was made to the father for the education of six children, who were entitled to an estate, the rental of which was 8600*l.* a year, although the father had an income of 6000*l.* a year. "On the outside," said Sir Wm. Grant, M. R., "6000*l.* a year would seem enough; at the same time the expenses of the father's establishment and his children's expectations are things to be looked to;" see also *De Witte v. Palin*, 26 L. T. Rep. (N. S.) 825.

But the reference *as to the ability* of the father will be omitted when the Court is satisfied that he is in reduced or insolvent circumstances, and has deserted his family; *and the only question then to be considered will be what is a proper allowance: *Ex parte* [*714] *Mountfort*, 15 Ves. 449; *In re England*, 1 Russ. & My. 499.

And where the property is small (*Walker v. Shore*, 15 Ves. 122; *Ex parte Swift*, 1 Russ. & My. 575; *Payne v. Low*, 1 Russ. & My. 223; *Ex parte Dudley*, 1 J. & W. 254, n.), or no allowance for maintenance is

asked (*In re Neale*, 15 Beav. 250), a reference will be altogether dispensed with.

The ability of the father to maintain his children will not be taken into consideration, when, in consequence of his ill conduct, his children have been taken away from him. See *Wellesley v. Duke of Beaufort*, 2 Russ. 29, where Lord Eldon observes, "I am not aware of any case in which the Court, where it has taken away from the father the care and custody of the children, has called in aid of their own means the property of their father."

A wife during the life of her husband, formerly being under no legal obligation to maintain the children, the Court would not, in determining upon the ability of the father to maintain them, take into consideration her separate estate; *Haley v. Bannister*, 4 Madd. 275. And see *Hodgens v. Hodgens*, 4 C. & F. 323; 11 Bligh. N. S. 62, affirming the decree of Lord Chancellor Sugden (L. & G. t. Sugd. 259), and reversing that of Lord Plunkett (L. & G. t. Plunk. 137, 148), where the House of Lords decided, that a married woman having property settled to her separate use was not bound to maintain her children, even although she might have eloped from her husband, and he was incapable of maintaining them. But now a married woman having separate property is subject to all such liability for the maintenance of her children as a widow is now by law subject to the maintenance of her children, but her husband is not relieved from liability to maintain her children. 33 & 34 Vict. 93, s. 14. See ante, vol. 1. p. 504.

After the death of her husband, a woman, whether she remained unmarried (*Lanoy v. Duchess of Athol*, 2 Atk. 447; *Ex parte Lord Petre*, 7 Ves. 403; *Beasley v. Magrath*, 2 S. & L. 35), or marries again (*Greenwell v. Greenwell*, 5 Ves. 194; *Billingsly v. Critchett*, 1 Bro. C. C. 268), will have maintenance allowed to her to support her children, without regard to her ability. And see *Douglass v. Andrews*, 12 Beav. 310.

In allowing maintenance for an infant, regard will be had to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and totally destitute, upon an application for maintenance for the eldest son, the Court will make a liberal allowance to him, that he may be the better able to maintain his [*715] brothers and sisters, considering *him in the light of the head of the family. See *Pierpont v. Lord Cheney*, 1 P. Wms. 493; *Harvey v. Harvey*, 2 P. Wms. 22; *Lanoy v. Duchess of Athol*, 2 Atk. 447; *Ex parte Lord Petre*, 7 Ves. 403; *Tweddell v. Tweddell*, T. & R. 13; and see *Ex parte Williams*, 2 Coll. 740; but in *Petre v. Petre*, 3 Atk. 511, as the eldest son had been conveyed away clandestinely to Douay, out of the hands of the guardian, the Court, as he could not be brought before them, could make no order of that kind, but directed, that after Lady Mary Petre's jointure was satisfied,

the surplus rents and profits should be laid out for the benefit of the eldest son. In *Bradshaw v. Bradshaw*, 1 J. & W. 647, a more liberal allowance was made for an infant, in consideration of the circumstances of an illegitimate brother, born of the same father and mother, and who had lived with them, who was totally unprovided for.

A liberal allowance also will be made for infants, in order to relieve their father or mother when in distressed circumstances. See *Roach v. Garvan*, 1 Ves. 160; *Hill v. Chapman*, 2 Bro. C. C. 231; and in *Heysham v. Heysham*, 1 Cox, 179, the mother, who was testamentary guardian, being insolvent, the Master certified that he approved of N. W. to have the care of the maintenance and education of the infant, and that he conceived the sum of 130*l.* per annum, part of 250*l.* (which was allowed for the maintenance and education of the infant), to be necessary for that purpose. This report was confirmed, and it was ordered that 130*l.*, part of the said 250*l.* per annum, should be paid to the said N. W. for the maintenance and education of the infant, and that the residue should be paid to his mother, till further order. So also, in *Allen v. Coster*, 1 Beav. 202, where the father was in great indigence, and, in consequence of the misconduct of himself and wife, the guardianship of his children had been committed to others, Lord Langdale, M. R., increased the maintenance of the children, for the support of their parents; observing, "I feel reluctant in doing it, for the conduct of the parents has been of the worst kind; but I think, that without saying anything as to the construction of the will, I may give to the infants the benefit of the income of the property, so as to assist the parents. To do so is evidently for the benefit of the infants themselves." It must be remarked, as to this case, that the counsel for the parents had contended, that upon the construction of the will under which the infants took, the surplus, after the performance of trusts for their maintenance and education, belonged to the parents.

An allowance will even be made for charitable purposes. Thus in **Langton v. Brackenburgh*, 2 Coll. 446, where the infant's estate was 1600*l.* a year, and the allowance to himself and his [*716] brother was 260*l.* a year, 20*l.* a year of the income was ordered to be applied in charity.

Where it will be for the benefit of the infant, maintenance will sometimes be allowed, although there be an express direction to accumulate, and although there be a limited gift of interest for maintenance, with an express direction to accumulate the rest, the Court will allow such further sum as may be deemed adequate to maintain the infant: *Stretch v. Watkins*, 1 Madd. 253; *Evans v. Massey*, 1 Y. & J. 196.

And even where a testator has provided for the maintenance of a child up to a certain period, leaving the interval before payment of a legacy unprovided for, the Court may infer that the testator did not mean that the child should have nothing during the interval, and will

make an allowance to him for maintenance. Thus in *Chambers v. Goldwin*, 11 Ves. 1, A. directed trustees to maintain and educate his sons during their minorities, and his daughter until her age of twenty-one years or *day of marriage*, and he gave his daughter a legacy in case she should live to attain the age of twenty-one years. The daughter married at the age of eighteen years. It was held by Lord Eldon, C., that she was entitled to a reasonable maintenance from that age until she attained twenty-one. See also *Martin v. Martin*, 1 Law Rep. Eq. 369.

And in addition to a fixed annual sum for maintenance directed by a testator, an allowance for keeping up a mansion has been made to a minor entitled to settled estates under a will, when it appears to have been the intention of the testator that he should reside there: *Griggs v. Gibson*, 14 W. R. (V. C. W.), 538.

And upon the principle of compensation, where there are equal legacies to a class of children, even with a direction for accumulation, the principal, with the accumulations, for instance, to be paid at twenty-one, with survivorship in case of the death of any under that age to the others: the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all or some of them, and maintains them all out of the interest: *Marshall v. Holloway*, 2 Swanst. 436, and cases cited in note.

And an advance to one of the children, who afterward dies, will in a similar case be allowed by the Court. See *Franklin v. Green*, 2 Vern. 137. There, legacies of 100*l.* a-piece were given to four children payable at twenty-one or marriage, and a maintenance not exceeding the interest in the meantime, with a limitation over of every 100*l.* for the benefit of the other children as should attain twenty-one or marry [*717] (Lewin Trustees, 5th ed., 422, note), the trustee paid twenty pounds out of the 100*l.* of one of the children for placing him out as an apprentice. He died an infant, and it was allowed in the trustee's accounts.

But the principle cannot be applied where property is not given absolutely to the children and the survivor; but in certain events there is a gift over to a stranger. Thus, in *Ex parte Kebble*, 11 Ves. 604 (overruling *Greenwell v. Greenwell*, 5 Ves. 194) a residue was bequeathed to five infants, with survivorship among them in case of the death of any under the age of twenty-one; and, in case all of them should die under that age, *the whole was given to their sister*, who took no interest directly in that residue; but a legacy was given to her by the same will, and in case of her death under the age of twenty-one, that legacy was given over to the other five children. Lord Eldon refused an application of the five infants for maintenance, there being no direction for it in the will. "By this will," said his Lordship, five children have this residue given to them, with

survivorship among them, and the sixth has nothing given to her in that fund, unless all the five die under the age of twenty-one. So the five would be maintained at her expense, for she has no interest in common with them. Where is the difference between her and a mere stranger? She is not a legatee of this residue with the other five; but it is given over to her as to a stranger, only in the event of the death of all the five under the age of twenty-one; and while it remains contingent, she has no interest with them. The circumstance that she has a legacy by another part of the will cannot alter it. If no legacy was given to her, it could not be contended; for this has not been allowed, except where all had a chance and an equal chance, and there is no instance of setting off one legacy against another in this way. There is no case in which interest of property directed to accumulate, has been applied to maintenance, except where it was one principal sum in which all were interested." See also *Errington v. Chapman*, 12 Ves. 20.

Nor will the principle be applied where property is not given absolutely to a class of children and the survivor; but in case of the death of a child under a certain age there is a limitation to the issue, who, for that purpose, are strangers: see *Ex parte Kebble*, 11 Ves. 606; *Turner v. Turner*, 4 Sim. 430; see also *Errington v. Chapman*, 12 Ves. 20; *Ex parte Whitehead*, 2 Y. & J. 243; *Parsons v. Coke*, 10 W. R. (V. C. K.) 641; maintenance was, however, allowed under such circumstances by Lord Thurlow, in *Fendall v. Nash*, 5 Ves. 197, n.; but this case has been disapproved of by Lord Eldon; 14 Ves. 203.

*Nor will maintenance, if not directed by the will, be ordered, where the children making the applications are not all the persons among whom the property is to go; where, for instance, unborn children may form part of the class. In *Sir Frederick Eden's case*, indeed Lord Rosslyn allowed maintenance; but upon an application to Lord Eldon for an increase of the allowance, he observes, "I did not think myself justified in following that, and refused it, as those children might be the persons to take the whole; but future children, then unborn, might be the persons to take a part of it;" *Ex parte Kebble*, 11 Ves. 604.

In *Lomax v. Lomax*, 11 Ves. 48, a petition was presented for maintenance out of the interest of a legacy to the children of the testator's daughter, when the youngest should attain the age of twenty-one. Lord Eldon, however, refused the application. "Upon a legacy," observed his Lordship, "when they shall attain twenty-one, and to such of them as shall attain twenty-one, is not the meaning, that such as do attain twenty-one shall have it at that time; and what right has the Court to give the interest before that time? If all die under twenty-one, and a child not yet in existence should come into existence, and attain that age, that child clearly would take the whole, interest as well

as principal. Therefore, I may give it to these children, who may never become entitled to it. In the case of Sir Frederick Eden's children, I refused to increase the maintenance, or even to continue it, under an order made by Lord Rosslyn." The application was renewed, but Lord Eldon refused it, saying, "The interest could not be given for maintenance, in the face of the will.

However, in *Haley v. Bannister*, 4 Madd. 275, a testator directed that the dividends of stock should accumulate until one of the children then born, or thereafter to be born of his daughter, should attain twenty-one; and upon his or her attaining that age (if there should be only one child who should attain that age), his executors should transfer the whole to such only child; and if more than one such child were then living, to transfer to such children one equal part of the said stock and accumulations, in proportion to the number of such children then living. The residuary personal estate was given upon the same limitations. Upon an application during the life of the father and mother, Sir J. Leach, V. C., held, that the children were entitled to maintenance. "I take," said his Honor, "the principle to be, that wherever the children have a common interest on a fund, the income of the fund, if necessary, may be applied for their maintenance. In this case, children born

[*719] *or to be born have a common interest; and therefore the income of the fund, if necessary, may be applied to their maintenance. So, in *Errat v. Barlow*, although no order for maintenance was made by Lord Eldon, where the interest of a legacy charged upon real estate was given in trust to the younger children of the testator's daughter, to accumulate during their minority, and to be payable equally among them at their ages of twenty-one; (see 14 Ves. 202), yet Sir William Grant, M. R., it seems, afterwards ordered it upon an ex parte application." The authority, however, of *Haley v. Bannister*, and of Sir William Grant's decision in *Errat v. Barlow*, is at least doubtful. In *Cannings v. Flower*, 7 Sim. 523, where the shares of children in a legacy were contingent on the son's attaining twenty-four or dying under that age, leaving issue, and on the daughter's attaining twenty-four or marrying, but the legacy was not given over in the event of no child acquiring a vested interest, Sir L. Shadwell, V. C., refused to order maintenance for the children, saying, he considered that the rule was established in the manner stated in his judgment in *Turner v. Turner*, (4 Sim. 430), that the chances of obtaining a vested interest in the fund appeared not to be equal amongst the children themselves; and that, at all events, he could not make the order without the consent of the testator's next of kin.

But even although there be an express direction for accumulation, where the Court sees that it is for the benefit of the infants, the chances of survivorship being equal, and can procure the consent of all persons interested in remainder, maintenance will be allowed, the Court

taking the chance of controverting the direction of the will. Thus, in *Cavendish v. Mercer*, 5 Ves. 195, n., there was a residuary bequest of a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital; and in case of the death of all before the time of payment, there was a gift over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, Lord Bathurst directed a maintenance, taking the consent of the mother. See 14 Ves. 202; *Re Arbuckle*, 14 W. R. (V. C. K.) 535.

Moreover, although there is a gift over, maintenance will be allowed, if there is a fair inference from the whole will, that it was the testator's intention to give it: *Lambert v. Parker*, G. Coop. 143.

Where there are two funds out of which an infant might be held entitled to maintenance, it will be allowed out of that fund which it is most for his benefit to be applied for that purpose: *Bruin v. Knott*, *1 Ph. 572; *Lygon v. Lord Coventry*, 14 Sim. 41; *Martin v. Martin*, 1 Law Rep. Eq. 369. [*720]

As a general rule, the Court will not permit trustees, of their own authority, to break in upon an infant's capital; and it appears that the Court has rarely sanctioned such conduct in a trustee. *Davies v. Austen*, 1 Ves. jun. 247. In *Walker v. Wetherell*, 6 Ves. 473, it appeared by the Master's report, that the fortunes of the children did not amount to more than 300*l.* each; and that one of the executors, who, after their father's death, married their mother, claimed sums considerably exceeding the interest of their respective fortunes for their maintenance, education, and advancement, and also the sum of 241*l.* as the fee for placing one of the children with a surgeon, and other expenses incident to that situation. The Master having allowed the claim, exceptions taken to his report were allowed by Sir Wm. Grant, M. R. "Whatever," said his Honor, "might be done upon particular circumstances, it is impossible to sanction a trustee in breaking in upon the capital. There are no particular circumstances in this instance upon the one side or the other. It is not shown that there were expectations of fortune, which made it necessary to provide a suitable education. The capital might be exhausted in a few years. On the other hand, no particular extravagance upon the part of the executor appears. On the contrary, applications were made to him by some of the executors, stating that the children could not live upon the interest. This claim is therefore ungracious; but it is better that an individual should suffer a hardship than that a general rule of the Court should be broken through in a point that would endanger the interests of all children." Sir Wm. Grant, however, in *Walker v. Wetherell*, lays down the rule of the Court too strictly, and it seems now, that the Court would sanction the trustee in breaking in upon the capital if the Court, upon ap-

plication being made to it, would have done so. See *Carmichael v. Wilson*, 3 Moll. 79; *Barlow v. Grant*, 1 Vern. 255; *Bridge v. Brown*, 2 Y & C. C. C. 181; *Prince v. Hine*, 26 Beav. 634.

Trustees, however, should be cautious in making such advances, for if their allowance is disputed in a suit, the costs of the suit, if there be a deficiency of assets will have priority over the allowance to the trustees. See *Robison v. Killey*, 30 Beav. 520, there a testator authorised his executor to advance any part "not exceeding one-half the presumptive share" of his children, towards their maintenance and advancement. The estate being very small the executors advanced more than the whole. The estate being insufficient to repay the amount to the executor, the Court, in a suit by *a child for administration, gave priority [*721] to the costs of the suit, but gave the surplus to the executor in part payment of his advances.

A trustee, however, may be allowed in his accounts for part of the capital of an infant employed for his *advancement*, without any application to the Court although the allowance might not have been made if he had expended the same sum for *maintenance*: *Swinnock v. Crisp*, Freem. Ch. Rep. 78; *Walker v. Wetherell*, 6 Ves. 474; *Ex parte M'Key*, 1 B. & B. 405.

In *Worthington v. McCraer*, 23 Beav. 81, a trustee bonâ fide advanced a sum of money to apprentice an infant, in the life of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation: it was held by Sir John Romilly, M. R., that in taking the accounts against the trustee, the amount ought to be allowed him.

But a trustee cannot safely advance part of the capital of an infant, even for his advancement, if it be limited over in certain events to third parties; for in such case the Court itself would not break in upon the capital: *Lee v. Brown*, 4 Ves. 362.

Where a person has maintained children out of feelings of kindness and benevolence, he can make no claim afterwards for the money thus expended: *Worthington v. M'Cræer*, 23 Beav. 81, 83; *Grove v. Price*, 26 Beav. 105.

So, where a mother makes advances to a son during his minority, and not with the intention of afterwards claiming as a creditor against his estate, there will be no debt due to her for maintenance from his estate (*In re Cottrell's estate*, 12 L. R. Eq. 566), nor will the mother, in the absence of a contract, be able to support a claim for the maintenance of her son during a period after he attained his majority. *Ib.*

It seems there is a difference when a stranger advances money to an infant for necessaries, as he will have a little more consideration than a trustee charged with the care of paying an infant, when of age, a sum of money would be allowed: *Davies v. Austen*, 1 Ves. Jun. 249.

As a general rule, the Court itself will not break in upon the capital for the maintenance and education of an infant (*Barlow v. Grant*, 1 Vern. 255; *Davies v. Austen*, 1 Ves. Jun. 247; *S. C.*, 3 Bro. C. C. 178; *Beasley v. Magrath*, 2 S. & L. 35); and it will only do so where the interest would be too small for those purposes. Thus, in *Re England*, 1 Russ. & My. 499, where the father had separated from his wife, and was resident in England, in very reduced circumstances, and not of ability to maintain his children, whom he had deserted, and the mother was *willing to maintain them if they were returned to her in India, 300*l.*, part of a residuary estate to which they were abso- [*722] lutely entitled, was ordered to be raised out of their shares, in order to defray their expenses to India. So, where the capital was only 60*l.* stock, it was broken into: *Ex parte Swift*, 1 Russ. & My. 575. And see *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 Russ. & My. 577; *Bridge v. Brown*, 2 Y. & C. C. C. 181; *Davies v. Davies*, 2 De G. Mac. & G. 53. And under special circumstances the Court has ordered an infant's legacy of small amount to be paid to the father about to emigrate with the infant to Australia, upon the solicitor for the petitioner communicating with him personally, for the purpose of undertaking to see that the fund should be duly applied in fitting out and transferring the father and the infant to Australia: *Walsh v. Walsh*, 1 Drew. 64. See also *Ex parte Hays*, 3 De G. & Sm. 485; and *In re Salter's Trusts*, 17 I. Ch. Rep. 176, where an order was made to pay to the guardian of an infant a small legacy, on an undertaking to apply it for an outfit and for his passage to New Zealand.

There is a distinction between the allowance made for prospective maintenance and past maintenance. In the former case, the allowance is made upon a scale corresponding with the fortune of the infant; in the latter, only for what has been actually properly expended. See *Bruin v. Knott*, 1 Ph. 572, in which case Lord Cottenham, C., overruling the decision of Sir L. Shadwell, V. C. (12 Sim. 436), held, that the allowance to which a mother, who had maintained her orphan child, was entitled after the death of her child, out of the accumulations of its fortune, was limited to what she had actually expended upon such maintenance, though such expenditure should have been less than what the amount of the child's fortune would have justified; and that the allowance ought to be paid out of that part of the child's fortune which it would have been most for the benefit of the child, if living, to have applied for that purpose. "The Vice-Chancellor," observed his Lordship, "seems to have proceeded upon the same principle as if this had been a question of prospective maintenance. I do not think, however, that is the right principle with reference to past maintenance. I see no reason why a party, who has maintained a child *without the order of the Court*, should be allowed more than she has actually expended. In lunacy, the case occurs every day, and the inquiry always is, what sum

has been properly expended? It does not follow, however, that the mother is to be put to the proof by voucher of every item that she has expended on account of her *child who has lived with her. That [*723] would be most unreasonable. The inquiry should be, what was the scale of expenditure on which the child was maintained, and what would be proper to be allowed in respect of it, having regard to the amount of the child's fortune? If the mother has maintained her child on a scale corresponding with his fortune, she will be allowed it; if she has not gone so far, she will be allowed only what she has actually expended. The principle is, that the mother is entitled to a complete indemnity for the money actually expended on her child's maintenance, within proper limits, but nothing more." And see *Ex parte Bond*, 2 My. & K. 439; *Stephens v. Lawry*, 2 Y. & C. C. C. 87; *Parsons v. Parsons*, 13 W. R. (V. C. K.) 214.

Where money on account of maintenance is ordered to be paid to a person on his undertaking to satisfy another, the Court will enforce the undertaking. Thus, in *Sirdefield v. Thacker*, 18 Beav. 588, where money had been ordered to be paid to a person for past maintenance of an infant, on his undertaking to pay the schoolmaster's bill; but as he showed a disposition not so to apply the money, the Court stayed the payment, and ultimately, on the application of the schoolmaster, ordered payment to him out of the fund.

Where the income arising from property is left to a person for the maintenance of children, he will be entitled to receive it for that purpose so long as he continues properly to maintain them (*Hadow v. Hadow*, 9 Sim. 438; *Jubber v. Jubber*, 9 Sim. 503; *Berkeley v. Swinburne*, 6 Sim. 613; *Thurston v. Essington*, Jac. 361, n.; *Longmore v. Elcum*, 2 Y. & C. C. C. 363; *Leach v. Leach*, 13 Sim. 304; *Hart v. Tribe*, 19 Beav. 149; *Browne v. Paull*, 1 Sim. N. S. 92); and in *Hammond v. Neame*, 1 Swanst. 35, under a bequest of stock, in trust to pay the dividends to M. H. H., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. H., until he, she, or they shall attain twenty-one," and then to transfer the principal equally among the children, with a bequest over, in default of such issue, to the nephews and nieces of the testator living at the death of M. H. H., it was held by Sir Thomas Plumer, M. R., that the dividends were payable to M. H. H., although she had no child.

But where a person puts himself in such a position as to be incapacitated from performing the trust, he will be entitled to a share only for his own maintenance. See *Castle v. Castle*, 1 De G. & Jo. 352: there a widow, who was entitled to the income of property for the maintenance of herself and her family, and the *education of her children, having eloped with a married man, was held to be entitled only to part of the income for her own maintenance. [*724]

Where the *income* of property is given to a wife for her maintenance and support, and the maintenance, education, clothing, and support of herself and children, without being confined to minors, the parent in these cases is a trustee for the children, but only so far as is required for their maintenance and support (*Carr v. Living*, 28 Beav. 644; 33 Beav. 474; *Scott v. Key*, 35 Beav. 291, 293). *Primâ facie*, it does not apply to married daughters or adult sons, but only to the children living at home with their mother (*Carr v. Living*, 28 Beav. 645). And see *Ryan v. Keogh*, 4 I. R. Eq. 357.

Whether in cases of this kind a child being willing to reside with the mother after attaining the age of twenty would thereby lose a right to participate in the fund, is, in the absence of express directions, which would of course be binding (*Gardner v. Barber*, 18 Jur. 508), somewhat doubtful (*Thorp v. Owen*, 2 Hare, 610; *Longmore v. Elcum*, 2 Y. & C. C. 370); but where a son or daughter leaves the house of the widow, and becomes forisfamiated, and perhaps have a family, it can scarcely be conceived to have been the intention of the testator, that the widow should apportion a certain part of her income for such son or daughter, and no longer spend her income in one establishment, but divide it into as many incomes as there are children, possibly not leaving enough for her own support: per Wigram, V. C., in *Thorp v. Owen*, 2 Hare, 613; *Bowden v. Laign*, 14 Sim. 113; *Carr v. Living*, 28 Beav. 644. And it seems to be just where the children are otherwise provided for, that they should not be entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education, and support (*Carr v. Living*, 28 Beav. 647).

Where the income of property has been applied pursuant to a trust for the maintenance and education of infants, no account will be directed as to its application unless a special case is made out, showing that some of the children have not been properly maintained (*Hora v Hora*, 33 Beav. 88; and see *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. N. S. 92; *Carr v. Living*, 28 Beav. 644); and the Court will not deprive the widow of the honest exercise of the discretion vested in her (*Raikes v. Ward*, 1 Hare, 450); but it will give her, if required, its assistance to inquire into or to sanction any reasonable arrangements she may desire to make: *Ib.*

And where a widow takes for life the income of a fund, for the maintenance of herself and the *maintenance and education of her children, the Court will not, even with her concurrence, [*725] sanction a transfer to children who have come of age of their share of the fund, unless the income of what remains is clearly enough for the maintenance at any time of the other children: see *Berry v. Bryant*, 2 Drew. & Sm. 1, in which case, however, part of their shares were paid to two adult sons upon an arrangement that they were each to undertake to continue to pay to their mother, for the benefit of those who

were to be maintained, such annual sum as would make-up the income to the amount at which it then stood, and that what remained in Court as the residue of the share of those two sons, should be held as a security for the payment of that annual sum.

What remains after answering the purpose of maintenance and education, belongs to the widow or her assignees, and the Court, if necessary, will, in a suit, direct a reference to ascertain its amount: *Carr v. Living*, 28 Beav. 644, 647. And see *Hammond v. Neame*, 1 Swanst. 35; *Bushnell v. Parsons*, Prec. Ch. 219; *Cape v. Cape*, 2 Y. & C. Exch. Ca. 543.

And where the fund is itself given to a person for the maintenance of children, the Court may safely and properly pay it over to such person, who, although it is in some respects to be looked upon as a gift conferred upon himself, will nevertheless be accountable for the proper application of the fund to those for whose benefit it was particularly given, if the intention was to create a trust in their favour, but he will not be so accountable where no trust was intended: (*Andrews v. Partington*, 2 Cox, 223; *Robinson v. Tickell*, 8 Ves. 142; *Woods v. Woods*, 1 My. Cr. 409; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 2 Ph. 553; *Webb v. Wools*, 2 Sim. N. S. 267; *Joddrell v. Joddrell*, 14 Brea. 397; *Biddles v. Biddles*, 16 Sim. 1; and see *Presant v. Goodwin*, 6 Jur. N. S. 404; *Lambe v. Eames*, 6 L. K. Ch. App. 597; *Mackett v. Mackett*, 14 L. R. Eq. 49); but if it was the fund is not assignable to creditors and others, without regard to the interests of the children (*Wetherell v. Wetherell*, 1 Keen, 80). In *Brown v. Casamajor*, 4 Ves. 498, a legacy was given to a father, "the better to enable him to provide for his younger children." He consented to secure the capital, but was held entitled to the interest. And in *Hamley v. Gilbert*, Jac. 354, where there was a gift of a residue to a lady for the education of her son, Lord Gifford, M. R., held her to be only entitled to it subject to the application of so much as the Court might think fit during his minority, although it was declared in the will that she should not be liable or subject to account for the disposal or application of the residue. In *Collier v. Collier*, 3 Ves. 33, *where the testator gave [*726] his wife 400*l.* a year, in addition to 500*l.* a year under her marriage settlement in consideration of the expense and care she would incur in the maintenance of their children, it was held by Lord Rosslyn, that she ought to maintain them when at home, but was not to be charged with their maintenance or education when at school.

The presumption in favour of a gift being intended is much stronger in the case of a father than a mother, for when a fund is given in aid of the performance of a duty which the donee is already legally bound to perform, it is a gift to, and a beneficial interest in, the person to whom it is made. Thus, in *Byne v. Blackburn*, 26 Beav. 41, a testator bequeathed a sum to trustees for his daughter for life, and after-

wards to pay the dividends to her husband "during his life, nevertheless to be by him applied for or towards the maintenance, education, or benefit" of the daughter's children. There was a gift to the children after the decease of the survivor of the daughter and her husband. It was held by Sir John Romilly, M. R., that the husband took beneficially. "In this case," said his Honor, "the testator himself appointed trustees of the fund, and he therefore could not have intended the father to act as a sub-trustee, and if he intended the children to have a direct and positive interest in the fund during the life of their father, he would have directed his own trustees to make the payment to the children. . . I think that this was a beneficial gift to the father, to assist him in the performance of his parental duties, and that he was to be the judge how to perform it. He had such a discretion as the Court could not control, and subject to that obligation, which lies between him and his own conscience, I think he has a beneficial gift."

Where an infant is residing out of the jurisdiction of the Court, in general, some one resident within the jurisdiction must be appointed guardian, to have the care and maintenance of the infant, and to whom the money may be paid, to be applied for his maintenance: *Logan v. Farlie*, Jac. 193.

However, in *Daniel v. Newton*, 8 Beav. 485, where guardians were appointed in Ireland to infants brought up and domiciled there, and their fortunes were in court in England, the Court adopted the proceedings in Ireland, and appointed the same persons guardians, notwithstanding they resided out of the jurisdiction, and ordered payment to them of the maintenance money.

In *De Weever v. Rochport*, 6 Beav. 391, where an infant was residing with her father out of the jurisdiction, Lord Langdale, M. R., ordered the father to appoint an attorney to receive the maintenance, and that, upon the appointment of such attorney, the dividends *of the funds in court should be paid to such attorney half-yearly, [*727] upon his production to the Accountant-General of an affidavit that he had duly applied, in the maintenance and education of the infant, all monies received by him on that account, up to the time of making such affidavits respectively. See *In re Morrison*, 16 Sim. 42; *Hart v. Tribe*, 19 Beav. 149.

In order indirectly to compel parents residing abroad to bring an infant within the jurisdiction, the Court may refuse any allowance for the infant's maintenance; *Lockwood v. Fenton*, 1 Sm. & G. 73.

In *Volans v. Carr*, 2 De G. & Sm. 242, a mother who was residing with her children in the United States of America (one of whom had been found a lunatic), being unable to maintain and educate them in a manner suitable to their fortunes, Sir J. L. Knight Bruce, V. C., ordered that the whole income, including the income of the share of the lunatic, should be paid to the mother.

As to the power of the Court to grant leases of infants' estates under 1 Will. 4, c. 65, s. 17, see 2 Seton on Decrees, 697, 3rd edit.; *In re Evans*, 2 My. & K. 318; *Ex parte Leigh*, 15 Sim. 445; *Wood v. Patteson*, 10 Beav. 541.

As to the appointment of guardians ad litem for an infant, when defendant in a suit, 1 Dan. Ch. Pr. 146, 5th ed.; 1 Smith's Ch. Pr. 122, 483, 7th ed.

Provisions relating to infants in the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85).—There are in this statute some important provisions relating to infants, which it will be well to bear in mind. With regard to the damages which a husband may obtain from an adulterer, the Court for Divorce and Matrimonial Causes has "power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof, shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife." Sect. 33.

And "in any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, *before making its final decree*, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." Sect. 35.

[*728] *And "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them." Sect. 45.

By 22 & 23 Vict. c. 61 (An Act to make further provision concerning the Court for Divorce and Matrimonial Causes, amended by 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; and 31 & 32 Vict. c. 77), the Court may, *after a final decree*, make orders as to the custody, maintenance, and education of the children of the marriage (sect. 4), and also as to the marriage settlements of the parties (sect. 5).

The jurisdiction with regard to the custody of children, given by the Act constituting the Divorce Court, does not in the least affect the jurisdiction of the Court of Chancery, or the principles upon which it is exercised: *In re Curtis*, 28 L. J. (Ch.) 458.

Where a wife succeeds in her suit against her husband in the Divorce

Court for a dissolution of the marriage, she will generally be entitled to the custody of the children: *Boynton v. Boynton*, 2 Sw. & Tr. 275.

The Divorce Court, it seems, has no jurisdiction, under the 35th section of the Divorce Act, to make any order as to the custody of children upwards of sixteen years of age: *Ryder v. Ryder*, 2 Swab. & Tr. 225.

With regard to the decisions of the Divorce Court as to the custody of children, see *Curtis v. Curtis*, 1 S. W. & Tr. 75; *Seymour v. Seymour*, Ib. 332; *Suggate v. Suggate*, Ib. 489, 492; *Whieldon v. Whieldon*, 2 Sw. & Tr. 388; *Carlidge v. Carlidge*, Ib. 567; *Chetwynd v. Chetwynd*, 1 L. P. P. & D. 39; *Mallinson v. Mallinson*, 1 L. R. P. & D. 93, 221.

During the lifetime of the father he is guardian by nature, and for nurture of his children. As such however, he has charge only of the person of the ward, and no right to the control or possession of his real or personal estate; *McCarty v. Rountree*, 19 Missouri, 145; *May v. Calder*, 2 Mass. 55; *Hyde v. Stone*, 7 Wend. 344; *Alstone v. Alstone*, 34 Alabama, 15; *Linton v. Walker*, 8 Florida, 144; *Jackson v. Combs*, 7 Cowen, 36; 2 Wend. 153; *Fonda v. Van Horn*, 15 Id. 631; *Kline v. Bebee*, 6 Conn. 494; *Miles v. Boyden*, 3 Pick. 213; *Spear v. Spear*, 9 Richardson, Eq. 188, 195; *Genet v. Tallmadge*, 1 Johnson, Ch. 561; and although the unauthorized receipt of property belonging to the infant, will render the father or other person receiving it, liable to be called to account as guardian; *Evans v. Pearce*, 15 Grattan, 513; it will not confer the rights and powers belonging to the office; *Van Epps v. Van Deusen*, 4 Paige, 64. Hence, a father is not entitled to receive a legacy left to his child; and a payment to him will not be a

defence to a subsequent suit by the duly appointed guardian, or the child himself after he comes of age; *Johnson v. Johnson*, 6 Johns. Ch. 163; *Linton v. Walker*. But on the descent of lands held in socage on the child in the lifetime of the father, he becomes entitled at common law to receive the rents and profits as guardian in socage, and may make a lease which will be valid during the continuance of the trust, although he cannot alienate the fee; *Thacker v. Henderson*, 69 Barb. 271; *Putnam v. Ritchie*, 6 Paige, 390. This guardianship may be determined by the ward at the end of his fourteenth year, but will otherwise continue until he is twenty-one; *Byrne v. Van Hoesen*, 5 Johnson, 66; *Jackson v. Davy*, 7 Id. 157; *Jackson v. Combs*.

In *Putnam v. Ritchie*, Chancellor Walworth said: "By the common law neither the guardian in socage, nor any other guardian had any power or authority to surrender a lease in fee, or to lease the freehold estate of the ward for any longer time than during the proba-

ble continuance of the trust, that is, in the case of guardianship by socage until the age of fourteen; (*Roe v. Hodgson*, 2 Wilson, 129; *Doe v. Bell*, 5 Durn. & East, 471, Litt. § 123. Carey's Comm. on Litt. 240)."

Agreeably to the common law, no one could be a guardian in socage, who was capable of inheriting from the ward; *Graham v. Houghtailing*, 1 Vroom, 532. And as a father might succeed to the estate of his children, under the legislation of New York, he was incapacitated from assuming the guardianship of their land. The disability was removed by the revised statutes, which provide that when an infant has real property, the father, or, if none, the mother, or in her default the nearest relative of full age, shall have the rights, powers and duties of a guardian in socage; *Holmes v. Seely*, 17 Wend. 75. But the powers of this class of guardians do not extend to the personal estate, and cease on the appointment of a general guardian by the surrogate. See *The People v. Kearney*, 31 Barb. 430.

On the father's death his authority as guardian by nature, for nurture, or in socage, devolves upon the mother. In the matter of *Abraham Van Houten*, 2 Green Ch. 221; *Peyton v. Smith*, 2 Dev. & Bat. Ch. 325; *Capel v. McMullan*, 8 Porter, 197; *Striplin v. Ware*, 36 Alabama, 87; *Lefever v. Lefever*, 6 Maryland, 472; *The People v. Wilcox*, 22 Barbour, 178; *Armstrong v. Stone*, 9 Grattan 102; *Byrne v. Van Hoesen*; *Jack-*

son v. Davy; *Osborn v. Allen*, 2 Dutcher, 389; *The Ohio Railroad Co. v. Tindall*, 13 Indiana, 164. Hence, a wife who enters upon or retains the possession of her husband's real estate after his decease, will be presumed to have received the profits as guardian in socage, and will be accountable for them as such to her children; *Byrne v. Van Hoesen*, 5 Johnson, 67. The court said the intendment of law is, that the mother is in possession by right, and entered as guardian in socage to her children, as her entry and perception of the profits have not been accompanied with any acts or declarations inconsistent with that character (3 Cruise's Dig. 411; 3 Wils. 516; 1 Johns. Rep. 163). This guardianship ceases when the infant arrives at the age of fourteen, so far as to entitle the infant to enter and take the land to himself; and yet if no other guardian succeeds, this will continue (Litt. s. 123, Andr. 313). The guardian in socage has the custody of the land, and is entitled to the profits for the benefit of the heirs. He has an interest in the estate and may lease it, may avow in his own name, and may, of course, have trespass (Com. Dig. tit. Guardian in Socage, Cro. Fac. 98)."

It was declared, in *Dedham v. Natick*, 15 Mass. 140, that "the mother, after the death of the father, remains the head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separ-

ated from her." If this language went beyond the doctrine of the common law, it announced a principle which has since been established in many of the States by statute.

It has been held in like manner in New Jersey and Indiana, that on the husband's decease, his widow succeeds to his rights as it regards their offspring, and may bring an action for wages that have been earned by the child while in the service of the defendant; *Osborn v. Allen*, 2 Dutcher, 389, or recover damages for an injury to his person through the negligence of a railway company; *The Ohio Railway Co. v. Tindall*, 13 Indiana, 164; see *Burke v. The Louisville Railroad Co.*, 7 Heiskell, 451.

On the other hand, Chief Justice Tilghman said, in *The Commonwealth v. Murray*, 4 Binney, 487, 492, that "a mother has no legal authority over her child;" but what the case actually determines is, that a mother is not under an obligation to maintain her child, nor entitled to his services, and not that she may not exercise a reasonable control as his natural guardian, until he is of an age to chose for himself, or her authority is superseded by the court.

The care of illegitimate children belongs *prima facie* to the mother as the person most interested in their welfare, and one whose relation to them admits of no dispute; *Wright v. Wright*, 2 Mass. 109; *Commonwealth v. Fee*, 6 S. & R. 255; *King v. Johnson*, 2 Hill Ch. 624; *McGonegal v. Mong*, 5 Barr, 269, 271; see *Carpenter v. White-*

man, 15 Johnson, 208; although the court may, where the welfare of the children requires it, take them from her keeping and deliver them to the father; *Byrne v. Love*, 14 Texas, 85; and in *The Commonwealth v. Anderson*, 1 Ashmead, 55, his claim was preferred to that of the maternal grandfather.

In *The Commonwealth v. Hamilton*, 6 Mass. R. 275, the court held that the mother had by her second marriage, lost the power of controlling her own actions, and, therefore, was not a fit custodian of the children whom she had borne to her first husband. A similar view was taken in *Worcester v. Merchant*, 14 Pickering, 512, where Putnam, J., said, "This application proceeds upon the ground that the father-in-law and the mother have a right to the services of her minor son during his minority; but we think that the case of *Freto v. Brown*, 4 Mass. R. 675, is decisive against the right claimed. In that case it was determined that a minor whose father is dead, and whose mother afterwards married, is entitled to his own earning while in the service of a third person.

It is clear that the father-in-law is under no legal obligation to support his son-in-law. The son-in-law has no home in the house of his father-in-law. He may turn the son-in-law out of doors when he pleases. The only claim which the father-in-law has, is that which a stranger has for necessities furnished to the minor."

The question, nevertheless, depends to a great extent on circumstances; see *Sewel v. Bitters*, 3

Bush, 74; *Perkins v. Finegan*, 105 Mass. 501; and in the case last cited, the court held that the refusal of a guardian to permit a girl to reside with her mother, who although remarried was well fitted to rear the ward and provide her with a home, was a sufficient cause for the removal of the guardian.

The authority of the father is paramount as regards his children; *Pierce v. Melloy*, 62 Illinois, 133; *Henson v. Watts*, 40 Indiana, 470; and a guardian appointed during his life to take charge of their estate, is simply a curator who can have no right to the custody or supervision of the ward, unless he is specially empowered by the court in consequence of the manifest unfitness of the father for the discharge of his parental duties; see *Lord v. Hough*, 37 California, 657. *The Succession of Forshall*, 25 Louisiana, Ann. 430. But although the mother succeeds in some measure to her husband's place at his death, her power is subordinate at common law and under the legislation of some of the States, and a testamentary guardian or one appointed by the court may take charge of the children, or direct that they shall be sent to school or college, notwithstanding the mother's earnestly expressed desire to keep them at home; see *Macready v. Wilcox*, 33 Conn. 221; *The Commonwealth v. Hamilton*, 6 Mass. 273; *The State v. Scott*, 10 Foster, 274; *The State v. Richardson*, 40 New Hamp. 281; *In the matter of Abram v. Van Houten*, 2 Green's Ch. 221.

The guardian is nevertheless subject to the control and supervision of the court, and may be enjoined or removed if his power is unduly exercised without due regard to the mother's feelings, or her claim to the society and affections of her children; *Perkins v. Finnegan*, 105 Mass. 501. It was accordingly declared in *Lefever v. Lefever*, 6 Maryland, 472, that if the acts or conduct of the guardian should be such as to prevent or interrupt the intimate and affectionate intercourse which should subsist between parent and child, "the remedy would be found in the statute, by which the court is empowered to revoke the appointment and make a new one." The same point was determined in *Perkins v. Finnegan*, 105 Mass. 501, where the course of the guardian in removing a girl of some eight years of age from her mother by a *habeas corpus*, and placing her under the care of his wife, was held to be a sufficient cause for his removal, although the mother had taken a second husband, and the guardian's wife who was the maternal grandmother of the ward, proposed to suffer the ward's property to accumulate, and defray the expense of her education.

The guardian nevertheless may and ought to remove his ward from the keeping of an unworthy mother, whose life and morals may have a contagious influence on the child; *Garner v. Gordon*, 41 Indiana, 92; see *The Commonwealth v. Addick*, 2 S. & R. 174.

The right of the father to the custody of his children, is subject

to the duty of providing for their support, and he is consequently entitled to their services and earnings as a means of fulfilling the obligation; *Spear v. Spear*, 9 Richardson, Eq. 184, 196; *Benson v. Remington*, 2 Mass. 113; *Nightingale v. Withington*, 15 Id. 272; *Day v. Everett*, 7 Id. 145; *Burlingame v. Burlingame*, 7 Cowen, 92; *Kauffitt v. Moderwell*, 9 Harris, 229; *The U. S. v. Mertz*, 2 Watts, 406. When, however, a father is unable or unwilling to maintain his children, and compels or suffers them to shift for themselves, they acquire a right *ex necessitate rei* to make beneficial contracts for their own support, and to receive and enjoy the fruits; *Jennes v. Emerson*, 15 New Hampshire, 486; *Janny v. Alden*, 12 Mass. 375; *Galbraith v. Black*, 4 S. & R. 207. Such a relinquishment may be express, or implied from circumstances; *Durken v. Hess*, 54 Missouri, 246. It follows conversely, that when the legal right of a father to the custody of his children, is determined by a decree of divorce which transfers them to the mother, his parental obligation also ceases, and no recovery can be had by her, or by a third person for necessities furnished for their use; *Finch v. Finch*, 22 Conn. 411.

Agreeably to the English authorities, the moral obligation which a father is under to provide for his child, imposes no legal liability that can be enforced by suit, even when the cause of action is for necessities furnished to an in-

fant who is in extreme need, and whom the father has neglected to support; *Mortimore v. Wright*, 6 M. & W. 481. A different view prevails in some of the States in this country, under which the father may be made answerable on proof that he has turned the child out of doors, or refused him maintenance at home; *Gordon v. Potter*, 17 Vermont, 350; *Thompson v. Dorsey*, 4 Maryland Ch. 149; *Cromwell v. Benjamin*, 41 Barb. 558; *Tomkins v. Tomkins*, 3 Stockton Ch. 517. In the case last cited, the chancellor said: "The position taken by the complainant's counsel is, that a parent is under no legal obligation to support his child, and that whoever furnishes a child with necessities, must do it gratuitously; that no recovery can be had for such necessities, unless they were furnished under an express contract with the parents. What was said by the judges in the cases of *Urmston v. Newcomer*, 4 Ad. & Ellis, 899, 31 E. C. L.; and *Mortimore v. Wright*, 6 M. & W. 48, would seem to sustain the position. Such is not the law in New Jersey. The law, as it has been adopted in this State, is as laid down by the court in *Van Valkenburgh v. Watson and Watson*, 13 J. R. 480. A parent is bound to provide his infant children with necessities; and if he neglects to do so, a third person may supply them, and charge the parent with the amount. But such third person must take notice of what is necessary for the infant, according to his situation in life; and where the infant lives with his

parent, and is provided for by him, a person furnishing necessities cannot charge the parent."

The authorities concur that to sustain an action on this ground, it must appear not only that the infant was in want, but that the father neglected or refused to provide for its support; *Farmington v. Jones*, 36 New Hamp. 271; *Angel v. M'Clellan*, 16 Mass. 28; *Brown v. Derloch*, 28 Georgia, 486; *Weeks v. Marow*, 40 Maine, 157; *Van Valkinburgh v. Watson*, 13 Johnson, 480; *Clinton v. Rowland*, 24 Barb. 634; *Townsend v. Burnham*, 33 Id. 270.

APPOINTMENT OF GUARDIANS.—In the United States the father is generally regarded as the person who, all other things being equal, is best fitted to take charge of the property of his children, and who should be appointed to that office if not shown to be incompetent; *Hall v. Lay*, 2 Ala. 529; *Lang v. Pettus*, 11 Id. 37; *Genet v. Talmadge*, 1 Johnson Ch. 561; *Hoyt v. Hilton*, Edward's Ch. 202. But it is also held that the main object in the appointment of a guardian is the welfare of the ward; and if the father is disqualified or cannot give security, some fit person will be appointed to act as curator until the child comes of age; *McCarty v. Rountree*, 19 Missouri, 345; *Spear v. Spear*, 9 Richardson Eq. 184, 196; see *Ex parte Mountfort*, 13 Vesey, 446. It is nevertheless held in Connecticut, that the father is entitled to the custody of the property as well as the persons of his children, until a guardian is appointed by the

proper tribunal; see *Selden's Appeal*, 31 Conn. 548.

The appointment of guardians is regulated in some of the States by statutes, which provide that the father of the minors, and, on his decease, the mother, while unmarried, shall if competent be entitled to the guardianship of the persons and estates of their minor children; *Lord v. Hough*, 37 California, 657; *Leavel v. Bettes*, 3 Bush, 74; *Isaacs v. Taylor*, 3 Dana, 600; *Redman v. Chance*, 31 Maryland, 42; *Lefever v. Lefever*, 6 Id. 472; *Duncan v. Crook*, 49 Missouri, 116. The right thus conferred though not absolute, is one that cannot be disregarded except for sufficient cause, and with due notice to the parent.

The mother ceases to be legally entitled under these statutes on contracting a second marriage, but it is not a disqualification if she is on the whole best fitted to take charge of the child; see *Leavel v. Bettes*, 3 Bush, 74.

In Indiana the court may appoint a guardian who shall have "the custody and tuition of such minor, and the management of his estate during minority, unless sooner removed or discharged from such trust: *Provided*, That the father of such minor, or if there be no father, the mother, if suitable persons respectively, shall have the custody of the person and the control of the education of such minor;" 2 G. & H. 566, sec. 6; "*Garner v. Gordon*, 41 Indiana, 105; *Sharpe v. Banks*, 25 Indiana, 495. In these cases the statute was said to

affirm the common law, "that the father is the natural guardian of his infant child, is responsible for its raising and education, and has the right to its custody."

In *Duncan v. Cook*, 49 Missouri, 117, Bliss, J., said: "Our statute recognizes the father, and after his death the mother, as the natural guardian of both person and estate; but if the minor have independent property, security must be given and accounting be had in the same manner as though a stranger were appointed; and in appointing strangers the appointment must specify whether it be of the person, or of the person and estate." "The guardian of the person, whether natural or legal, shall be entitled to the charge, custody and control of the person of his ward, and the care of his education, support and maintenance; the curator shall have the care and management of the estate of the minor subject to the superintending control of the court; and the guardian of the person and estate of the minor shall have all the powers and perform all the duties, both of a guardian of the person and curator;" Wagr. Stat. 675, § 17.

In like manner, it is established in Maryland by statute, and under the course of judicial decision, that "upon the death of the husband his widow becomes the natural guardian of her infant children, and upon qualifying and giving bond as required by the act of 1816, chapter 203, she is entitled to the control both of their persons and property to the exclusion of all other persons;" *Lefevre v.*

Lefevre, 6 Maryland, 472; and although the Orphans' Court may appoint a third person if the mother declines or is incompetent, she must have notice and an opportunity to assert her claim; *Redman v. Chance*, 31 Maryland, 42.

The rule is nearly if not quite the same in New Jersey, where the father, and next to him "the mother, and after the mother the next of kin, are entitled to be appointed guardians of a minor under the age of fourteen years; and such claim cannot be disregarded unless for some satisfactory reason apparent to the court; Nix. Dig. 580, § 23; 2 Kent's Com. 7th ed., 233, note 6; *Eldrige and wife v. Lippincott*, Coxe, 397; *Read v. Drake*, 1 Green's Ch. R. 78; *Albert v. Perry*, 1 McCarter, 542.

In Maine, the appointment of guardians for minors under fourteen years of age belongs to the Court of Probate. If the minor is over fourteen years of age, he may nominate his guardian subject to the approval of the judges. The statute does not affirm that the claim of the father or mother is to be preferred in the appointment, but it provides "that the father, if alive, and competent to transact his own business, and if not, the mother while unmarried, and thus competent, shall have the care of the person and education of the minor; otherwise these duties shall devolve upon the guardian, and in any case, the judge may decree them to him if he deems it for the welfare of the minor. The guar-

dian is therefore made a curator of the estate during the lives of the parents, and cannot remove the children from the mother without due notice and hearing; *Peacock v. Peacock*, 61 Maine, 211.

Agreeably to the statutes of Alabama "Where a minor has a father living, and has an estate in his own right, a guardian must be appointed for him; and his father, if a suitable and proper person, and willing to give bond and qualify as guardian, is entitled to a preference. No such guardian can exercise any control over the person of his ward, during the life of the father; or during the life of the mother, if the ward is a female, or a male under the age of fourteen years."

In Pennsylvania, the duty of a father to maintain, protect and educate his offspring, is fully recognized by the courts, and held to imply a corresponding power in all that regards the custody and education of the child. But it is also held, that to intrust him with the care or investment of the child's money or effects would be unfavorable to the interests and happiness of both. Hence, in choosing a guardian for a minor's estate, the court will not select the father, although in making such a choice due regard will be shown to his wishes and advice; see *Senseman's Appeal*, 9 Harris, 331.

In selecting a guardian the court should look primarily to the interest of the ward, and may discard the parents or relatives and appoint a stranger who is shown to be more competent; *Alert v.*

Perry, 1 McCarter, 542; *Bennett v. Byrne*, 2 Barb. Ch. 216; *Hatley v. Chamberlain*, 1 Redfield, 333; *Redmond v. Chance*, 21 Maryland, 42. The ordinary said in the case first cited: "The reasons disclosed by the evidence in this case rendered the appointment of the mother and stepfather of the infant as her guardians improper, and fully warranted the court in passing by their claims. It is not denied that the mother, under the statute, has the clear legal right to the guardianship of her child, which cannot be disregarded without justifiable cause. But that right must be held in subordination to, and exercised in consistency with, the rights, the moral training and the highest welfare of the child. The law gives no countenance to the idea that the moral and mental culture, the proper education and discipline of the child, are to be held in subordination to the legal rights of the parent. The courts, both of law and equity, constantly interfere by writ of *habeas corpus* for the protection of infants against the immoral and vicious influences exercised over them in their own home, and will dispose of their custody, even against the legal claim of the father, in such mode as shall be most conducive to the welfare of the child."

The power must, nevertheless, be exercised judicially, with due notice, and an opportunity for all the parties concerned to present their claims; *White v. Pomeroy*, 6 Barb. 640; *Hart v. Gray*, 3 Sumner, 339; *Lee v. Buck*, 30 Indiana,

148; *Senseman's App.*, 9 Harris, 332. It was held, in the case last cited, that although the father is not eligible as guardian under the laws of Pennsylvania, it is erroneous to proceed without his knowledge.

In providing for the guardianship and education of an orphan child, the court will have a just regard to the wishes of its deceased parents, although not expressed formally or by will, and should in general direct the infant to be brought up in the faith which they professed. *In the matter of Anna Turner*, 4 C. E. Green, 433. The ordinary said: "In this State all Christian denominations stand on the same footing in the eye of the law. No chancellor or judge although he cannot avoid the conviction that the faith which he has adopted by education or choice, and the church to which he is in consequence of this attached, would be the best for the welfare of the child, has the right to be governed by his individual belief in the disposition of the children of others. Parents while living have a right to control the religious education of their children, and their wishes in this respect must be regarded after their death. Where both parents were of the same religious faith, and die without expressing any wish on this subject, the courts will presume that they wished their children educated in their own faith. In this case the father who by law has the right to dispose of the guardianship of his child, has expressed no wish authoritative or

otherwise. I cannot regard his promise to the priest at his marriage, as expressing a wish; the circumstances under which it was enacted, would by no means allow it to be considered as the expression of his desire or conviction. The fact that he consented to its baptism in the Roman church is of more weight, and yet cannot be regarded as the expression of a desire on his part as to the religious education of his child. But knowing the desire of his wife and her friends, and what would be their course if he should die, he omitted to make any provision, from which it may be inferred that he assented that his wife should control in this matter. The mother of the child by her last will has in the clearest possible manner expressed her wishes on this subject, and they should be regarded by the court. Her wishes and convictions, rather than those of the judge, should be allowed to guide the religious education of her child. So far then as this consideration is entitled to any weight, the leaning should be to the maternal grandfather.

The same considerations apply with more force to the question of selecting the guardian, now directly before the court.

The paternal kin are not entitled to any preference on that account, over the maternal; both stand on the same footing; *Albert v. Perry*, 1 McCarter, 540; *Underhill v. Dennis*, 9 Paige, 202.

The father has expressed no wish or preference in this matter, but the mother, the surviving

parent, has. She had no power to dispose of the guardianship, and the disposition of it in her will is void; but it is an authentic expression of her wishes, and as such will be regarded by the court; *Underhill v. Dennis*, 9 Paige, 202; *Bennett v. Byrne*, 2 Barb. C. R. 216; *In re Kay*, Eng. Law, Rep. 1 Chan. 387; *Foster v. Matt*, 3 Bradf. R. 409. It might not be, if it appeared clearly that the interest of the infant required her wishes to be disregarded. In this case it does not so appear. For these reasons I am of opinion that the guardianship of the infant should be committed to Daniel McNamara, the maternal grandfather."

POWERS OF THE GUARDIAN.—

The powers of a guardian are local, for the obvious reason that the laws of a State can have no force or effect *proprio jure* within the territory of another sovereign. A guardian cannot therefore exercise any control or power, over the real or personal property of the ward in a sister State, or foreign country; *Morrell v. Dickey*, 1 Johnson's Ch. 153; *Ex parte Dawson*, 3 Bradford, 130, 135; *Earle v. Dresser*, 30 Ind. 11. But a guardian who derives his authority from the State where the ward is domiciled, and has the charge and custody of his person, is *prima facie* entitled to the assets wherever situate, as a means of providing for the ward, and in order that he may be able to hand the property over to him when he attains his majority. A court of chancery may consequently direct

that the funds belonging to a minor who is an inhabitant of and resides in another State, shall be paid by the local administrator or guardian, to the person who has been duly appointed under the law of the place of domicile; *Earle v. Dresser*, 30 Ind. 11. Elliot, J., said that "the application was addressed to the sound discretion of the court to be determined upon principles of comity, equity and justice. If it appeared from the facts of the case that any principle of public policy would be violated, or that the legal rights of any of our own citizens would be injured or impaired by the transmission of the fund to the foreign guardian, it would undoubtedly be right to retain it here. But it does not appear that such consequences would result from its transmission. Dresser, the foreign guardian, is the father of the ward. The domicile of the father is the legal domicile of the infant child, and they are both domiciled in the State of Michigan.

The father is the natural guardian, and independent of his letters of guardianship, if not morally or otherwise incapacitated, has the right to the custody, care and education of his infant child, and would be quite as likely to consult its interests in the disposition or investment of the fund as a stranger, or one more remotely related. Dresser was appointed guardian of the person and estate of the ward by the proper probate court of the county of his domicile, in Michigan, and gave bond as appears with special

reference to this fund. Under such circumstances it seems evident that the best interests of the ward as well as the principles of justice and fair comity demand that the fund should be paid over to the foreign guardian."

For like reasons a minor who is forcibly or clandestinely removed to another State, should be surrendered to the person who is entitled as guardian agreeably to the law of the place of domicile, although the rule is not absolute, and should be administered with a due regard to the infant's wishes; see *Foster v. Alston*, 6 Howard, Mississippi, 406; *Ex parte Dawson*, 3 Bradford, 131; *The State v. Baird*, 6 C. E. Green, 384.

In *Dawson v. Jay*, 3 De Gex McNaughton & Gordon, 764, Wm. Dawson, then an English subject, went at a very early age to reside in the United States, where he became a naturalized citizen, took an American wife whom he survived, and died leaving an only child of tender years. His sister, Miss M. A. Dawson, was appointed guardian of the infant who as her mother's heiress was entitled to a considerable real and personal estate in the city of New York, and had no property in England. This appointment took place in pursuance of an arrangement between the paternal and maternal relatives, that the child should be reared and educated in the United States, and on the faith of a written assurance from Miss Dawson not to remove her ward. She subsequently wrote to say that she did not consider this promise binding, and

proceedings were forthwith instituted in the courts of New York, which ended in the removal of Miss Dawson from the guardianship, and the appointment of the ward's maternal aunt, Miss Jay. Pending this suit, the child was covertly taken to England, notwithstanding an injunction issued by the Supreme Court, though not served. Miss Jay followed, and applied to the Court of Chancery for an order that the infant should be returned to the United States, which was granted by the Vice Chancellor, but reversed on appeal. Lord Cranworth held that the child, though begotten by a father who had expatriated himself, and born in America, was to all intents and purposes a British subject, and that although the guardian who had been appointed in New York, was her maternal aunt and a person of the highest respectability, and all the property of the ward was in America, it was his duty not to suffer her to go out of the jurisdiction of the court. He would therefore order Miss Jay to remit the net income of the real and personal estate to England, and that it should be paid into court to the credit of the cause, after deducting the yearly sum of £200 for maintenance.

When the question whether this order was valid, arose in *Ex parte Dawson*, 3 Bradford, 130, it was not unjustly criticised. The court held that the removal of the ward from the country of her birth clandestinely, and in defiance of the authority of the courts of justice, was a violation of right and

legal principle. It was not sanctioned or justified by the statutes of VII. Anne, chap. 5, sec 3, and IV. George, 2 Chap. 21, which gave the children of English subjects although born abroad, the privileges of English citizenship. These statutes were enabling, and designed to enlarge the rights which persons thus situated could assert in England, and not to cancel the obligation which they had incurred to the laws of their birth place.

It was the established doctrine of the common law that the allegiance arising from birth could not be forfeited, cancelled or altered, by any change of time, place or circumstance; 1 Bl. Com. 369; Calvin's Case, 7 Rep. 16, a It followed that the accidental causes by which the ward had been brought to England, did not confer jurisdiction on the English tribunals, or divest that which had already been acquired by the courts of New York.

Her birth and domicile were in New York, and her real and personal property were there also, and yet the chancellor held that she was to be deemed a British subject because of a legal fiction created by act of Parliament, and that it was incumbent on the American courts to transmit the income to be appropriated under the direction of a foreign tribunal. The court did not feel that it was called on by any circumstances properly addressed to judicial discretion, to forego its jurisdiction over the minor, her estate and guardian, in deference to such a judgment. She had been clandestinely carried

away in fraud of our laws, and to reward such an act by sending her property after her, would be yielding that to comity which it did not require, and in a case where it had been ignored. The court would therefore allow the expenses which the guardian had incurred in her fruitless application to the Court of Chancery, and refuse to permit the funds of the minor to be sent abroad."

The right of a father to appoint a testamentary guardian, is generally recognized in the United States. It is a statutory power which belongs only to the father, and cannot be exercised by the grandfather or other relative, although holding the relation of a parent; *Hoyt v. Hilton*, 2 Edwards, 202. No form is requisite for such an appointment, and it may be made by any words which show that the testator intended to commit the care and tuition of his child exclusively to some one whom he designates in his will. But the court will not deduce an intention to confer a power which must necessarily supersede the mother's, from vague or doubtful language which may have another meaning. Thus, a direction in a husband's will that his wife shall have the use of the property for the benefit of the children, subject to the supervision of the executors, will not invest them with the authority of guardians; *Peyton v. Smith*, 2 Dev. & Batt. Eq. 325. So a clause providing that the executors shall give the testator's son a good college education out of the estate, has been held to en-

title them to regulate his course of study and determine where he should be sent to school or college, and not to constitute them guardians in other respects, or dispense with the obligation of consulting the wishes and views of the mother; *In the matter of Abraham Van Houten*, 2 Green Ch. 220.

In *Lord v. Hough*, 37 California, 658, the plaintiff, who was a widow, sued to obtain the personal custody and guardianship of her children. The defendants, who were the executors and mother of her deceased husband, relied on the following provision in his will: "The personal care, custody and control of my said children I do hereby confide to my dear mother solely, except in such cases as my executors may determine otherwise for the purposes of education." The defendants further averred that the plaintiff was not a suitable person to be intrusted with the custody and tuition of the children. Sanderson, J., said "that the question was whether the right conferred by the will on the testamentary guardian, was superior to the mother's right as defined by the laws of California. Agreeably to the English law, a testamentary guardian was like all other guardians, but a trustee, and as such, subject to the supervision and control of a court of chancery.

The principle had been asserted by Lord Macclesfield in *Beauford v. Beatty*, 1 Pere Williams, 702, and by Chancellor Kent in *the matter of Andrews*, 1 Johnson Ch. 109. But while guardians were

amenable to the Court of Chancery, it could not interpose without cause in that or any other matter. The discretion of the chancellor in the supervision and removal of guardians was not an arbitrary or capricious, but a judicial discretion to be exercised with a due regard to the rights of all concerned. It would otherwise be vain to provide by law that the father, or a person by him selected should have the custody of the child, and it would lie in the mouth of a chancellor to say whether he should or not. It followed that if the Statute 12 Charles II., c. 324, was the law of California, the custody of the children could not be taken from the testamentary guardian named by the deceased father. The question, however, depended on the tenth section of the California statute in relation to the appointment of guardians, which gave the power of appointing a testamentary guardian to the father, and on his decease to the mother, and provided that every person so appointed should have the same powers as the guardian appointed by the Probate Court. Under the fifth and sixth sections of the statute which conferred the power of appointment on that court "the father of the minor, if living, and, on his decease, the mother while she remains unmarried, being themselves reasonably competent to transact their own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor. Sect. 6. If the minor have no father or mother living and competent to have the custody and care of such minor, the guardian



so appointed shall have the custody and tuition of his ward."

The rule prescribed was according to the law of nature. It selected the same guardian if not otherwise unsuitable, which nature had appointed, and in the same order, the father first, the mother next. If from any cause these could not be had to act in respect to the infant's estate, they were still retained to serve as guardians by nature and for nurture, and only in the event that neither could be had for that purpose, was the personal custody of the minor to be delivered over to a stranger. The inevitable inference was that the testamentary guardian, since he only had the powers of a probate guardian, could not take the person of the minor from a mother who was competent, willing and worthy to have the care and tuition of the child."

ALLOWANCE FROM THE MINOR'S ESTATE FOR HIS SUPPORT.—The question whether the expenses incident to the maintenance and education of a minor, shall be defrayed out of his estate or devolve upon the father, is relative, depending on the father's means and the fortune of the ward. A father is under an obligation to rear and educate his children, and when his estate is ample, the court will not exonerate him from this duty, or direct that any portion of the burden shall be borne by the estate of a minor child; *In the matter of Kane*, 2 Barbour Ch. 375; *Cruger v. Heyward*, 2 Dessausure, 94; *Sparhawk v. Buell*, 9 Vermont, 41; *Addison v. Bowie*, 2 Bland,

606; *Myers v. Myers*, 2 M'Cord Ch. 214; *Dupont v. Johnson*, 1 Bailey Eq. 279; *Spear v. Spear*, 9 Richardson, Eq. 188, 196; *Tompkins v. Tompkins*, 3 C. E. Green, 303; *Booth v. Smith*, 2 Strobhart Eq. 31; *Harland's Case*, 5 Rawle, 133; *Morris v. Morris*, 2 McCarter, 239; *Walker v. Crowder*, 2 Iredell Eq. 478; *Haase v. Roehrscheid*, 6 Indiana, 67; *Hines v. Mullins*, 25 Georgia, 696.

On the other hand, when the children's means are large, and their father's inadequate to afford them such an establishment and education as befits the position which they will hold when they come of age, the court will from a just consideration for them as well as for the parent, direct that a suitable allowance shall be made from their income; *In the matter of Burke*, 6 Sandford Ch. 607; *Rice v. Tonnele*, 4 Id. 568; *Heyward v. Cuthbert*, 4 Dessausure, 445; *Wilkes v. Rogers*, 6 Johnson, 566; *Watts v. Stule*, 19 Alabama, 656; *Dupont v. Johnson*, 1 Bailey Eq. 274; *Godard v. Wagner*, 2 Strobhart Eq. 1; *Corbin v. Wilson*, 2 Ashmead, 178; *Bethea v. M'Coll*, 5 Alabama, 312; *Watts v. Steele*, 19 Id. 656; *In the matter of Kane*, 2 Barb. Ch. 375.

In the case first cited, the father was in narrow circumstances, while his infant daughters had a present income of \$4,000, and would be entitled to a fortune of \$80,000 on coming of age, and the court directed an allowance of \$2,500 a year for the purpose of enabling the father to have them educated suitably at home, although their

yearly expenses at a boarding school would not have exceeded \$1,200.

This decision was criticised in *McKnight v. Walsh*, 8 C.E. Green, 136; and it was said to be erroneous to sanction an outlay of the minor's income which exceeds a just provision for his wants, for the purpose of keeping up the family establishment, although he resides with his parents, and obtains the home which he might otherwise want.

It has also been held that such an appropriation may be made where there is a gift to a class, with a postponement of the period of enjoyment, and a limitation over to the survivors in the event of death, as when the bequest is to such of the testator's children or grandchildren as shall be living when the youngest comes of age; *Haley v. Bannister*, 4 Maddox, 275; *Newport v. Cook*, 2 Ashmead, 333; *Norris v. Fisher*, 1b. 411; because it is uncertain which of the legatees will survive, and the risk of ultimate loss is counterbalanced by the immediate benefit. But a chancellor cannot anticipate the time prescribed for the payment of such a bequest, when there is a gift over to a person not in esse, or to a person who is not one of the class on whose behalf the application is made; *Newport v. Cook*, 2 Ashmead, 332, 334.

When the circumstances require it, the court may direct that the principal of a minor's estate shall be taken to supply his urgent wants; *In the matter of Bost-*

wick, 4 Johnson's Ch. 100; *Long v. Norcom*, 2 Iredell Eq. 354; *Withers v. Hickman*, 6 B. Monroe, 293; *Hargood v. Wills*, 1 Hill Eq. 59; *Williams' Case*, 3 Bland, 186; *Carter v. Rolland*, 11 Humphrey, 339.

In the case first cited, a mother, who was entitled under her father's will to a legacy of \$3,600 for her life with remainder to her children, and who had no other means, was allowed the sum of \$682, which she had been compelled to expend for their support out of the principal, with leave to apply from time to time for such further sums as should be indispensably requisite. So when the health of the ward is seriously impaired, and requires a greater outlay than his income can afford, the court may direct that the means shall be taken from the principal; *Long v. Norcom*.

The rule that a minor shall live within his income is ordinarily imperative, and there can be no departure from it except on the ground of a necessity which is too plain for a reasonable doubt; see *Penn v. Logan*, 1 Spear Eq. 29; *Teague v. Dendy*, 2 McCord Ch. 207. But the capital may be applied, with the sanction of the court, for the purpose of establishing the ward in business, or enabling him to make a marriage settlement, because this is virtually an investment; *Williams' Case*, 3 Bland, 168; *Hanson v. Chapman*, 1b. 198.

A provision that the fund shall accumulate until the ward comes of age, or fixing the amount to be

laid out for his support, will not preclude the immediate application of so much of the income or principal, as may be requisite to meet such pressing wants as cannot otherwise be supplied; *Ex parte Potts*, 1 Ashmead, 343; *Corbin v. Wilson*, 2 Id. 178, 209; *Stretch v. Watkins*, 1 Maddock, 253. It is a general rule that one may demand immediate payment of that which he is to receive at a future period, if there is no right that can be prejudiced by granting the request; *Norris v. Fisher*, 2 Ashmead, 411.

A bequest contingent on the happening of a future and uncertain event is not within this principle. It does not therefore carry interest, nor can any portion of it be applied for the support of a minor legatee, unless it proceeds from a parent or one who is under a parental obligation, and may be presumed to have meant that the infant should not be without the means of support. Such is the established doctrine as it regards children; see *Magoffin v. Patton*, 4 Rawle, 119; *Siebert's Appeal*, 7 Harris, 49; *Corbin v. Wilson*, 2 Ashmead, 178, 202; and it has been extended in the United States to grandchildren; *Siebert's Appeal*; *Leiby's Appeal*, 13 Wright, 182. It was accordingly held in this instance that although the legacies which the testator had bequeathed to his grandchildren, were contingent on their reaching the age of twenty-one years, yet the court might direct that the interest on the amount which would be due to them on the happening of that

event, should be paid annually to their guardian for their support and maintenance; see *Hill on Trustees*, 401; *Locke v. Robinson*, 2 Merivale, 304; *Newport v. Cook*, 2 Ashmead, 332.

In *Newport v. Cook*, the testator directed that his personal estate should be accumulated for the use of his born and unborn grandchildren, "to be received by them as they shall respectively arrive at the age of twenty-three years," with a proviso that if any of them should die without leaving issue, the share of the child so dying should go to the surviving grandchildren. The question before the court was whether any portion of the estate could be used for the support of the children during their minority. King, P. J., said, although courts of equity recognized the obligation of a father to support his children, and generally refused to grant him an allowance from their estate, yet such relief might be accorded where his means were not adequate to give them a suitable education; *Sherwood v. Smith*, 5 Vesey, 54; *Cavendish v. Mercer*, 14 Id. 202; *Myer v. Myer*, 2 McCord Ch. 255.

The case of *Stretch v. Watkins*, 1 Maddock, 253, was that of a legacy by a father to a daughter, with a direction for the accumulation of interest until she came of age, subject to an allowance of £20 per annum for her maintenance. On a bill filed by the mother and daughter, for further allowance for the support and education of the daughter, it was granted by the

Vice Chancellor. These cases were decided on the principle that where the legacy is vested in interest though the time of payment is postponed, and will go to the executors or administrators of the legatee at his death, there can be no just reason for refusing a part of that which will ultimately be his own. The difficulty in the case before the court arose from the executory limitation over to the survivors, in the event of the death of any of the legatees without issue. In considering this point it was important to bear in mind that it was not a case of an executory limitation over to a third person on the happening of a given contingency, and was on the contrary a gift to a class, all or some of whom must take the fund absolutely, each having a common interest in it and an equal chance of surviving.

The weight of authority was that a court of equity would direct an allowance to be made under these circumstances for the maintenance of infant legatees, although the testator's intention was that the income should accumulate for the benefit of the common fund, and although the applicants had a father living, if he was unable to give them an appropriate education; *Greenwell v. Greenwell*, 5 Vesey, 197; *Ex parte Keebler*, 10 Id. 605; *Haley v. Bannister*, 4 Maddock, 275.

But the application could not have been granted if the provision of the will had been, not that the legacy should go to the survivors in the event of death, but to a third person, or even to the chil-

dren of the deceased; *Turner v. Turner*, 4 Simons, 430; *Ex parte Keebler* 11 Vesey, 604.

It followed that there was no difficulty in granting maintenance from the income of the estate, which was all that the complainants asked for. But in a case of clear and manifest urgency, the court would not hesitate to break into the principal of a vested legacy for the purpose of educating the infant legatee.

In general the court looks with disfavor on a guardian who has expended the capital of the ward's estate without an order to that effect from some competent tribunal, and will be slow to ratify that which is *prima facie* tortious; *M'Dowell v. Caldwell*, 2 M'Cord Ch. 43; *Davis v. Roberts*, 1 Smedes & Marshall Ch. 543; *Myers v. Wade*, 6 Randolph, 444; *Davis v. Harkness*, 1 Gilman, 173; *Otte v. Becton*, 55 Missouri, 99; *Hassart v. Rowe*, 11 Barb. 22. When, however, the omission appears to have arisen from ignorance, or is explained by circumstances, it may be overlooked and the account confirmed if otherwise unobjectionable, and the better opinion seems to be that an allowance should not be refused for such an expenditure, where the guardian can make out a case which would have left no doubt as to the proper course if he had applied for directions in the first instance; *Long v. Norcom*, 2 Iredell Eq. 354; *Sparhawk v. Buell*, 9 Vermont, 1; *In the matter of Bostwick*; *Withers v. Hickman*, 6 B. Monroe, 293.

A guardian may accordingly be

credited with the amount expended for necessary repairs to the ward's real estate, or even in purchasing it at a sheriff's sale to prevent a sacrifice, although he made the outlay on his own responsibility, and without being duly authorized; *Bonsall's Appeal*, 266; *Eckford v. D'Kay*, 8 Paige, 90.

It has nevertheless been held in some instances, that the burden of proof is on the guardian to show not only that the circumstances justified the outlay, but that the need was so urgent as to justify the assumption of an authority which does not ordinarily exist; *Holmes v. Logan*, 3 Strobhart, Eq. 31; *Willard v. Chovin*, 2 Id. 40; *Denney v. Bullock*, 7 Iredell Eq. 102; In *Willard v. Chovin*, the court said: "The objectionable expenditures run through a series of years, during which it was easy to have made application for the sanction of the court. An expenditure made upon an emergency suddenly arising, and acted on by the guardian, might afterwards be sanctioned by the court, when proved to have been for the benefit of the ward. But unauthorized encroachments upon the capital by the guardian are not to be encouraged, and it must be a strong case that would be exempted from the operation of the general rule."

To sustain an application by a father for the reimbursement of the amount which he has laid out for the past maintenance of his minor child, it must appear not only that the expenditure was for the infant's good, and such as the

court would have authorized, but that the father's circumstances were such that he could not reasonably be required to defray the charge from his own resources; *In the matter of Kane*, 2 Barb. Ch. 375-380; *Davis v. Roberts*, 1 Smedes & Marshall's Ch. 543; *Myers v. Wade*, 6 Randolph, 444.

When the object is an allowance for the maintenance or education of an infant out of the principal or income of a contingent legacy, or a legacy payable at a future day, the application must be made to chancery, and a recovery cannot be had at common law; *Seibert's Appeal*, 7 Harris, 49-54; *Miles v. Wistar*, 5 Binney, 477; *Newport v. Cook*, 2 Ashmead, 332, 347.

The original jurisdiction of chancery does not extend to the sale of an infant's real estate; and if a special authority for that purpose is conferred by the legislature, it must be strictly pursued or the conveyance will be void; *Williamson v. Berry*, 8 Howard, 495. In this instance, a devisee for life with remainder to his children, who had been authorized by the legislature of the State of New York to expose the premises for sale under the direction of the chancellor, and invest the proceeds for the uses of the will, executed a conveyance in satisfaction of an antecedent debt, which was approved by a master in chancery, and confirmed by the court. An ejectment by the remainder men was subsequently brought by a writ of error before the Supreme Court of the United States. That tribunal held that the conveyance

was a plain departure from the power, and might be set aside, although the defendant was a purchaser for value and in good faith from the original grantee.

Nelson, J., dissented on the ground that the question had been determined by the New York courts, in an action for other land, but depending on the same title, and because a sale made under the directions of a competent tribunal could not be impeached collaterally after the property had passed into the hands of a bona fide purchaser; see *Clark v. Van Surlay*, 15 Wend. 436; *Cochran v. Van Surlay*, 20 Id. 365. The following extract from his opinion may be cited as affording a comprehensive view of the powers of a court of chancery in dealing with the property of a minor ward. "The Court of Chancery possesses an inherent jurisdiction, which extends to the care of the persons of infants so far as is necessary for their protection and education; and also to the care of their property, real and personal, for its due management and preservation, and proper application for their maintenance.

"The court is the general guardian, and on the institution of proceedings therein involving rights of person or property concerning them, they are regarded as wards of the court, and as under its special cognizance and protection; and no act can be done affecting either the person or property, or the condition of infants, except under the express or implied direction of the court itself, and ev-

erything done without such direction is treated as a violation of the authority of the court, and the offending party deemed guilty of a contempt, and treated accordingly; 2 Story, Eq. §§ 1341, 1352, 1353; 3 Johns. Ch. 49; 4 Id. 378; 2 Id. 542; 6 Paige, 366, 391; 10 Vesey, 52; Macpherson on the Law of Infants, p. 103; Appendix, 1; *Smith v. Smith*, 3 Atk. 304.

"If the father is not able to maintain his children, the court will order maintenance out of their own estate; and the inability need not depend upon insolvency; but inability, from limited means, to give the child an education suitable to the fortune possessed or expected; *Buckworth v. Buckworth*, 1 Cox, 80; *Jervois v. Silk*, Cooper, 52. The allowance will be made although the devise or settlement under which the property is held contains no direction for maintenance, *Ib.*, but even directs the income to accumulate; 5 Ves. 194, 195, note, 197, note; 10 Id. 44; 4 Sim, 132; Macpherson, Ch. 21, § 2, p. 223.

"It is also settled, that where there are legacies to a class of children, for whom it would be beneficial that maintenance should be allowed, though the will does not authorize it, but directs an accumulation of the income, and the principal, with the accumulation, to be paid over at twenty-one, with survivorship in case any should die under age, the court will direct maintenance, 11 Ves. 606; 12 Id. 204; 2 Swanst. 436; but if there is a gift over, it will not be allowed without the consent of

the ultimate devisee, 11 Ves. 202; 5 Id. 193, note; Ward on Legacies, 303; Macpherson, 232, 233, 234.

"So the court will break in upon the principal where the income is insufficient for maintenance and education, 1 Jack. & Walk. 253; 1 Russ. & Mylnes, 499, 575; and will break in upon it for past payments, 2 Vern. 137; 2 P. Wms. 23; and where the father is unable to maintain his children, and has contracted debts for this purpose, or for their education, the court will direct a reimbursement out of the children's estate, 6 Ves. 424, 454; 1 Bro. C. C. 387; Macpherson, 9, p. 246; and will, if the father or mother is in narrow circumstances, in fixing the allowance, have regard to them, increasing it for the benefit of the family; 1 Ves. 160; 2 Bro. C. C. 251; 1 Beav. 202; 1 Cox, 179.

"The management and disposition of the estates of infants, which I have thus referred to, and briefly stated with the authorities, are among the mass of powers upon this subject which belong to the original and inherent jurisdiction of the Court of Chancery. They relate to their personal, and the income of their real estate, the court having no inherent power to direct a sale of the latter for their maintenance and education; that power rests with the legislature." And the inability need not depend upon insolvency; but inability, from limited means, to give the child an education suitable to the fortune possessed or expected;

Buckworth v. Buckworth, 1 Cox, 80; *Jervois v. Silk*, Cooper, 52. The allowance will be made although the devise or settlement under which the property is held contains no direction for maintenance, Ib., but even directs the income to accumulate; 5 Ves. 194, 195, note, 197, note; 10 Id. 44; 4 Sim. 132; Macpherson Ch. 21, § 2, p. 223.

THE FATHER'S RIGHT.—The authorities concur that the father is primarily entitled to the services and custody of his children, and that they should not be withheld arbitrarily from him, nor unless on some definite ground established with the certainty of legal proof; *The State v. Richardson*, 40 New Hampshire, 272; *The People v. Mercein*, 3 Hill, 422; *The Commonwealth v. Briggs*, 16 Pick. 205; *Magee v. Holland*, 3 Dutcher, 88; *Johnson v. Terry*, 34 Conn. 259; *Henson v. Watts*, 40 Indiana, 170; *The State v. Banks*, 25 Id. 495; *Goshwiler v. Dode*, 224 Ohio, N. S. 615; *Pierce v. Milloy*, 62 Illinois, 133.

It was accordingly held, in *Magee v. Holland*, 3 Dutcher, 86, that the father might maintain an action for the abduction of his minor children, and recover exemplary damages, although the defendant had acted in conjunction with and at the request of the mother; and that if loss of services was requisite to ground the suit, it might be inferred from the fact that the children were minors residing in the plaintiff's family, and subject to his authority; see 3 Blackstone, Com. 140; *In the matter of Kott-*

mann, 2 Hill, S. C., 363, 366. The cases of *Sargent v. Matthewson*, 38 New Hamp. 54, and *Coughrey v. Smith*, 50 Barb. 351, are to the same effect; see *Butterfield v. Ashley*, 6 Cushing, 249.

It is generally conceded that a father may take manual possession of his child, and use as much force as is indispensably requisite to maintain and vindicate the possession thus acquired against any one by whom it is unlawfully disturbed; see *Johnson v. Terry*, 34 Conn. 259; *In the matter of Kottman*, 2 Hill, C. S. 363.

The weight of authority is in accordance with these decisions, that in a contest between parents for the custody of their offspring, the father will prevail, unless some definite and sufficient cause can be assigned for postponing a right which is ordinarily paramount; see *Tarkington v. The State*, 1 Carter, 171; *The People v. Humphreys*, 24 Barb. 521; *The People v. Olmstead*, 27 Id. 9; *Hutson v. Townsend*, 6 Richardson Eq. 249; *Goshwiler v. Dode*, 224 Ohio, N. S. 615; *Wood v. Wood*, 3 Alabama, 756; *The State v. Payne*, 4 Humphrey, 423; *The State v. Stigal*, 2 Zabriskie, 286; *Johnson v. Terry*, 34 Conn. 259; *In the matter of Kottman*, 2 Hill S. C. 363; *The People v. Chegary*, 18 Wend. 637; *The People v. Mercine*, 8 Paige, 25 Wend. 64; 3 Hill, 399. In the case last cited, an English subject married the daughter of a citizen of New York, and had two children by her, a boy and girl. He became desirous of establishing himself

in business in Nova Scotia, and requested his wife to accompany him. She refused, and it was finally agreed in writing between the husband, wife, and her father, that she should reside with the latter for the present, and that the husband should relinquish all claim to the custody of his daughter, but that his son should be surrendered to him when required. The husband then removed with his daughters by a former marriage to Nova Scotia, but returned in the ensuing autumn and demanded the boy, who was delivered to him. A writ of habeas corpus was then issued at his instance from the court of chancery for the production of the girl. The chancellor held that such a writ was not the proper mode of instituting a proceeding to try the legal right of guardianship, and that the court would therefore exercise its discretion in disposing of the child, with a due regard to the natural rights of the parents. When such a controversy arose between a husband and wife, it was material to inquire which party had occasioned the rupture, and what were the demerits on either side. In the case under consideration, enough had occurred to justify the wife in refusing to place herself under the entire control of her husband, in the foreign country to which he desired to take her. It followed that as the infant was only twenty-one months old, and stood in need of maternal care and solicitude, it should not be taken from her custody and delivered to the father.

This judgment was pronounced on the 26th of August, 1839, and on the 29th day of October following, the relator obtained another habeas corpus from the Court of Common Pleas, which was like the first, directed to the mother and grandfather of the child. They made a return, alleging that the circumstances had not changed since the hearing before the chancellor, and relying on his adjudication as conclusive.

The case was removed by *certiorari* to the Supreme Court, which decided that the question was not *res adjudicata*, and must consequently be determined in accordance with the rule of law, which gives the children to the father in preference to the claims of the mother, or of any other person. *The People v. Chegarry*, 18 Wend. 637; *The People ex rel. Nickerson*, 19 Wend. 16. In cases of voluntary separation between husband and wife, there must be some rule in relation to the custody of their minor children, because, without one the matter would probably be determined by violence, and that which the law had established should be followed. The father's right might be forfeited by misconduct, or lost through misfortune, and when he attempted to assert it by a writ of *habeas corpus*, the court might, in the exercise of a sound discretion leave the children with the mother or some other competent person; *In the matter of Dowle*, 8 Johnson, 328; *In the matter of Waldron*, 13 Johnson, 418. But this was not an arbitrary discretion or license to do

whatever the court might deem best, and it was on the contrary, well settled that in the absence of any positive disqualification on the part of the father for the proper discharge of his parental duties, and when there was no other special reason touching the welfare of the children for preferring the mother, the father had a paramount right which no court was at liberty to disregard. It was not to be presumed without proof, that the welfare of the children would be promoted by leaving them with the mother. The law had settled that question the other way by preferring the father. His claim could not be set aside on slight grounds, or because it was conjectured that the interests of the child required it. He must be chargeable with such grossly immoral conduct as showed him to be plainly disqualified for the office which he desired to fulfil, or else it must appear that in consequence of disease, or some other misfortune he was wanting in the capacity or the means for the proper training of the children, according to their circumstances and means in life. It was also held that the relator was not concluded by the agreement into which he had entered, because it was an agreement for a future separation, which the law would not sanction. The case was then taken by a writ of error to the Court of Appeals, which reversed the decision of the Supreme Court, on the two-fold ground that the adjudication before the Chancellor was conclusive in view of the admission that

the facts were unchanged, and that the welfare of a child of such tender years would be best promoted by leaving it where it could have maternal care.

After the lapse of some years, and when the child had attained the age of four years and six months, the case was again brought before the Supreme Court by a writ of *habeas corpus*, and determined in favor of the father, on the ground that the infant was now old enough to be removed from the mother without injury, and that the former decision could not be regarded as conclusive in view of the altered state of facts. The court held that where a wife left her husband without cause, his right to the custody of the children was indubitable, and should be vindicated from a regard to the interests of society, not less than of the parents. There was no just cause why the relator's wife should not go to the home which he had prepared for her in Nova Scotia, and if she chose to remain separated from him, he ought not to lose the society and services of his children through her caprice.

The doctrine that the father's right is paramount, and may be enforced notwithstanding any agreement into which he may have entered, was also recognized in *Johnson v. Terry*, 34 Conn. 259. The plaintiff's wife left him, and took their children with her. He obtained a divorce soon afterwards, and the children remained in her keeping for more than five years, without any claim on his part. The eldest boy, finally, went at

his own desire and with her consent, to reside with the defendant. The plaintiff employed two men who enticed the boy into a wagon, and drove away with him. He called to the defendant for help, who followed and tried to take him by force from the plaintiff, and the latter brought an action for the assault. Butler, J., said, "That the father is entitled to the custody and control of his minor children, even to the exclusion of the mother, is elementary law. The right arises necessarily from, and is incident to his duty to maintain, protect and educate them. In order to justify the assault the defendant was bound to show a paramount right. That he utterly failed to do. It was claimed upon the argument that the facts showed a relinquishment of the custody to the mother. It is not claimed that there was any agreement or contract between the father and the mother, by force of which the custody and control was transferred. All that the finding shows is that she left the home of the father and took with her the children. It is not found that she took them pursuant to any agreement, or with the assent of the father. And if such contract were shown, it would not be a justification to the defendant, for such a contract would not be recognized as a lawful one. It is not in the power of a father to divest himself by contract, even with the mother, of the custody of his children. This was distinctly recognized as law in *Torrington v. Norwich*, 21 Conn. R. 543, and is also recognized in

our legislation (Gen. Statutes, p. 309, sec. 53), which enables a parent under certain circumstances to transfer the right, and impliedly restrains him under all others. The citation, from the opinion of Judge Peters, in *Morse v. Welton*, 6 Conn. 550, is inapplicable, for he was speaking, not of the right to the custody and control of a child, but of a right to his services."

A similar view has been taken in other instances; see *Farnsworth v. Richardson*, 35 Maine, 267; *Richardson v. Richardson*, 32 Id. 560; *The State v. Sibley*, 44 New Hamp. 321; *Byrne v. Love*, 14 Texas, 81; but the better opinion seems to be that where the father expressly or impliedly waives his right, and the arrangement is conducive to the welfare of the child, it will not be set aside by the court, and may, on the contrary be upheld and enforced; see *Van Artsdalen v. Van Artsdalen*, 2 Harris, 384; *The People v. Mercein*, 25 Wend. 64; *In the matter of Murphy*, 12 Howard P. 513; *Foster v. Mott*, 3 Bradford, 409; *Curtis v. Curtis*, 5 Gray, 535; *The State v. Smith*, 6 Greenleaf, 462, 464. In the case last cited, a covenant between the husband and a third person acting as trustee for the wife, that she should be permitted to withdraw if ill treated, and take her children with her, seems to have been regarded as valid, although manifestly contrary to public policy as anticipating and providing for a future separation; see *The People v. Mercein*; *post*, notes to *Stapilton v. Stapilton*.

It has been said that the court of chancery will not permit an alien father, to remove an infant which is too young to choose for itself, from the country where it was born, or into another State, without the mother's consent, whether she is or not in fault for separating from her husband, and although her domicile is the same as his; see 2 Kent. 5th ed., 220, note d.; *Miner v. Miner*, 11 Illinois, 440; *De Manneville v. De Manneville*, 10 Vesey, 52; This may be just where the husband is an alien enemy, but the judgment in *The People v. Mercein, ante*, would seem to be more consistent with the comity which should prevail in time of peace, and the obligation which a marriage to a foreigner who has not been naturalized, imposes on the wife.

The father's right does not depend on his children's wishes or inclinations, because such a rule would be alike inconsistent with parental discipline and filial obedience; *The State v. Richardson*, 40 New Hampshire, 272; and he may consequently exercise it, although they desire to remain with the persons with whom they have been left for nurture or safe keeping; *Johnson v. Terry*, 34 Conn. 259, 260; *The State v. Banks*, 25 Indiana, 495; *Henson v. Watts*, 40 Id. In the case last cited the plaintiff had placed his daughter in charge of the defendants, and when he came at the expiration of a year to take her away, she resisted, and they refused to let her go. The court held that

these circumstances did not impair the plaintiff's right, and gave him judgment.

Some regard it nevertheless due to the wishes of the child, after it has attained an age to think and feel; see *The King v. Greenhill*, 6 N. & M. 244; *The Commonwealth v. Hammond*, 10 Pick. 274; and this consideration is one that must increase in weight with advancing years; *The People v. Chagary*, 18 Wend. 637, 644. In the matter of *Woolstonecraft*, 4 Johnson's Ch. 18; the desire of a girl of thirteen years to remain with her mother, was treated as a determining cause for not surrendering her to the person to whom she had been entrusted by her guardian; and in *The State v. Baird*, 8 C. E. Greene, it seems to have been considered that on the separation of the parents, their daughter who was eighteen years old, might determine with which she would reside.

The court will not, however, allow the wishes of the infant to prevail against the legitimate demands of parental authority; *Johnson v. Terry*, 34 Conn. 259, 260; and a daughter who leaves her father's house from caprice, or with the view of contracting a disadvantageous marriage, may be compelled to return by a writ of habeas corpus, although she has nearly attained her majority, and will soon be her own mistress; *The King v. Ward*, 1 Wm. Bl. 385. In *The King v. Ward*, "Morton, Solicitor General, moved for a habeas corpus to Mrs. Ward to bring in the body of Elizabeth Vernon an infant under twenty-

one, who had eloped from her father, and lived at Mrs. Ward's house who was her aunt, and was suspected to be going to Scotland and with the privity of Mrs. Ward, in order to marry an Irish officer; Mrs. Ward having not only refused to restore Miss Vernon to her father, but also kept her from him by force. Per Lord Mansfield, C. J., *et Cur.*—Take your habeas corpus, and let Mrs. Ward show cause why an information should not be filed against her."

THE MOTHER'S RIGHT.—Agreeably to the main current of American decision, the mother's right is primary as regards every one but the father, and the court will not take the children from her for the purpose of delivering them to the testamentary guardian, unless it appears that she is abusing her authority, or her character and habits unfit her for such a charge; In the matter of *Walstonecraft*, 4 Johnson, Ch.; *Foster v. Alston*, 6 Howard, 406; *Armstrong v. Stone*, 9 Grattan, 102.

In *Armstrong v. Stone*, a child was taken by a habeas corpus from the custody of its grandparents, and handed over to the mother. It was said that this course was presumably best suited to promote the welfare of the infant, and that the mother had a legal right which the court was not at liberty to disregard.

In *Foster v. Alston*, 6 Howard, Miss., 406, the testamentary guardian lived in Tennessee, and the mother took the children forcibly from his residence, and brought

them to Alabama, and it was held that he could not regain the possession of his wards through a writ of *habeas corpus*, because the court would look primarily to their welfare, and as that would not be promoted by separating them from their mother, they ought not to be separated from her, whether he had or had not the legal right which he claimed.

In the matter of *Wolstonecraft*, 4 Johnson Ch. 81, a mother, who had been divorced from her husband for adultery, took her daughter after his death by force from Alfred Hannen with whom she had been left by her guardian. Hannen brought the case by a writ of *habeas corpus* before the Chancellor, who asked the infant whether she preferred to return to Hannen or remain with her maternal grandfather, with whom she was residing at the time. She chose the latter alternative, and it was held that as she was thirteen years of age the court would not restrain her inclinations. The course and practice in such cases was only to deliver the infant from illegal restraint, and if he is competent to form and declare an election to allow him to go where he pleases, although if the infant be too young to form a judgment, then the court is to exercise its judgment for the infant.

In *Striplin v. Ware*, 36 Alabama, 88, the court refused to deliver the children to the testamentary guardian, in opposition to the claim of the mother that they should be left with her, although she was married to a second hus-

band whose morals were by no means unexceptionable. The Chief Justice said that there was a strong presumption that children of that age would be better cared for by their parents than they could well be by third persons. This inference might be repelled by proof that the parent was guilty of gross ill-treatment or cruelty towards his children, or that his conduct or domestic associations were such that they could not remain with him without contamination, and a Court of Chancery might then interfere as the general guardian and protector of all infants within its jurisdiction, and place them in some sure hand. But this jurisdiction ought not to be exercised unless it plainly appeared that the interests of the child required that the paramount right of the parent should be postponed; and as this was not satisfactorily established, the bill must be dismissed.

It is nevertheless clear under the authorities and on principle, that as the mother's right depends essentially on fitness, it cannot be asserted against the father, or a duly appointed guardian, if she has any defect which unfits her for the charge which she desires to undertake; *Gishwiler v. Dode*, 24 Ohio, N. S. 615; *Garner v. Gordon*, 41 Indiana, 921; *Smith v. Smith*, 1 Brewster. In *Smith v. Smith*, 547, the court refused to take children from the hands of an aunt, with whom they had been placed by their father, and deliver them to a mother who had been addicted to habits of intemper-

ance, and might relapse. For a like reason evidence of the guardian's unfitness is admissible when the *habeas corpus* is sued out by him; *Petition of Smith*, 13 Illinois 138.

In *The Commonwealth v. Adicks*, 5 Binney, 520, 2 S. & R. 174, a woman who had been divorced for adultery, contracted an illegal marriage with her paramour. She had two girls by her former husband, one ten and the other seven years old, who remained with her. He obtained a writ of *habeas corpus*, which was dismissed by the court on the ground that the children were of an age to require maternal care and watchfulness. "We are of opinion," said Chief Justice Tilghman, "that although we are bound to free the person from all illegal restraints, we are not bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person. But we may in our discretion do so, if we think that, under the circumstances of the case, it ought to be done. For this we refer to the cases of *The King v. Smith*, 2 Stra. 982, and *The King v. Delaval*, 3 Burr, 1436. * * *

We cannot avoid expressing our disapprobation of the mother's conduct, although so far as regards her treatment of the children she is in no fault. They appear to have been well taken care of in all respects. It is to them, that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of as-

sistance which can be afforded by none so well as a mother. It is on their account therefore, that exercising the discretion with which the law has invested us, we think it best at present, not to take them from her."

The question having been again brought before the court when the elder child had entered on her fourteenth year, it was held that as she was now of an age to be influenced by her mother's principles and example, she could not properly be allowed to continue in an association that might be prejudicial to her morals and prospects in life. The Chief Justice said, "This case was brought before the court between two and three years ago, when on account of the tender age of the infants it was judged improper to take them from the mother. The law was at that time fully considered and declared by the court. We are not confined to an abstract question on the rights of guardianship, but are to determine according to our discretion, on the expediency of delivering the infants to the custody of the father. The great object of the *habeas corpus* is to free the person from illegal restraint. That being done, the court may proceed farther or not, as circumstances require. These children do not stand before us in the same situation as formerly. The eldest has now arrived at a critical age; every moment is important; and the education of the next three years will probably be decisive of her fate. The case of the youngest is not so urgent.

But it is important that the sisters should not be separated. When we decide for one, therefore, we must decide for both. I wish not to wound the feelings of the mother by unnecessary censure, but the case being brought before the court, it is impossible to shut our eyes on the impropriety of her conduct. She was divorced from her first husband for a great crime, and whatever may be her opinion of her second marriage, we know that it is void by the law of this State. Yet I view her not as a vulgar prostitute. Far from it. She may have been ignorant of the law, which rendered her marriage void, and it has not been suggested, that she has been unfaithful to the man whom she now calls her husband. She is said to have received a good education in a convent in Canada, and having been married by her mother's command, at too early an age, to a man with whom she had no previous acquaintance, she discovered, too late, that neither her years, her habits, her education, nor her disposition, accorded with those of her husband. Hence her guilt, and her misfortunes. She may be pitied, but cannot be justified. But what is to be said to the claim of the father, who demands the custody of his children; who expresses his anxiety for their future welfare; who asserts his ability to protect and support them; and declares his intention of placing them under the immediate superintendence of the mother of Mrs. Lee, or of her brother, who is married to a re-

spectable woman, and now resides at New York? What effect will the decision of this court have on the morals of these children, from whom the unfortunate history of their parents can be no longer concealed? If they are permitted to remain with their mother, will they not conclude that her conduct is approved? There is one circumstance which has great weight with me. I am satisfied, that either from books, from conversation, or from the unfortunate speculation of her own mind, the mother has fallen into a fatal error, on a fundamental point of morals—the obligation of the marriage contract. It is the more incumbent on us, therefore, to guard the children against the consequences of this pernicious mistake, and to fortify their minds, by inspiring them with fixed principles on this essential article. At the present moment they may not reflect on the subject, but they soon will; and when they inquire, why it was that they were separated from their mother, they will be taught, as far as our opinions can teach them, that in good fortune or in bad, in sickness or in health, in happiness or in misery, the marriage contract, unless dissolved by the law of the country, is sacred and inviolable. For these reasons, and many others which it is unnecessary to mention, I am of opinion, that the children should be delivered to their father."

The insanity or prolonged absence of the father or his conviction for a criminal offence, may

throw the charge of the children on the mother, and authorize her to make any disposition of them which a sound judgment can approve.

In *Dumain v. Gwynne*, 10 Allen, 272, the father of the infant was a man of intemperate habits, and under sentence for the crime of burglary, and the mother entered into an agreement with the defendants, as managers of the Temporary Home for Destitute Children, by which the offspring of the marriage were surrendered to them absolutely, to be suitably provided for and educated. The father, having been discharged returned to his wife, and maintained himself by the pursuits of honest industry. After the lapse of some years, during which his conduct had been irreproachable, he obtained a writ of *habeas corpus* to regain the possession of his children. The respondents declined to produce them, or to state where they were, but offered to communicate these circumstances privately to the judge, and establish them to his satisfaction. The court held that the care of the children devolved on the mother while the father was in prison, and that she might bind him by a contract for their good. Chapman, J., said: "The common law regards the father as the natural guardian of his children, and recognizes his right to their custody. Formerly his right was held to be so much superior to that of the mother that when she had separated herself from him on the alleged ground of ill treatment, and taken with her their

infant child, then at the breast, it was brought into court on *habeas corpus* and delivered to the father, though he was an alien, or was living in illicit intercourse with another woman, unless she could make it appear that he intended to abuse his right; *The King v. Manneville*, 5 East. 221; *The King v. Greenhill*, 4 Ad. & El. 624; By St. 2 & 3 Vict. c. 54, the rights of the mother are now better provided for. But before that statute the courts of chancery in England were accustomed to disregard the strict legal rights of the father to the custody of the children, whenever the welfare or interests of the children required it. In some instances they have taken his children from him and placed them in the custody of strangers. They have regarded the welfare of the child as paramount to the rights of the father or mother. In this country our courts of law, while adopting the legal principle that the father is usually entitled to the custody of his children, have been inclined to modify it by adopting the equitable principle that this right must yield to considerations affecting the welfare of the children, and by regarding more highly the rights of the mother; *Commonwealth v. Briggs*, 16 Pick. 203; *Pool v. Gott*, 14 Law Reporter, 269; *State v. Smith*, 6 Greenl. 462; *Mercein v. The People*, 25 Wend. 102.

In some of the States the common law has been modified by legislation. In this commonwealth, if parents allow their children to

become truants or to grow up in ignorance, the children may be taken by the municipal authorities and placed in houses of reformation or institutions of instruction. When the parents live separate or when proceedings for divorce have been instituted, this court has authority to make decrees upon the petition of either parent concerning the care, custody, education and maintenance of minor children; and as between father and mother it is provided that the rights of the parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession; Gen. Sts. c. 107, §§ 36, 37. To what extent these rights impose obligations on the mother in respect to the maintenance of the children has never been determined. Provision is also made for the adoption of children, by which all the legal rights of both parents may be transferred to a stranger, by a decree of the probate court, and the child may become the legal heir of its adopted parent. If a parent does not consent to such adoption of his child, or if he is not found in the State, the probate court may, after the publication of certain specified notices, decree without his consent that the child shall, to all legal intents and purposes, be the child of the person petitioning for the decree; Gen. Sts. c. 110.

This statute regards the happiness and welfare of the children as being much more important than the legal rights of either

parent. Independently of the statute, it is held by this court that a father may transfer to his child his right to the services and earnings of the child, and is bound by his contract or gift on this subject, and that he may by his misconduct forfeit his right to the custody and services of his child either temporarily or permanently; *Abbott v. Converse*, 4 Allen, 530, and authorities there cited."

The father's poverty or his inability from whatever cause to educate the child, or afford it an assured home, may also be a ground for refusing to deliver the child to him, and for awarding it to the mother, grandfather, or to any friend or relative who is able and willing to supply its wants; see *Ex parte Waldron*, 13 Johnson, 418; *The U. S. v. Green*, 3 Mason, 482; *The People v. Mercein*, 3 Hill; and in the case first cited, the court refused on this ground to take a child from its maternal grandfather and deliver it to the father. So a father who suffers a third person to stand in *loco parentis*, and fulfil the duties which he omits until new affections have supplanted the natural growth, should not be permitted to sever a tie which has been sanctioned by his neglect. This consideration seems to have been overlooked in *Johnson v. Terry*, 34 Conn. 259; although it can have little weight, unless there is reason to suppose that the effect of allowing the father to assert his right will be injurious to the child; In *the matter of Murphy*, 12

Howard Pr. 513; *In re Good-enough*, 19 Wisconsin, 274.

JURISDICTION OF CHANCERY.—The law sanctions the authority of the father not for his own sake, but that he may train up his children in those habits of order, industry and morals, which are essential to their welfare. It follows that if he shows himself unfit for such a trust, he may be removed by a court of equity or other duly authorized tribunal, and the mother or some competent person appointed in his stead; *Cowls v. Cowls*, 3 Gilman; *Gardenshire v. Hinds*, 1 Head, 402; *State v. Stigal*, 2 Zabriskie, 289; *Garner v. Gorton*, 41 Indiana, 92. This jurisdiction seems to have been originally assumed by the chancellor as representing the king in his capacity as *parens patriæ*, and may be exercised with equal propriety in the United States on behalf of the commonwealth; *Cowls v. Cowls*; *In the matter of Clifton*, 47 Howard Pr. 172; *The State v. Baird*, 3 C. E. Green, 195, 6 Id. 384, 387; *Hutson v. Townsend*, 6 Richardson, 249; *Striplin v. Ware*, 36 Alabama, 88; *Armstrong v. Stone*, 9 Grattan, 102, 106; *Miner v. Miner*, 11 Illinois, 40. It extends to all guardians whether claiming *ex jure naturæ*, or by virtue of a delegated authority, and will justify any order that is essential to the safety and protection of the infant. If both claimants are manifestly unfit, the child may consequently be confided to a third person or to a charitable incorporation; *Lapitino v. De Giglio*, 6 Philadelphia, 304;

Commonwealth v. Nutt, 1 Brown, 143; and in these instances the power was exercised through a writ of *habeas corpus*.

In *Aymar v. Roff*, 3 Johnson Ch. 49, the defendant took advantage of the youth and inexperience of a child which was not yet twelve years old, to inveigle her into a marriage, from which she dissented on being informed of the nature of the contract into which she had entered, and of the duties and obligations which it imposed. The bill which was filed in her name and that of her father, who for himself, and as her next friend, set forth these facts and asked that she might be declared a ward of the court, and that the defendant might be restrained from having any intercourse or correspondence with her. An order was made in accordance with the prayer of the bill, and the reporter adds that, "It appears from the cases referred to in *Eyre v. The Countess of Shaftesbury*, 2 Peere Williams, 111, 112, that the parson and all other persons concerned in the marriage of an infant without the consent of the guardian have been committed."

In *Cowls v. Cowls*, 3 Gilman, 436, a bill was filed by a divorced wife against her husband for the purpose of obtaining the custody of their children, and a reasonable allowance for their support. There were two children living when the divorce was granted, aged six and four years respectively. The bill alleged that the defendant had been living since the divorce with a mistress, and had recently made

her his wife; that she was a woman of notoriously bad character, and not in any way qualified for the nurture and education of the children; that they were left entirely in her charge and under the influence of her bad example; that she neglected them and was addicted to excessive and frequent intoxication; that frequent quarrels took place between him and his present wife in the presence of the children, and which sometimes ended in his driving her from the house; that he was in the habitual use of profane, indecent and immoral language. These allegations having been admitted by a demurrer, it was ordered by the court below that the children should be taken from the father, and placed in the custody of the mother, and that he should pay the sum of \$90 annually for their support. This decree was appealed from and affirmed. Caton, J., said, "It is clear that our legislature, in providing that, 'when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just,' has conferred no new authority or jurisdiction upon the court. It was by its original jurisdiction clothed with the same power before. The cases provided for in this statute, are necessarily embraced in that broad and comprehensive jurisdiction with which the Court of Chan-

cery is vested over the persons and estates of infants, and their parents who are bound for their maintenance.

* * * * "The power of the Court of Chancery to interfere with and control, not only the estates, but the persons and custody of all minors within the limits of its jurisdiction, is of very ancient origin, and cannot now be questioned. This is a power which must necessarily exist somewhere, in every well regulated society, and more especially in a republican government, where each man should be reared and educated under such influences that he may be qualified to exercise the right of a freeman, and take part in the government of the country. It is a duty, then, which the country owes as well to itself, as to the infant, to see that he is not abused, defrauded or neglected; and the infant has a right to this protection. While a father so conducts himself as not to violate this right, the court will not ordinarily interfere with his parental control. If, however, by his neglect or his abuse he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere and take the infant under its own charge, and remove it from the control of the parent and place it in the custody of a proper person to act as guardian, who may be a stranger.

"The powers and the duty of the court on this branch of the subject, are very satisfactorily laid down by Story. He says: 'The

jurisdiction of the Court of Chancery extends to the case of the person of the infant, so far as is necessary for his protection and education, and to the care of the property of the infant for its due management and preservation, and proper application for his maintenance. It is upon the former ground principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents as guardians by nature or by nurture, in regard to the custody and care of their children. For although in general, parents are entrusted with the custody of the persons and education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be well brought up, with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical and irreligious principles; or that his domestic associations are such as to tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable

person to act as guardian, and to take care of them, and superintend their education;’ 2 Story, Eq. Jus. § 1341.

“Infants thus taken under the charge of the Court of Chancery for the protection of their persons or property, are called wards of the court, and the guardian, or person appointed by the court to act as guardian, is an officer of the court, and is entirely under its direction and control, and entitled to its aid in enforcing a proper obedience and submission on the part of the ward, and to prevent the improper interference of third persons. A jurisdiction thus extensive, and liable as we have seen, to enter into the domestic relations of every family in the community, is necessarily of a very delicate, and often of a very embarrassing nature; and yet its exercise is indispensable in every well governed society. It is indispensably necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves.

To apply these principles to the case before us. What are its circumstances? After a divorce had been decreed between the parties, without making any provision as to the care, custody, or maintenance of the children, the mother files a bill, and asks that the custody of the children shall be taken from the father for the reasons that he has for some time been living with a prostitute, whom he has finally married, and that the children, who are of a tender age, are left principally under her control and

pernicious example and influence ; that he is very intemperate in his habits, and profane, and is in the habit of using vulgar and obscene language in the presence of his family. Here we have grouped together into one disgusting and revolting picture, those features of a father's character who has become unworthy of the charge of his own offspring, and any one of which, as we have seen it laid down by Mr. Justice Story, will authorize the court in its discretion, to interfere and remove the child without the influence of such a polluted atmosphere. Under such circumstances, if these children are allowed to remain with their father, it is vain to expect that they will be properly reared and educated. It would be too much to hope that they will not be injuriously affected by the pernicious examples constantly before them. We cannot doubt but a due regard for the well being of these children requires the court to take them under its own care and control.

And now the question arises, whether the court acted judiciously in giving the custody of these children to their mother. In determining the fitness of the person to whom the custody of these children shall be given to act as guardian, the court is not bound down by any particular form of proceeding. It may be either referred to a master to inquire and report as to who will be a fit person ; or that may be inquired of in open court ; or the court may determine from its own knowledge alone. At the time, or after a divorce is decreed,

when the court finds itself called upon to remove the children, or a part of them, from the custody of the father, it will of course, if the mother be unobjectionable, place them in her charge, as it may well be expected that she will feel more solicitous for their welfare than a stranger. Indeed, it may often happen in such case, when no serious objection can be urged against the father, that it would be advisable to give to the mother the care of a portion at least of the children, especially if they be daughters of very tender years. In all such cases, the court should take into consideration all of the circumstances of each particular case, and dispose of the children in such manner as may appear best calculated to secure for them proper care and attention, as well as a virtuous education.

It was urged against the fitness of the mother to have the care of these children, that she had shown a want of maternal affection and solicitude for their welfare, in not having applied to have them removed from their father's control at the time the divorce was allowed.

Admitting that there are some suspicions that the mother was not a judicious selection to have the care of these children, it does not necessarily follow that the decree should be reversed. The court below may at any time, on the application of the father, or any other person on behalf of the infants, or even of its own motion, remove the mother from this trust and appoint some other person.

The Court of Chancery may remove all guardians, whether appointed by itself, by the Court of Probate, by testament, or even by express act of the legislature, whenever it is satisfied that the guardian is abusing his trust, or the interests of the ward require it; *Duke of Beaufort v. Berty*, 1 Peere Williams, 703; 2 Story's Equity Jurisprudence, § 1339."

In *M' Cord v. Ochiltree*, 8 Blackford, 15, it was again said, that the necessity for the existence of a power adequate to the protection of minors was obvious, and would be implied from a general legislative or constitutional grant of chancery powers. In *Maguire v. Maguire*, 7 Dana, 181, the court incidentally remarked, that the protection of infants from brutal treatment by their parents, formed a part of the original jurisdiction of chancery, and, as such might be exercised in this country as well as in England. In *The State v. Stigall*, 2 New Jersey, 286, the court cited and relied upon 2 Story's Equity, sect. 1341, as sustaining the same proposition; and the right of chancery to interfere for the protection of infants against the abuse of parental authority, by removing them from the custody of the parents, has been authoritatively asserted in other instances, and said to be incident to the control and supervision which equity is entitled to exercise over all guardians, whether they derive their authority from nature, from the delegation of the father, or from the appointment of a court of probate, or other competent tribu-

nal; *Wood v. Wood*, 5 Paige, 596, 605; *The People v. Wilcox*, 22 Barbour, 178; *In the matter of Wolstonecraft*, 4 Johnson Ch. 80; *Miner v. Miner*, 11 Illinois, 43.

The power is nevertheless one of much delicacy, and requiring a nice discrimination in its exercise; *Striplin v. Ware*, 36 Alabama, 87. A man whom no one can approve, may be a tolerable parent, and appear in a different aspect to his children from that in which he is seen by the world.

While the parents live together they are entitled to the custody of their offspring, unless the case is one of such gross abuse or immorality, as to leave no room for doubt. If they separate and cannot agree which shall be the guardian, the father has the primary right, subject to limitations which can more easily be enumerated than defined; see *The People v. Mercein*, 3 Hill, 422; *Gishwiler v. Dode*, 24 Ohio, N. S. 615; *Taylor v. Jeter*, 33 Georgia, 198.

They may nevertheless all be reduced to the same principle, that while there is a presumption in favor of paternal control and discipline, it may be rebutted by proof that the father cannot in view of all the circumstances be properly entrusted with the care and nurture of the child; *McBride v. McBride*, 1 Bush, 15; *Miner v. Miner*, 11 Illinois 40. The question is necessarily a complicated one, depending on the character, habits and means of the parents, and the age, health and sex of the children; *Bush v. Bush*, 37 Indiana, 164; *Gishwiler*

v. Dode, 24 Ohio, N. S. 615; *The State v. Baird*, 6 C. E. Green, 384; *The Commonwealth v. Addicks*, 5 Binney, 520; 2 S. & R. 17.

The subject is regulated in New Jersey by a statute, which provides that where a husband and wife separate or are divorced, she shall have the custody of the children within the age of seven years, if she is not an unfit person for such guardianship; *The State v. Baird*, 6 C. E. Green, 384, 393.

In the *State v. Baird*, a wife left her home in Philadelphia clandestinely with her children. The husband followed, and sued out a writ of *habeas corpus* in the Court of Chancery. It was held, that where such a question was brought before a chancellor, whether by petition, *habeas corpus*, or formally by a bill, it must be governed by the considerations which prevail in a Court of Equity where the interests or guardianship of minors are involved. In the case in hand, the respondent had left her husband without sufficient cause, but her character was unblemished, and the court might do what seemed best for the children in view of the existing circumstances. The judgment consequently was, that the eldest child, being a woman who had nearly attained her majority, might follow her inclinations, which were to her mother. That the mother was also entitled to the custody of the youngest child, who was under seven years, and of his brother, who was just above that age, and that the three remaining children who were be-

tween the ages of nine and sixteen, should be awarded to the father.

So in *Ex parte Schumpert*, 6 Richardson, 344, the court refused to deliver a child less than five years old to the father, and ordered that it should be suffered to remain with the mother, on the maternal grandfather giving security to indemnify the father against liability for its support and maintenance.

The public welfare, not less than individual happiness, is concerned in the strength of the family tie and the stability of the home; and a court will not readily intrust children to a parent whose faults have occasioned a breach in the domestic circle. A wife who abandons her husband without cause, should not be rewarded with the possession of their offspring, and the principle is the same when her misconduct leads to a divorce; see *The People v. Marcein*, 8 Paige, 48; 25 Wend. 68; 3 Hill, 399; *The Commonwealth v. Olmstead*, 27 Barb.; *The Commonwealth v. Briggs*, 16 Pick. 205; *Carr v. Carr*, 22 Grattan, 168. In *Carr v. Carr*, a daughter was delivered to the father on this ground, with a direction that she should remain with him until the age of eighteen years, although the court would otherwise have decided for the mother in view of the sex of the child. In like manner, a husband who is guilty of gross wrongs which compel his wife to withdraw from him or sue for a divorce, is also culpable as a parent, and cannot ask that the

children should be separated from the mother whom he has virtually driven from her home; *Miner v. Miner*, 11 Illinois, 40. If both parents are equally in fault, the children's welfare should be the primary consideration, and hence boys above the age of seven years may be awarded to the father, while the younger children and the girls are delivered to the mother; see *Bush v. Bush*, 37 Indiana, 164; *The State v. Baird*, 3 C. E. Green, 195; 6 Id. 384. But an infant, especially when of the female sex, should not be intrusted to a parent who has shown herself to be licentious in thought or expression, or impure in act; *Garner v. Gordon*, 41 Indiana, 92; *The Commonwealth v. Addicks*, 2 S. & R. 174.

It is now generally conceded that children under seven years should be assigned to the mother, as presumably best able to afford the care and nurture which their tender age requires; *Bush v. Bush*, 37 Indiana, 164; *The State v. Payne*, 4 Humphrey, 423; *Miner v. Miner*, 11 Illinois, 40; *The State v. Stigal*, 2 Zabriskie, 286; and the period of her guardianship may be enlarged in view of the illness, sex or weakness of the child, or where the younger of two children who have been brought up together, is not old enough to be separated from its mother, and it would be cruel if not injurious to divide playmates. *The State v. Baird*, 6 C. E. Green, 384; *The Commonwealth v. Addicks*, 5 Binney, 520, 2 S. & R. 174; *Miner v. Miner*. But it is held in New York that a

wife who abandons her husband without cause is not entitled to the children, although under seven years of age and in need of maternal care: *The People v. Mercein*, 3 Hill, 399; *The People ex rel. Olmstead v. Olmstead*, 27 Barb. 9.

It was held in *Miner v. Miner*, 11 Illinois, 40, that when a bill is filed for a divorce, the court has power to provide for the custody of the children, and although the husband's right is *prima facie* paramount, they will not be awarded to him when his misconduct has led to the separation from his wife, especially if they are of tender years, or the female sex, and need maternal care. Caton, J., said: "The husband's right to the custody of the offspring of the marriage is paramount, unless he has forfeited, waived or lost it by misconduct or misfortune, or through the operation of some cause which is sufficient to deprive him of it in the opinion of an enlightened chancellor. In the event of a separation of the parents, this right must be conferred upon one of them, otherwise the impulses of their nature would induce them to resort to violence to retain possession of their children. Next to the right of the father, that of the mother must be recognized. These rights, however, are subject to the control of the Court of Chancery, and when its aid is invoked, while it may not disregard the natural rights of parents and the ties of blood, the best interests of the child must be primarily consulted. It is upon this consideration that an infant of tender years is gener-

ally left with the mother (if no objection to her is shown to exist) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply. This remark will apply with great force in cases of female children of a more advanced age. While the affection of parents for daughters may be equal, yet the mother from her natural endowments, her position in society, and her constant association with them, can give them that care, attention and advice so indispensable to their welfare; which a father if the same children were left to his supervision, would be compelled in a great degree to confide to strangers. In no case do I find this legal right of the father asserted, where a divorce has been granted for his fault or misconduct. If such right ever did exist, so as to abridge or control the exercise of the equitable discretion of the Court of Chancery, it has been entirely removed by our statute, which authorizes the court when a divorce shall be granted to make such order, touching the care, custody and support of the children, or any of them, as from the circumstances of the parties, and the nature of the case shall be fit, reasonable and just." A similar view was taken in *McBride v. McBride*, 1 Bush, 15.

COMMON LAW JURISDICTION.—If we now turn to the jurisdiction of the courts of common law,

it will appear lamentably deficient although constantly invoked. The writ of *habeas corpus ad subjiciendum*, which is the only means at their command for such purposes, is a remedy for false imprisonment, and will not be employed to relieve any one from a custody which is lawful; see *The People v. Mercein*, 8 Paige, 48. The object is to afford redress and protection to the person by or on whose behalf the application is made; and if he is not injuriously detained the writ should be dismissed. It was held to follow that a child could not be removed by such means from the keeping of its father, unless it was subjected to some treatment or restraint which exceeded the just bounds of parental authority and discipline; see *The matter of Kottman*, 2 Hill, S. C. 363, 364; *Ex parte Shinn*, 9 B. Monroe, 278; *The State v. Paine*, 4 Humphrey, 523. If the father abused his authority the court might intervene; *Armstrong v. Stone*, 9 Grattan, 102, 106; but his morals and manners were otherwise as irrelevant to such an inquiry, as those of the keeper of Newgate would be to the question whether one who had been duly committed should be released. If the father's fitness was denied, recourse must be had to the Court of Chancery as the only tribunal competent for such an investigation, and to provide for the safe keeping of the ward after it had been withdrawn from its natural guardian; *The People v. Stigal*, 2 Zabriskie; *The People v. Chigary*, 18 Wend. 637,

643; *The People v. Wilcox*, 22 Barb. 178, 183.

When the father issued the writ, the case was so far different that the court would not interfere unless the infant was injuriously detained. If it was of such tender years that it could not properly be said to have a will, restraint would be inferred from its being withheld from the person to whom it should naturally incline. If, on the other hand, it was old enough to form and express an opinion, and desired to remain with the person who had it in charge, coercion would not be inferred in opposition to the fact, for the sake of vindicating the authority of the father; *The People v. Porter*, 1 Duer. 709; *In the matter of Kottman*, 2 Hill, S. C. 362. A child might be told, under these circumstances, that it was at liberty to go where it pleased, and protected *eundo, morando et redeundo* against parental interference; *The People v. Chigary*, 18 Wend. 643. But it was at the same time held that some care should be had for a being which was more or less incompetent to think and act for itself. That the child was full grown, and desired to remain where it was, would not prevent the court from restoring it to the father, if it was withheld from him for a wrongful purpose, or for a purpose that might have an injurious effect on its future life or character; see *The King v. Ward*, 1 W. Bl. 385. Conversely a child of whatever age would not be delivered to a father who intended to make a disposition

of it that was contrary to law or morals. This discretion was at first confined within such narrow limits, that a child of a year old might be taken from the mother's arms and delivered to the father, notwithstanding the injury to be apprehended from such a separation. But it has been gradually enlarged, and the court will now refuse to aid the father when the effect would be injurious to the child; see *The United States v. Green*, 3 Mason, 48; *Ex parte Waldron*, 13 Johnson, 418; *The State v. Stigal*, 2 Zabriskie, 286; *Ex parte Kottman*.

The growth of this jurisdiction and the limits within which it is still confined in some of the States, appear from the case of *The State v. Stigal*. It was there held, in conformity with the English decisions, that where in a controversy between husband and wife for the custody of their children, these are produced under a writ of habeas corpus, the court will not ordinarily deliver them to either parent, but will see that they are allowed to go with the one whom they prefer; that it was doubtful whether a child which was too young to choose, could be taken from the custody of the father and given to the mother, however profligate his conduct and character might be; but that where a child of very tender years was in the mother's keeping; the court might judge whether it should be delivered to the father, or suffered to remain with the mother until it was less in need of maternal care and vigilance. It is said to follow that, as in the case under consider-

ation, the husband and wife had separated with mutual recriminations, of which there was no proof, he was entitled to the eldest boy, who was five years old, but that the two younger children should not be taken from the mother, who was living decorously with her father. Randolph, J., said, "The power and right of the father are allowed for the benefit of the child, and not to enable him to govern with arbitrary caprice or tyrannical control, so as to subvert the very object of the law in giving him the authority. Thus, when the children would be exposed to cruelty or gross corruption, immoral principles or habits, or the father is not of the ability to provide for the support, education and future prospects of the child, and the mother or person with whom the child resides is able, the court will make no order granting the custody of the child to the father. So if the child is of tender years, and especially if a female, or of sickly constitution, in the custody of a mother against whom there is no charge but inability to live with her husband, the court would make no order of removal. The discretion is pretty broad, and perhaps extending with the improvements and refinements of the age, yet it is not arbitrary, but based on sound principles, though, like all other discretionary proceedings, it will take its hue from the officer exercising it. In *Rex v. Greenhill*, 4 Ad. & El. 624, the father left his home and family, and was cohabiting with a mistress; then the mother left and took with her three young chil-

dren. The husband was otherwise of good character, and had large property, the mother none. He offered to abandon his mistress and be reconciled to his wife, or to take the children to his mansion, to be educated under the supervision of his mother, and away from any immoral influence. The wife refused, and the court made the order of removal, on the ground that it would be for the benefit of the children, and there being nothing of cruelty or corruption about the father or his home, the law gave him the custody. But in *Rex v. Dobbins*, and in *Rex v. Wilson*, in the same book, p. 664-5, note, where the conduct of the father at his home came within the discretionary exceptions, the court refused to take the child from the mother. In the *matter of Whaldron*, 13 Johns. Rep. 419, the father was poor, and his wife went home to her father who was of large estate, where she was delivered of a child and died, leaving the child the heir apparent to his grandfather; and when it was still of tender age, the father applied for its custody; but the court refused it on account of the inability of the father and the great benefit to the child, and that the special powers of the Court of Chancery in the case invoked would be sufficient to correct any evil. In the case of *Nickerson*, 19 Johns. 16, the court say the father is the natural guardian, and entitled to the custody of the child, if there be no danger of ill-usage or he be not of grossly immoral principles or habits, or

unable to provide for him. In the *De Hautville Case*, the child was but twenty-one months old, very sickly, and, in the opinion of physicians, not of an age to be separated from his mother; and on these grounds the court rightfully refused to remove the child from the mother, and place him with the father."

It is established in conformity with this decision that an infant will not be removed by a writ of *habeas corpus* from a custody which is not illegal or injurious as it regards him, although the person with whom he resides, or who has charge of him is not legally entitled as against the parent or guardian by whom the writ was obtained; *In the matter of Walstonecraft*, 4 Johnson Ch. 80; *In the matter of Kottman*, 2 Hill, S. C. 363; *The State v. Smith*, 6 Greenleaf, 462; *The United States v. Green*, 3 Mason, 482. But they also hold that a father cannot be compelled to surrender his child, unless he has abused, or is unduly exercising his power. If the legal custodian is unfit he may be superseded by a court of chancery or other duly constituted tribunal, but this cannot be done under a writ of *habeas corpus*, or by a court of common law. Hence a mother may fail in regaining the possession of a child which has been taken from her by the father, although the court would have declined to deliver the child to him; see *Foster v. Alston*, 6 Howard, Miss. 406; *In the matter of Walstonecraft*, 4 Johnson Ch. 81; *Ex parte Williams*, 11 Richardson,

452; *The King v. Greenhill*, 6 Nevile & Manning, 244; *In re Hakewill*, 12 C. B. 233. "The point," said Cresswell, J., in *In re Hakewill*, "was expressly determined in this court in *Ex parte Skinner*, 9 J. B. Moore, 278 (E. C. L. R. vol. 17.) So, in *The King v. Greenhill*, 6 N. & M. 244 (E. C. L. R. vol. 36), it was held by the Court of Queen's Bench, that the father is entitled to the custody of his children, to the exclusion of their mother, although they be within the age of nurture; and that, where a child is in the custody of the mother, the court will compel her to deliver it into the custody of the father, unless it appear to the court that the child will be improperly restrained, or its morals contaminated by being placed in the father's custody. 'The custody of the father,' says Lord Denman, 'is the proper legal custody. Where there is danger to the infant, in intrusting it to the care of the father, the court will not act upon the jurisdiction which they possess. Therefore, if there were well-founded apprehensions of the father's acting with extreme harshness or cruelty, or with gross profligacy or immoral conduct, so that the child would be in danger of contamination, the court would not order the child to be delivered to him.' And Littledale, J., said: 'Upon general principles of law, the father is entitled to the custody of the children. If they be of an age to judge for themselves, they have a right to determine where they will go: but, if they

be not, it is the bounden duty of the court to put them in that custody which the law points out. Supposing the children were in the custody of a third person, and the question was, whether the father or the mother should be intrusted with them, there could be no doubt that the court would order them to be delivered to the custody of the father, and any application of the mother would not be attended to.' If these children were of an age to judge for themselves, we might compel their production. But this application does not embrace the only one of these children who is of such age: it is not suggested that she is in any improper custody. As to the other children, I think the cases abundantly show that the primary right of custody of children is in their father."

The objection to this course of decision is that as a *habeas corpus* is often the only remedy within the reach of those who are interested on behalf of the child, it should not depend on the accident of possession, especially when obtained by force or fraud. Such a rule tends to make the infant the sport of artifice and violence, to the detriment alike of its heart and morals. The question should not be who has the child, but to whom it should be entrusted for its own sake and the welfare of society; see *Johnson v. Terry*, 34 Conn. 259; *Foster v. Alston*, 6 Howard, 406. Two considerations should be kept steadily in view in every such case: One, that the primary object is the wel-

fare of the child; the other, that this will presumably be promoted by delivering it to the father, and that the onus is on those who maintain the contrary. Such was the final decision in *The People v. Mercein*, and it was approved by the majority of the court in *Goshwiler v. Dodez*, 4 Ohio, N. S.

The subject is now regulated in some of the States by statutes, which confer a discretionary power on the courts, that may be exercised summarily on petition or through a writ of *habeas corpus*; see *Tarlington v. The State*, 1 Carter, 171. By the common law, said Smith, J., in the case last cited, "the father, in preference to the mother, was entitled to the custody of the children of the marriage; and this paternal right was always enforced in cases like the present, except under the most peculiar circumstances; *The King v. Greenhill*, 4 Ad. & El. 624. See also, 10 Ves. 58; Jac. 264, n.; 2 Russ. 1; 2 Sim. 35. When it was clearly established that the father was of immoral and irreligious principles, and that thus his children were likely to be corrupted, the aid of the courts to compel their delivery to him has been refused, but there is no pretence that such was the fact in this case. An absolute want of ability to provide for them, would also, no doubt, have been good cause for such refusal, but the proof in this case falls short of establishing such want of ability.

"Very recently, the common law, by which the father, when the husband and wife lived in a state of

separation, was entitled to the absolute dominion over the children, to the exclusion of the mother, has been materially modified by the statute, both in England and in this country. By stat. 2 & 3 Vic. c. 54, a mother (unless an adulteress) may, by petition to the lord chancellor or master of the rolls, obtain an order for access to her infant children, but at such times only, and subject to such regulations, as the court shall think proper; and if such children are within the age of seven years, the mother may obtain an order that they shall be delivered to her and remain in her custody until attaining such age. See 10 Sim. 291; 11 Id. 178. In New York, a wife living separate from her husband, but not divorced, may, by a statutory provision, sue out a *habeas corpus* to have the minor child of the marriage brought before the Supreme Court, which may award the custody of the child to the mother, for such time, and under such regulations, as it may see fit to prescribe, the court retaining power, from time to time, to vary, modify, or annual its order; 2 N. Y. R. S. 148. The object of these statutes is, doubtless, to confer upon the courts a greater discretionary power, in these painful cases of conflict between husband and wife for the custody of their infant offspring, than they were at liberty to exer-

cise under the more rigid rules of the common law. For cases on this subject, see *Ex parte M'Dowley*, 8 Johnson, 328; *Ex parte Waldron*, 13 Id. 418; *Ex parte Chegary*, 18 Wend. 637; *Ex parte Nickerson*, 19 Id. 16; *Ex parte Barry*, 8 Paige, 47; 25 Wend. 68; 3 Hill, 399. The present revised statutes of this State, provide, that when any husband and wife shall live apart, without being divorced, either party may apply to the court having jurisdiction, for a writ of *habeas corpus* to have a minor child of the marriage brought before it, and, on the return of such writ, the court, on due consideration of the age and sex of the child or children, and the respective fitness and conditions of the parents, may award the custody of the child or children to either parent, under such regulations and restrictions, and with such provisions and directions, as the case may require; R. S. p. 606, §§ 73, 74. The whole matter, therefore, is now left to the sound discretion of the court, having regard to the welfare and true interest of the child, as well as the permanent interests of society, in the due enforcement of matrimonial obligations. This statute, however, was not in force when this case was before the Circuit Court. As the law then stood, the decision was unquestionably correct."

[*729] *WARMSTREY v. LADY TANFIELD.¹

4 CAR. 1.

REPORTED 1 CH. REP. 29.

POSSIBILITY ASSIGNABLE IN EQUITY.]—*A grant of a future possibility not good in law, yet a possibility of a trust may be assigned in equity.*

THE plaintiff's title appeared to be, that one William Freeman, being possessed of the third part of the parsonage for the whole term to come, granted all his interest therein, to one Alborough, in trust for the use of the said William Freeman and Alice his wife, during their lives, and after to the use of such issue male of their two bodies as the said William should by will appoint; and after, the said William appointed the premises after the death of the said Alice unto Richard Freeman, son of the said William and Alice; and that the said interest in law of the said Alborough came by mesne conveyance unto John and Robert Palmer; and that the said Richard Freeman, during the life of the said Alice, who not long after died, assigned the premises unto the plaintiff, and also released to the plaintiff, and the said Palmers assured their interest in law in the said premises to the plaintiff.

The defendant insists, for title, that the said Richard Freeman, about two years after his assignment aforesaid to the plaintiff, made a lease of the premises to Walter Thomas and John Make-rith, who passed their estate to one Evans, and Hawkins, in trust for the defendant the Lady Tanfield, and had possession given her.

This Court,² with the judges, taking consideration of the said assignments, grants, and release, were of opinion, and declared, that *howbeit a grant of a future possibility is not good in law,³ yet a possibility of a trust in equity *might be assigned*, and the [*730] said Richard Freeman's assignment of his said trust unto the plaintiff is also confirmed by the assignment of the said Palmer, who had the interest in law, and the said plaintiff's assignment is also precedent to the deed made to the said Thomas, by which the said defendant, the Lady Tanfield, claimeth the said lease.

¹ L. A., fol. 151; 1 Eq. Ca. Ab. 46, pl. 10; 10 Co. 47.

² Lord Coventry was Lord Keeper.

³ See Lampet's case, 10 Co. 47 a, 48 b.

*ROW v. DAWSON.¹

[*731]

NOVEMBER 27, 1749.

REPORTED 1 VES. 331.

CHOSE IN ACTION ASSIGNABLE IN EQUITY.]—*A. borrows money of B., and gives him a draft upon a fund due to him (A.) out of the Exchequer, which was deposited with the officer from whom the fund was payable. A. afterwards becomes bankrupt; this is an assignment thereof to B. for valuable consideration, which shall prevail against the general assignees under the commission of bankruptcy. A chose in action, though not assignable at law, is assignable in equity, and no particular form of words is necessary.*

Tonson and Conway lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz.: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway, value received."

Gibson became bankrupt; and the question was whether the defendants Tonson, and the executors of Conway, were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, are entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy, in law or equity.

LORD CHANCELLOR HARDWICKE.—At first I little doubted about my own jurisdiction, and whether the plaintiffs ought not to have gone into the Exchequer, as *being a court of revenue; for this is not a personal credit given to, or de- [*732] mand upon the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the Crown for public services. But there is something in the present case delivering it from that: the officer admits he has received a sum of money applicable to this demand, which brings it to the old case of a liberate, which a person has under the Great Seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft, not to pay generally,

¹ Reg Lib. 1749, B., fol. 89.

but out of his particular fund, which creates no personal demand; therefore, not a draft on personal credit, to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing; the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistence. Then what is it, for it must amount to something? *It is an agreement, for valuable consideration beforehand, to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt: and, though the law does not admit an assignment of a chose in action,¹ this Court does; and any words will do, no particular words being necessary thereto.*

In the case of a bond, it may be assigned in equity for valuable consideration, and good, although no special form used. Suppose an obligee receives the money on the bond, and there is [*733] wrote on the back of it, "Whereas I have *received the principal and interest from such an one, do you the obligor pay the money to him." This is just that case; only it is not a debt arising from specialty: therefore, like an assignment of rent, by direction to a tenant or steward, to pay so much of a year's rent to a third person.

The case of *Ryall v. Rowles*,² now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission; and it is clear that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause in the statute Jac. 1.

But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, *is deposited with the officer Swinburn*, and therefore it attached immediately upon it; so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.

¹ And so is a possibility for valuable consideration; 1 Ves. 391. And see *Warmstrey v. Lady Tanfield*, ante, p. 729.

² See next page.

RYALL v. ROWLES.¹

[*734]

FEBRUARY 24, 1747-8; JANUARY 27, 1749-50.

REPORTED 1 VES. 348.

ASSIGNMENT OF DEBTS WITHOUT NOTICE TO DEBTOR, INVALID AGAINST ASSIGNEES IN BANKRUPTCY.]—*Assignee by way of mortgage of goods and chattels, or choses in action, allowing the assignor to continue in the possession, or in the order and disposition of them, will, upon the construction of 21 Jac. 1, c. 19, ss. 10, 11,² have no specific lien on them against his assignees in bankruptcy.*

WILLIAM HARVEST, a trader within the several statutes concerning bankrupts, in June, 1732, borrowed from Benjamin and Joseph Tomkins 1500*l*, and, as a security, conveyed and assigned his dwelling house and brew house at Kingston, and all the coppers and utensils in trade belong thereto, by way of mortgage, subject to redemption.

He afterwards took Jonathan Stephens into partnership with him, and in less than a month after the partnership, December 22, 1736, made a second mortgage to Potter, in trust for Jonathan Stephens, of his moiety of not only the utensils, but the stock in trade, *debts, profits, &c.*, for securing a sum of money then lent to him by Jonathan Stephens, and any future sums that should be lent.

December 10, 1737, he made a third mortgage of the seventh part of his undivided moiety of all the stock in trade, utensils, *debts due or to grow due*, to Sir James Reynel.

April 24, 1738, he made a fourth mortgage of the seventh part of his undivided moiety, with the same description, to Skip.

*September 7, 1738, he made a fifth mortgage to Jonathan Stephens, for securing to him 2000*l*, which Stephens [*735] had paid to one Baugh, who had the original mortgage on the freehold estate; the real premises, which were conveyed by way of lease to Tomkins, having been mortgaged to Philip Stone in 1725, and assigned to Baugh, who assigned to Stephens upon being paid the 2000*l*.

He afterwards made a sixth mortgage to George Harvest, his son, of the seventh part of his undivided moiety of the partnership, stock in trade, *debts, utensils, and profits*, in consideration of a sum of money lent.

Notwithstanding these several mortgages, *he continued in possession of the utensils and stock in trade as before*, altered, disposed, and mortgaged them as his own, and received the *debts in partner-*

¹ *S. C.*, 1 Atk. 165; nom. Ryall v. Rolle.

² Repealed, but, with some modifications, re-enacted. See note, post.

ship with Stephens, without any control from any of the mortgagees till 1740, when he failed and became bankrupt.

Then the assignees and mortgagees insisted on the right to the several goods, stock, &c., comprised in their several assignments, in opposition to the general creditors claiming under the commission.

The cause was heard before Lord Chancellor Hardwicke, the Seal after Michaelmas, 1747, and it being a new case, his Lordship ordered it to be argued by two counsel on each side, assisted by the Judges, upon the question, whether all or any and which of these mortgages came within the stat. 21 Jac. 1, c. 19, particularly the latter part of the tenth, and the whole of the eleventh section, or not? It was argued February 24, 1747-8.

Solicitor-General (the Hon. William Murray,¹) and Mr. Noel, for the assignees under the commission.—The questions upon the construction of this statute are two: first, whether any conveyance of goods or chattels by way of mortgage, or with condition of redemption, is within that statute? The second, if the Court should think so, whether any of these six mortgages are within the clause as to any of the goods comprised therein; the consequence of [*736] which is, that they must be as creditors under the commission, and not be preferred to the other creditors?

The first will depend on the true construction of the Act itself; to find out which three things are to be resorted to: the circumstances at the time of making the Act,—for to them the law was adapted,—the remedy intended, and the mischief designed to be prevented thereby, and judicial explanations of the Act since. It will appear, that some conditions of redemption are within this clause, and that it was calculated for this. When this Act was made, fraudulent conveyances were sufficiently guarded against by 13 Eliz. cc. 5, 7. *Twyne's case*, 3 Co. 80, upon the construction of that Act, was considered so strongly within it, that the party was punished criminally; and particular provisions are made by that statute in case of bankruptcy. Fraudulent conveyances, then, being provided for before, were never intended by the Act now in construction, but the thing intended was an equal distribution amongst creditors, which was very unequal, some creditors getting prior liens several ways, as by bond, judgment, &c., to take away; which priority, unless where satisfaction by execution and recovery before the bankruptcy, was the intention of the Act, and to reduce creditors who had trusted the bankrupt generally to equality. Another way creditors had of gaining a priority was by pledged goods; and after that, a new way, by conveyance without delivery of the goods. Anciently, as appears from the Year Books, 5 Hen. 7, fol. 1, delivery was necessary to a sale, and was often done by parol. The pledge must be delivered over to the pawnee himself at the time of borrowing, otherwise

¹ Afterwards Lord Mansfield.

no property vested in him. But that doctrine was afterwards exploded, as in Yelv. 164, and 2 Leon. 80, (*Clark's case*), where the property was held vested, though no delivery at the time. And Owen, 124, held, that such pawnee might assign over his property; so that wherever the conveyance was under hand and seal, it was not necessary to vest the property by delivery of goods pledged. There is no real distinction between the words *mortgaging* and *pledging*: the first *being generally applied to lands, the other to goods; and they are in effect synonymous terms. As to lands, the mortgagee holds by title; and the title deeds always are, or should be, in his possession. But as to goods, there is no hold where the pawnor keeps them in his possession. The *end* of the Act, therefore, being to reduce creditors to equality, it is but reasonable to put such creditors who took pledges and left them in the hands of the bankrupt or pledger, to dispose of and alter them as he pleased, upon equality with other creditors; for the mortgagees give the bankrupt a general credit. Suppose a diamond pledged for a large sum, and the pawnor keeps possession of it, if he sells the diamond, as he may do the next day, the creditor must come in under a commission. The inconvenience in allowing a preference in cases of these secret conveyances, is greater than that of judgments, which are public and open; not that the Act intended to restrain the pawning and selling goods generally: and there might be a sale of goods where possession could not be given; as of ships at sea, and goods and merchandize that are bringing home. Such conveyances, then, by way of mortgage, are within the reason of the Act; and the question is, whether within the letter? The word *convey*, in the preamble, extends to all conveyances in general, whether absolute or by condition. Mortgages of lands or goods are in this Act called *conveyances*. And where a general word is mentioned to take in all, it is not usual afterwards to specify particular words which come after it. The mischief recited in the preamble is material, *often happening*. It never was a frequent practice to buy goods absolutely, and to leave them in the possession of the vendor to do as he would with his own; which case never happens without fraud. And the preamble supposes a good consideration, not upon fraud; against which case, if the legislature had intended a provision, it would have put it upon that. But they knew that would be void by 13 Eliz., and were, therefore, providing against conveyances by way of mortgage, the mortgagor keeping possession, and exercising all acts of ownership. The *enacting part is very carefully penned, and every word [*737] deserves to be weighed. The goods must be originally the property of the bankrupt, and conveyed by him, and must continue in the order and disposition of the bankrupt. It is objected that a mortgagee or grantee on redemption cannot be called owner or proprietor; but the Act considers him as such. The words take in all ownerships whatsoever: some for greater interests, others for less; and the pawnee or mortgagee is, in

point of law, considered as proprietor, and may maintain *trouver* upon it, although that action is founded in property. Such conveyance by pledge has been held to be good against extent of the Crown, because the property is altered. 3 Bul. 17, shows, that pawnee has a special property, so that no act of pawnor can affect it by outlawry or felony. So, if a lease for years is made of goods, a *scire facias* for the King upon a subsequent outlawry, shall not affect them till the lease ended. It is objected, that the word *true* is added to *owner* or *proprietor*, and that the mortgagee never was deemed such; but *true* is never put in opposition to *special*, but *false*, owner; and it is so meant in this Act. It is said, that mortgages are allowed and accepted out of the Act, power being by another clause given to the commissioners or assignees to redeem. But though a trader may mortgage, his goods must be delivered to the mortgagee, or in the hands of a third person, and not remain in mortgagor, besides, that clause only gives the same power the assignees had before, in place of the bankrupt. As to judicial expositions upon this statute since, it has been held, that the preamble shall be taken into construction, and the enacting part controlled by it. So held by Chief Justice Holt, in *L'Apotre v. L'Plastrier*, cited in 1 P. Wm. 318.

CHIEF JUSTICE LEE.—My account of that case is different from that in Peere Williams, evidence having been given of the alteration of the diamonds by taking them out of the sockets. It was held by the Court, that, offering to sell generally was sufficient [*739] evidence of offering *to sell as owner; but no judgment was given, it being adjourned for further argument, although the Court said, if this was not within the Act, they knew not what was. I had occasion to cite this case before Lord Raymond, at Guildhall, and it was then said, there was no determination upon it.

LORD CHANCELLOR HARDWICKE.—I have seen another note of that case; and it appears to have been argued a second time, when Sir Edward Northey took the distinction, that the enacting part was controlled by the preamble. Search was directed to be made for the rule, which was found; and this matter was determined Pasch. 9 Anne; but whether upon the point in question or not, did not appear.

For the general assignees.—In August, 1744, *Ex parte Marsh*,¹ his Lordship held, that plate in trust for benefit of the wife was not within the statute, not being of the bankrupt, or conveyed by him. The preamble then makes part of the enacting clause, and is the key to it, (1 P. Wms. 317,) notwithstanding the general Act of Parliament may take its rise from a particular case, and ought to be construed to prevent the mischief, and advance the remedy. The question of the mortgage of goods being

¹ 1 Atk. 158.

within this Act of Parliament has been in judgment before. The case of *Stephens v. Sole*,¹ July 5, 1736, which was solemnly argued, is in point. There William Tappenden, indebted to the plaintiff in 1400*l.*, for securing payment thereof mortgaged to the plaintiff some leasehold estates, wharfs, and three hoys, but kept possession of the hoys, and sometime after became bankrupt. The plaintiff brought an ejectment, and got possession of the leasehold estate, but the assignees got the hoys. The leasehold not being sufficient to pay the plaintiff his principal and interest, he brought a bill to foreclose, and to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees admitting the leasehold not sufficient to pay the plaintiff, insisted on their right to the hoys under the statute, the bankrupt having the possession, and acting as owner thereof till [*740] declared *bankrupt. Lord Talbot decreed that the plaintiff might be at liberty to come in under the commission for his deficiency; dismissing the bill so far as it required account of the profits of the hoys, which were ordered to be sold for the benefit of the creditors in general. No case has since occurred where it was held that a mortgage by way of condition is not within this clause; and wherever it has come before the Lord Chancellor, with proper facts so as to create a doubt, it has been sent to be tried; as in *Bourne v. Dodson*,² 5th December, 1740; but it never was. So, upon the bankruptcy of *Raymond, Ex parte Page*, where the mortgagees gave it up, coming in under the commission.

If, then, any or some mortgages may be within this Act, the second question is, whether the six mortgages, or any of them, are within the statute, which will depend on three considerations: the nature of the chattels, the interest conveyed, the persons to whom or for whose benefit they are conveyed. The chattels are, stock and utensils in trade, the debts due and to be due; and yet, possession of the whole was left with the bankrupt, who had the order and disposition of them as before, sold, altered, and disposed as owner, was reputed as such; and all this with the express consent of the mortgagee, who might have prevented this, the nature of the conveyance being so. Nor was he to account with the dispositive for what he should sell, nor for any of the debts he should recover, for that might probably have altered the case. As to the specific goods that were to be, the assignments of them are merely void at law, and only to be supported in equity by way of agreements to be performed, when the goods come in esse, this Court considering it as done from the time it ought; whereas Courts of law only give reparation by damages. As to the debts, present and future, they cannot be assigned at law; and in equity, it can only be supported where the assignees have a proper power to sue for, recover, and receive the debts assigned; whereas here, the bankrupt after conveyance is to sue, &c., and

¹ Cited 1 Atk. 157, 161.

² 1 Atk. 154.

[*741] not to come to any account; and *debts come within the words and meaning of the Act, within the word *chattels*, and would pass in a will thereby. As to the interest conveyed, they are all, except one, shares of the stock; and the Act requires delivery, and that possession should be altered. The mortgagees of part ought to come into the trade and act as part owners; and then it will be notorious who are the true owners, which answers the objection, that delivery could not be given of parts of the goods. As to the persons claiming the benefit of the assignments, it must be admitted, that each partner has a pledge on the partnership effects for what is due to him, upon adjusting the accounts, and the surplus must be divided. But here the money advanced by Stephens has nothing to do with the partnership, being an entire separate loan; and if this is suffered to stand against the rest of the creditors, it will elude all the act of bankruptcy, for most trades of the City are carried on in partnership. Stephens was, after the conveyance, owner of the whole, redeemable as to one moiety; yet Harvest continued to act in the partnership, and sold and disposed of his moiety as he pleased. Then, as to the general expediency, the policy of the law has been always to level creditors, except such as have recovered satisfaction, or got such possession as cannot be defeated; whereas, if this method of mortgaging were allowed, one or two favorite creditors would sweep away the whole, nor would creditors know what to trust to. Trade cannot be carried on without credit, which would be destroyed if such liens are allowed to give a priority; and for above a *century* have the legislature been guarding against it. It is no injustice to turn aside such mortgagees, who trust the credit of the bankrupt, and would, in cases of insolvency, set up their conveyances to defeat others, who were induced to trust on the credit of his stock and trade: not, indeed, that all mortgages of goods without delivery are void, as of ships or cargo at sea; but then, everything is done to enable the taking possession upon arrival, as invoices, bills of lading, &c. So, in case of bulky [*742] goods, delivery of the key of the warehouse to *the mortgagee; but these cases fall not within the Act, nor the mischief intended to be remedied.

Attorney-General (Sir Dudley Rider), and Mr. *Wilbraham*, for all the mortgagees.—The general question is, whether any and which of these mortgages are securities, under which the several defendants claim, are made void in the whole or in part by 21 Jac. 1, c. 19? Upon which, two considerations arise: whether the particular interest claimed by the mortgagees in goods be such as made them true owners within the clause of that Act; secondly, as to the goods assigned, what possession could be given? The true view of the laws relating to bankruptcy is, that all conveyances to defeat creditors shall be absolutely void. The real ground of the conveyance was to be inquired into, to rebut the general charge of fraudulent conveyance; and it would be an odd construction, that, in all events, although a valuable consideration

were paid, it shall be absolutely void, because the possession was left in the conveyer. Though strong evidence of fraud, it was only evidence, and capable of being rebutted; and the consideration, if good, was a strong circumstance to be opposed thereto. The meaning of the Act was to prevent false credit, by a person having goods which did not belong to him, being sold absolutely. Not a word in the Act about pledges, but only general conveyances. A mortgage is the appropriation of a specific thing to certain purposes, not only for payment of money but for indemnifying on divers occasions. A pledge requires delivery of the thing; a mortgage does not. That they differ, may be seen by Justinian's Inst., lib. 4, tit. 6, s. 7, and by the definition of Hypotheca and Pignus, Bro. 271, Trespass. It is no pledge, unless delivered at the same time. But the mortgagor is presumed and understood to have possession; nor was the retaining possession ever evidence of fraud, where the conveyance was intended only as a mortgage: 2 Bul. 226. It is the same with regard to goods as to lands: Prec. Ch. 285; where a redemption was intended, the produce of goods may be granted, as *well as the goods [*743] themselves. The words *owner* and *proprietor* are to be limited by the nature of the conveyance, and extend not to mean the real owner in all cases. Though the preamble is the key, Lord Cooper, in *Copeman v. Gallant*, 1 P. Wms. 314, would not allow that the preamble should restrain the enacting clause. A factor, having goods sent him from abroad to sell, is not owner within the Act; because, if he becomes bankrupt, the Court will take the goods out of the hands of the assignees for the right owner. It is common to have general Acts of Parliament from particular cases; and sometimes the legislature recites the particular, and sometimes a general, reason. The preamble, therefore, where general, ought to be considered with the enacting part; but where a particular reason is given, it would be odd to construe the remedy for that case only, and not take the Act in general. The mortgagor is generally considered as *true owner*; so in common-law courts and in the Acts concerning mortgages and the redemption of estates, he is called owner. The word *owner* is indeed sufficient to take in special owner; but that this Act does not interfere in this case, appears from *Meggot v. Mills*, 1 Lord Ray. 286, and *Jacob v. Shepherd*, cited in 2 P. Wms. 431.¹ If possession was to be altered, it would in this case defeat the mortgage; for it was intended that the trade should be continued, and not to put the mortgagee in possession. The nature of the mortgage was proper to have the possession kept in the mortgagor; therefore, like the case of a leasehold estate for years, a mortgage of which, though a chattel, is not within the Act; and there is a great distinction between the possession of goods being in the person who is real owner, and one who is only conditional owner: 1 Lord Ray. 724. As to the things assigned, it could be

¹ See this case stated at length by Lord Mansfield, 1 Burr. 480.

of no use to the mortgagee to take these utensils, being fixed to and continued as part of the premises. A share in trade is a mere chose in action: *Small v. Oudley*, 2 P. Wms. 427. Some of the things are to be in futuro, and of which the mortgagees [*744] could not possibly have possession. This Court *will bind property which the law will not bind; and this Act can affect nothing but what means a legal conveyance. If the general Acts of Parliament, or the common law, give not these kinds of debts or goods to the general assignees, this Act cannot; and the mortgagees will have a lien and priority; not that the creditors of the partnership shall be hereby prevented, but the plaintiffs are private creditors, and these are only assignments of the residue, after payment of the partnership debts, of what shall be taken hereafter, which can be assigned in equity but not in law. In notion of law, the possession of one partner is the possession of the other. It is common to have a covenant in a partnership, that one partner shall not assign without consent of the other; and the assignee of part of the partnership effects cannot maintain trover, for the partnership may be given in evidence, and the assignee has no remedy but in equity. Had it been to Stephens instead of Potter, it could not have been within the Act; for there, to all intents, Stephens would have been in possession. In the very deed, the assignment is said to be in trust for Stephens; and then it will be presumed that Potter suffered Stephens to continue in the possession which he had before, viz., real owner as to one moiety, and special owner as to the other. Then, as to the exigencies of trade, money is often wanted at an hour's warning, and then it is frequent to borrow upon goods for a limited time; and if a man was in that case to put another in possession of his shop, or to deliver the key of his warehouse, it would be publishing himself a bankrupt to the world. Credit is a very tender thing; and if the method was to deliver possession in all cases, it would be so great an inconvenience, as to destroy all credit and trust whatsoever.

Reply. The clause in this Act extends indeed to absolute sales, but not to that case only. Allowing that the enacting part shall not be restrained by the preamble, yet, that it goes as far as the case in the preamble can be no question, but whether it shall go farther? The case stated in the preamble, that many convey and [*745] still *retain, is the present case, for in absolute conveyances it would not often happen without fraud. Chattels are no real pledge or security unless a delivery; it is otherwise in case of lands, the title being a security without the rents and profits. The distinction between mortgagee and pledgee is nominal only, and alters not the nature of the contract: the Roman law says, hypotheca and pignus are the same; so Calvin's Lex, and so is the nature of the contract.

LORD CHANCELLOR HARDWICKE.—The power of a master to

bind a ship is called hypotheca, yet there is no delivery of possession, and it differs from pignus or pledge.

Reply. It does so; but the master has a particular lien by way of security for what might be due to him, and those cases are exactly the same as absolute sales, where delivery may not at all times be necessary. 2 Bul. 226, relating to mortgage of lands, it is quite out of the case. The general proprietor here acts with consent of the special. Hale in his Analysis, in his division of special property, says, that a pledge and grant on condition is a special property: the report in 1 Lord Ray. 286, has only stated some dictums; as to 1 Lord Ray. 724, the fourth point, the only question was, whether the execution was fraudulent?—not a mortgage by a bankrupt, but the putting goods into the hands of another, to sell on his account. In *Jacob v. Shepherd*, if the Act had been thought of, that case was not within it, nor was it truly referred to in 2 P. Wms. 427.

LORD CHANCELLOR HARDWICKE.—It was not. Sir Joseph Jekyll set aside the assignment of goods as fraudulent, without taking notice of this clause. But Lord Chancellor King was of a different opinion, because there was a consideration, and that he could not make a bankruptcy where the law did not. But the assignment being so extensive, he sent it to law to see whether the assignment itself was not an act of bankruptcy, but still took no notice of this clause.

Reply. Then *Small v. Oudley*, 2 P. Wms. 427, falls *under the same consideration; the present statute was not under [*746] consideration, nor could it be. No chattels were ever intended to be excepted out, but some chattels cannot come within the circumstances of the Act, as leaseholds, which are governed by the same rules as real estates. It is objected, that the Act extends only to legal, and most of the things here assigned are equitable chattels. But where the Act set aside all conveyances, it means both in law and equity, and equity must follow the law. The only case in which, as to the rules of property, this Court does not follow the law, is, that a widow is not entitled to dower out of a trust estate, which obtained at first without being attended to. Possession of debts assigned may be given by delivery of the securities, and by giving power to receive and recover; but here, all those powers are left in the bankrupt, and to apply the debts to his own use. Certainly he that lends money on goods in a ship, and not taking possession, will lend without that security, and on the general credit, for such goods are really no security, because the moment they are sold the lender becomes a general creditor. The line how far the Act extends, and where to stop, is easily drawn by the Act itself, for where possession of the bankrupt is without consent of the mortgagee, it is out of the Act, otherwise not. It is said this will prevent the assignment of stock in trade, but an absolute assignment of all stock in trade would hardly be good in cases of bankruptcy, even laying it out

of this Act; It was so said by the Master of the Rolls in *Small v. Oudley*, it being only ideal, and carrying a badge of fraud.

The Court having taken time to consider, now delivered their opinion.

MR. JUSTICE BURNET.—This case is of so extensive a consequence to trade in general, it may be attended with such inconvenience either way, and in most respects is so wholly new, and no judicial determination, that I shall endeavor to lay my thoughts in as clear a light as possible.

On stating the case, as far as it relates to the question *as it [*747] stands on the pleadings, and the Master's report, the general question seems to be, whether these six mortgagees, or any of them, will be entitled to resort to the utensils, &c., for a satisfaction of their debts? Or whether, like the rest of the creditors, they must come under the commission for a distributive share of those debts? Which depends on a more restrained question, whether these six mortgagees, or any of them, did not permit the bankrupt to continue in the possession, order, and disposition, so that by the statute Jac. 1, the commissioners were entitled to sell and dispose of these several mortgaged chattels for the benefit of all the creditors.

It is natural from the mortgages to consider this in three distinct lights. First, the nature of a mortgage or conditional sale of specific goods—things in possession of which there may be actual delivery where the bankrupt continues in possession of these goods, and it is necessary to consider such mortgage to a stranger and to a partner. Next, the nature of three of these mortgages to strangers as conditional sales of things partly in possession, as utensils and stock in trade, and partly choses in action, as debts and future profits. Lastly, whether the general rule will extend to it, supposing these mortgages to strangers are within the same rule as mortgages of specific goods, whether there is any difference between a mortgage to a partner and to a stranger? And although the present question must wholly receive a determination from the clause in the statute, yet it is necessary to consider conveyances to creditors before that statute.

But previously, it is proper to clear the question with relation to pawns. It was contended, that pawns, by the Roman and English law, required delivery, but that hypothecation or mortgage did not. As to the Roman law there was an authority cited, Just. Inst., lib. 4, tit. 6, s. 7, which passage, if it stood alone, might go a good way to prove what it was cited for. But there is another Roman authority, proving pignus to be as valid without delivery; and the true distinction between them is only that pignus is of movables capable of delivery, the other of immovables only; Domat., lib. 1; Wood, lib. 3, chap. 2, 219; [*748] Digest, 50, tit. 16, Law 238; 18 lib. Pandects, tit. 7, Law 1; 20 lib. Pandects, tit. 4, Law 12, s. 10; where a pawn to two and delivered but to one, and where the pledge is concurrent in

point of time, the preference to the person to whom a delivery is stated there, that he will have a better remedy by way of action than the other. Delivery, then, is not necessary by the Roman law; and the other nations, receiving this Roman law, corrected the inconvenience of this law as to that point, that if a pawn is not delivered, it shall not affect a purchaser for valuable consideration, as it certainly did in that law. But, supposing that distinction true, it could have no influence in the present case, unless the Roman hypothecation and English mortgage were the same, which they are not. No property was transferred in the hypothecation; an English mortgage is an immediate conveyance, with power to redeem; and equity, at any time, admits redemption, notwithstanding forfeiture; but that does not alter the conveyance, therefore there is no comparison between them; and in the Roman law there is a place, where it is held, that suppose there is an hypothecation, with condition, that if the money is not paid at the day, the pawnee shall enjoy the goods, that is a conditional sale: Just. Code, lib. 4, tit. 44, Law 2; and the other liber of the Code, relating to conditional sales of movables, Law 7. All that can be inferred from the Roman law, with respect to pawns and hypothecation, will be foreign; and from the English law, as to pawns, as foreign. I admit delivery necessary to a pawn: the Year Book, cited 5 Hen. 7, is an express authority in point, and therewith agrees 2 Roll. Rep. 439, *Ross v. Bramsted*, that is no pawn where no possession is transferred at the time. 2 Leon. 30, and Yel. 164, are cases not of pawns, but bailment to third persons, to sell goods for the use of a particular creditor, who will have an interest in the performance of that contract, and may sue the bailee, which has nothing in common with the case of a pawn. All the books treating of pawns treat them as in the possession of pawnee, where *a pawn is compared to distress, and suppose that the custody of the pawn [*749] must be in the pawnee: Owen 123; 2 Ld. Ray. 917; 2 Sal. 522. But there is one case more, where the proper distinction between mortgage and pawns is taken: *Ratcliffe v. Davis*, Noy, 137; Cro. Jac. 244; Yel. 179; 1 Bul. 29; where the Court held there was a special property in pawnee, entitling to the custody till the condition is performed, but that on payment the whole property vested in pawner, distinguishing it from a mortgage, which is a conveyance of the thing; that, therefore, must be laid out of the case, because it has nothing in common.

The next consideration, then, is, in what condition the creditors stood in relation to conditional sales or mortgages by their debtors, to their prejudice, where the mortgagor continued in possession of the goods mortgaged; and the statute governing this matter is 13 Elizabeth, in which there is no distinction between conditional and absolute sales, provided they are fraudulent. This statute being made to protect creditors against all conveyances to defraud them, it was incumbent on a Court of equity, or a jury at common law, upon considering the whole

circumstances, to pronounce whether the conveyance was made with such intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud where left in his hands. But if, from concurrent circumstances, it appeared the title-deeds were not left to defraud creditors, but upon reasonable and honest purposes, or left with the vendor not so as to deceive touching his substance, that, being accompanied with other circumstances, could not be pronounced a badge of fraud. Therefore, it lay open upon this, to determine whether fraudulent or not. The leading case on this is *Twyne's case*,¹ where it is held, that it was upon a valuable consideration, but not *bonâ fide*, from the continuing in possession and trading therewith. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor unless to procure a collusive credit; and it is the [*750] *same whether in absolute or conditional sales, neither the statute nor the reason of the thing making any difference. If no delivery is necessary on a mortgage, they may be mortgaged three times over above the value, and then it is just the same as if they remained in his hands after one absolute sale. But it is insisted, there are several cases where there is a distinction as to this possession after sale between conditional and absolute conveyances of lands or goods. That of lands is not applicable to a case of goods; the case cited for this was *Stone v. Grubham*, 2 Bul. 226, and 1 Rol. Rep. 3; but there is no argument from thence, unless the possession of lands and goods after a conveyance was on the same foot. Possession is not otherwise a badge of fraud, unless as calculated to deceive creditors. There is no way of coming at the knowledge of who is owner of goods but by seeing in whose possession they are; the possession of lands is of a different nature: there may be a possession as tenant at will, as every mortgagor is of a mortgagee before the condition is broken. Every one desiring credit entitles to an inquiry into his substance; and therefore, because the possession of land is of an ambiguous nature, as it may be in the hands of the tenant as well as the owner, the title-deeds, &c., may be required, but never at what market goods were bought, the possession and usure of them being all. Therefore, in equity, where deeds are left with a second mortgagee and the first mortgagee neglects to take them into his possession, the first mortgage is postponed. The reason is given by Lord Talbot, in *Head v. Egerton*, 2 P. Wms. 280, he suffering for his fraud. The next case cited for this was *Bucknal v. Roiston*, Prec. Ch. 285; but no distinction was taken there between conditional and absolute sales, by Lord Cowper, but that there was no evidence in the case before him of a possession calculated to acquire a false credit which would not make it void. The next case in support of this distinction was *Meggot v. Mills*, 1 Lord Ray, 286, and cases in the time of King William, 159;

from both which books it appears the case was so imperfect that the Court *sent it to a new trial. What reason weighed with Holt is not clear; but it is clear that it was not this [*751] distinction distinguishing only bills of sale to a landlord from any other creditor. But though from all these cases, it does appear, that, in the construction of the 13th Elizabeth, there is no distinction between conditional and absolute sales of goods, if made with intent to defraud creditors, yet a Court of equity or a jury are left at large to construe whether it was made with such intent or not.

Then, to consider the statute of Jac.¹ 1, the 10th section is, by misprint, connected with another part to which it has no connection, when it is the preamble to the 11th; no distinction is made in this preamble between absolute or conditional conveyances; nor is there any reason, as the thing may be mortgaged twice or thrice over. Undoubtedly, as the preamble makes no such distinction, so the enacting clause will, in its descriptive words, take in one as well as the other. The only question which can arise is, whether the mortgagor, and not the mortgagee, shall be construed the true owner and proprietor. The conditional vendee is so, and the contrary can be no other principle than that of confounding pawns and mortgages. There might be some doubt, perhaps, in the case of a pawn, and 3 Bul. 17 was cited. But how can that be doubted in the case of a mortgage, which is an immediate sale, although, by performing the condition, the thing may be redeemed afterwards by indulgence of a Court of equity? But, till performance, the conditional vendee, though subject to be divested thereof, is the absolute proprietor. A pawn is complete by the delivery; but an absolute sale is complete by the contract, and the party is entitled as soon as the money is paid. If a conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods, and should come in the same case with the other creditors, especially as he has been the bait to draw other creditors in. But there is an express case in point, destroying every such distinction: *Stephens v. Sole*.² It was urged, there were subsequent *cases impeaching the strength of this; but none such have I seen. As to *Bourne v. Dodson*,³ December 4, 1740, [*752] it is sufficient to say, there was no judicial determination. But the Lord Chancellor said, the assignment, if void, was void at law, and directed a trial; but then considered the great inconveniences which might accrue, if ships and a cargo at sea should be liable to the bankruptcy of the party in the meantime, and, on the other hand, if mortgages and conditional sales should be construed out of the statute, so that it was not determined, but sent to law. Another case for this was *Brown v. Heathcote*,⁴ Mich.

¹ 21 Jac. 1, c. 19.

² Cited 1 Atk. 157, 161.

³ 1 Atk. 154.

⁴ 1 Atk. 160.

1746, where it was contended, there was no delivery of possession, which remained in the bankrupt till the ship's return, so that it was within the statute of Jac. 1; but Lord Chancellor held not, the case not being within the description of the statute; for the assignor could not be said to have the order and disposition, there being no possibility of putting Heathcote in possession, nor could he consent or dissent as to the possession continuing as it did, of a ship and cargo at sea. Nor does it come within the reason of the statute, which was intended to hinder the acquiring false credit or substance, which could not be where an ownership could not be shown. And a delivery of all the muniments and means of reducing a ship or cargo at sea into possession is in law a delivery of them. So, a delivery of the key of a warehouse is a delivery of those goods which are bulky, being the only immediate delivery the things are capable of; so that this is not within the intent or words of the Act, as *Stephens v. Sole* is. Then, a conditional sale is the same as an absolute sale, where the possession is left in the bankrupt, in order to acquire a reputation of ownership, and so a false credit. It is necessary to apply this to these mortgages, though Jonathan Stephens will be preferred in point of mortgage upon the real estate to Tomkins; yet, as to any lien upon the utensils fixed, the mortgage of Tomkins will be preferred to Jonathan Stephens. The mortgage of Tomkins is of a double nature, of a lease of the house, with the fixed and [*753] movable *goods. As to the fixed, there is no title to remove them till the mortgagee is satisfied; for though they might be seized according to *Poole's case*, 1 Sal. 368, yet, where a trader erects fixtures to his house and leaves it, neither he nor any other can remove them during the term, any more than he can cut down trees during the term he had leased, if they are part of the lease, and not excepted thereout. Those which are not fixed will be liable to the seizure in a lease of the house with the movables, the whole rent issuing out of the house, and not out of the chattels: 5 Co. 17, 1; and 4 Dyer, 212 b. It is true that a partner is possessed per mie and per tout of the chattels; and therefore no actual delivery is requisite; but the offence of the statute is not that, but the permitting to continue in possession after a sale to another, and that other is entitled to the possession of the whole in *entirety*, as Jonathan Stephens was entitled, who therefore, permitting William Harvest to continue as half owner, is within the case described in the statute. Next consider the other three mortgages of a seventh share of the bankrupt's moiety in the partnership stock, utensils, debts, stock, and profits in trade, partly things in possession, partly in action. But I will first consider the case of an assignment of a mere chose in action. The simplest case I know is of a debt on bond, which is only assignable in equity, not at law. The reason why assignable in equity, is because the assignor can furnish the assignee with all the means to reduce it into possession, giving authority to sue in his name, and the bond into his hands to prove the debt, when

he does sue. Why is not delivery, then, as requisite on such an assignment as a delivery in the conveyance of a thing in possession? Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? A bond debt is certainly a chattel, although some doubt was formerly made of that, so that, in a grant of all goods and chattels, a bond debt would not pass; but that is not because it is not a chattel in its nature, but because of the forfeiture to the king, who *takes the obligation and duty thereof: Bro. [*754] Prerog. 20; 3 Inst. 55; Finch's Law, lib. 2, c. 17. But the conclusive case is *Ford's case*, 12 Co. 1, that personal actions are included in the word *goods* in an Act of Parliament, as goods in possession. Then the debt by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due and cancel the bond, and assign it over again to another creditor, and cannot have this bond but by consent of the true owner in equity; and therefore, as he is not obliged to accept a defective security, it is his own fault. As to bulky goods, the means of reducing into possession has been held sufficient; why not, then, in the case of a chose in action? But this case will not need that express determination, this being an assignment of things partly in possession, partly in action. It has been said, a share in trade is a mere chose in action, and *Small v. Oudley* cited for it; but that could not come within the statute. There is no distinction between the trade of the same and of another man; and every act must be construed largely and beneficially in favor of creditors. If goods are assigned to a factor, who, before he breaks, sells them, money has no ear-mark, and the merchant must come under the commission; but if he lays out the money in fresh new goods, to be sent to that merchant, those goods may be followed: 1 Sal. 160. Suppose the bankrupt had sold these goods, and takes notes, payable to himself, for the money, and breaks before they are payable, the assignee receiving the money on these notes, it would be money had and received to the merchant's use, because it arose from the sale of goods of that merchant: *Surman v. Scot*, C. B., Hil. 16 Geo. 2. As the goods themselves would be liable, why should not the profits arising from the sale thereof be in the same condition? As to the three assignments of the seventh share of a moiety, they, permitting the bankrupt to act and intermeddle as owner of the whole moiety, must come as other creditors under the commission, forfeiting any right to resort to these mortgages themselves for satisfaction.

*The last point is in relation to the assignment of the whole moiety to Potter, in trust for Stephens: which [*755] will either fall under the consideration of an assignment to Potter, as distinct from Stephens, or in the same light as if an assignment to Stephens directly; and in either light it will not vary the determination. If as an assignment to Potter, he will be a trustee for Stephens till redemption; and there will be a resulting trust

after redemption for William Harvest, who in such case ought to have delivered the partnership deed over to Potter, if he was distinct from Stephens, because that is part of his title, and Potter ought to have been admitted partner for a moiety; for it is difficult to say why William Harvest was permitted, after a conveyance of his whole moiety to Potter (which was all his substance), to continue acting as owner, and with the partnership deed to show that he was owner for a moiety, unless for the purpose of gaining a delusive credit. But, if it is considered as an assignment to Stephens himself, he, being seized *per mie* and *per tout*, will indeed require no actual delivery: but the permitting to act, after parting with all the interest till redemption, is the very thing the statute was intended to prevent. The partnership deed might be insisted on to be deposited; for William Harvest was secure without having the deed in his possession. Stephens, then, is the true owner of this moiety, and has permitted the bankrupt to continue in the order and possession as if owner; and he has been reputed owner, and has taken upon him the order and disposition of this moiety as owner, and comes within the express words of the mischief and intent of 21 Jac. 1, otherwise a door would be open to fraud, by a partner being permitted to retain all the badges of ownership, to deceive the rest of the world. It was insisted, the partnership stock was a security; but they are on the same foot as strangers. If one partner lends money to another partner on a separate account, it is never held that his moiety in the stock would be a security for that. The general rule, in *Lord Craven's case* (2 Ch. Rep. 226),¹ and *Richardson v. Goodwin* (2 Vern. 293), and *Croft v. Pike* (3 P. Wms. [756] 180), is strong against such a rule. It may be said, it will lay trade under great restraint, if a trader cannot mortgage his whole stock without admitting into his trade. That may be inconvenient, but the inconvenience on the other side is greater. If it is once established, that the friends of a sinking man may secure themselves by a mortgage on everything he has which is valuable, without running a risk themselves, commissions of bankruptcy will become useless, when nothing is left to the creditors. As to movables, therefore, these six mortgages, notwithstanding they will be liable to the disposal of the commissioners by the statute 21 Jac. 1, as to the fixtures, no removal can be till satisfaction of the mortgage to Tomkins.

LORD CHIEF BARON PARKER.—I will take this case upon the general question, as it has been stated. There are four questions: First, whether any mortgage, or sale upon condition of redemption, is within this clause? Secondly, whether mortgages, or sales on condition of specific chattels, are within it? The third, whether a mortgage or sale on condition of a particular part or share of trade is within it? The fourth, whether the mortgage or sale to Potter, in trust for Stephens, is within it?

¹ *Craven v. Knight*.

As to the first: laying out what was offered at the bar relating to hypothecation or pawns, as not affording any light in this case, let us consider how the law stood before the statute of Jac. 1.

Fraudulent deeds are made void by 13 Eliz., in which there is a proviso not to extend to conveyances on good consideration *bonâ fide*. *Twyne's case* was held not *bonâ fide*, because accompanied with a trust. Although the clause in 21 Jac. 1 does not in its introduction expressly speak of frauds, yet the reason of the legislature was to prevent that false credit which was destructive to trade, and a further remedy was intended than by 13 Eliz., and a mortgage or sale on condition is within this clause, and within the mischief. But the principal difficulty on this part arises from these words in the clause, "*by consent of *the true owner and proprietor.*" But in this clause they are put in opposition [*757] to a *false or seeming ownership*: and therefore a mortgagee or vendee upon condition may be said to be true owner, and a contrary construction would defeat this clause. But this point was settled in *Stephens v. Sole*. The thirteenth clause of this Act, giving the assignees of the bankrupt's estate a right to redeem, only relates to mortgages regularly made, and not to such as are void for want of delivery of the goods; therefore no argument for the defendants.

As to the second: we must consider, first, whether the bankrupt's own goods only, or the goods also of persons left with the bankrupt for sale or safe custody, are within this clause?

The preamble, speaking of bankrupts only, is narrower than the enacting part, which speaks of any goods: then, as to the effect of it, I admit, in many cases, the preamble will not restrain the general purview, as in 1 Jones, 163; Pal. 485. But it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, it shall restrain; and here would be an inconvenience, if not restrained, from the hazard to trade. In *L'Apostre v. Le Plaistrier* the preamble governed. So in *Godfrey v. Furzo*, 3 P. Wms. 185. So in *Ex parte Marsh*, August, 1744.¹ I own, in *Copeman v. Gallant*, Lord Cowper's reason for holding it not within the clause of the statute was, that the assignment was not with an honest intent, for payment of the debts of the assignor, and he decreed for the plaintiff. I have a great reverence for his memory, but though I approve of his decree, I cannot agree to the reason; for though an honest intent will entitle to regard, yet if an honest intent is sufficient to take it out of this clause, both the letter and intent will be overturned. As to the objection, on the part of the defendant, from the case of factors, the reason of it is not well founded, because it must relate either to persons acting by commission only, or in their own right and by commission, in neither of which is there any *deceit; so that the reason fails: in the former there is no pretence that the [*758]

¹ 1 Atk. 186.

lender advances his money on the visible stock: it is on the general credit. Then, consider whether any of these goods in the Master's report are within this clause. As to the goods fixed, they are like trees, considered in law as part of it: but as they are capable of being severed (I do not mean by severance a cutting down), they are capable of being re-united: *Stukely v. Butler*, Hob. 168, and Owen, 49. Things fixed to the brewhouse had been several times mortgaged distinct from the brewhouse, but were vested in William Harvest afterwards, and no occasion to deliver to Tomkins; but they will pass by the mortgage of the brewhouse with the things fixed. I admit *Poole's case* (Salk. 368), that during the term the goods may be sold; but the present is distinguishable, there being a mortgage; nor could he remove the fixtures, because of the mortgagee's interest, otherwise great inconvenience would follow, as lessor of a brewhouse with his own fixtures would be liable to be stripped thereof. As to the utensils unfixed, where the goods mortgaged are of such a nature as to be capable of delivery [there ought to be an actual delivery]; but if no delivery can be at the time of the mortgage, it is sufficient if the proper means of reducing into possession are given. If bulky goods in a warehouse are mortgaged, delivery of the key will be sufficient. I agree also with *Heathcote's case*; but there the Lord Chancellor determined it not within stat. 21 Jac. 1, chiefly because the ship and cargo could not be delivered but by delivery of invoices, &c. It is objected, for defendant, that an undivided share of stock will not admit a separate property and possession; and therefore, of necessity, the possession of mortgagor must be possession for mortgagee: but though it is true that a partner has a joint interest, these interests are severable; as appears by a fieri facias against one partner, which will not affect the other's moiety; the consequence of a sale under that will be, that the vendee of the sheriff will be tenant in common with the other partner: 2 Mod. 279, 1 Sho. 173, Sal. and 2 Ray. 871. To [*759] consider the *cases cited: in *Meggott v. Mills*,¹ this statute appears not by the report of Lord Raymond to be considered, though it might properly; the other statutes were only considered, which differs it from the present. Next, *Cole v. Davis*, 1 Ray. 724, admits the same answer; and I doubt whether the sale there was not accompanied with a trust, like *Twyne's case*, so as to be avoided by 13 Eliz.; but that was not within the clause of the stat. Jac. 1, because the bankrupt there did not take on him the sole alteration, as owner (which is required by the clause), but the sheriff. As to *Small v. Oudley*,² a distinction was taken by Sir Joseph Jekyll between a man's own trade and another's; this clause was overlooked both by Court and counsel. *Bucknal v. Roiston*³ is rather an authority against the defendants than for them. In the present, all the requisites in 21 Jac. 1 concur to

¹ Lord Ray. 286.² 3 P. Wms. 427.³ Prec. Ch. 285.

bring the case within it, as the possession of the goods was not delivered, though capable thereof, William Harvest having the possession, and the articles of partnership and evidence of his title in his hands, and taking upon him the whole alteration as owner.

On the third question, it is objected for defendant, that this clause extends not to things in action, as are mortgages of parts of shares, speaking only of goods and chattels which a person has, at the time of bankruptcy, in his possession; but goods and chattels include debts: *Stran.* 188; *Slade's case*, 4 Co. 95; and things in action are considered as goods and chattels in a person attainted, and so the Crown entitled: *Litt.* 80; *Clayton's case*. So, 12 Co. 1. If, then, goods and chattels comprehend things in action, in the construction of any Act of Parliament, it ought in this; for otherwise he might assign without notice to others, and so have the order and disposition within the meaning of this clause; and this is enforced by the first clause, that the most beneficial construction for creditors under the commission should be made. But it is said, there can be only an equitable assignment of a chose in action, which is true; and yet in the case of bonds assigned (for bills of exchange or promissory notes *are assignable at law), they must be delivered; and such [*760] delivery of the bond or notice of the assignment will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor: *Domat*, lib. 1. This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given. The assignees, therefore, have power to dispose of it for the benefit of the creditors.

As to the fourth and most difficult question, it is objected, for the defendants, that, though Potter did not take possession, he was merely nominal, and Stephens to be considered as a vendee of Harvest's moiety, and was a partner with him, and so continued and in possession per mie and per tout with him; and I agree he was at first. But when Stephens became entitled to the other moiety, the question is, whether he should not have had the sole, and not a joint possession only, to take it out of this statute. As Potter did not interfere, Stephens should have taken possession, which, not having done, Harvest continued in possession as visible partner, received the debts, &c., by consent and permission of Stephens, had the order and disposition, and was one of the reputed owners as much as Stephens. It is objected, that the law would judge Stephens to be in possession according to his right; but there is no color for it, where he permitted all this inconsistent with his own right. A further difficulty arises, from the several determinations in this Court, that one partner borrowing or embezzling any partnership effects, his own share is liable; as held in *Meliorucchi v. The Royal Exchange Assurance*

Company.¹ The reason of those determinations relating to partnership is, that each is liable to the whole of the partnership debts; and if one is charged further than he ought, equity gives him a lien on the partnership effects. That is true, but not applicable to the present. Here Harvest did not borrow money or embezzle the effects of the partnership. This is not a partnership transaction, but as distinct as if strangers had done it. Nor [*761] is it applicable in point of *reason, all the partnership debts being paid. There is no instance where this rule of equity extends to private loans, all the cases relating to partnership transactions, and so should be confined.

I agree, therefore, that none of the mortgages in the Master's report, except the mortgage to Tomkins, and those secured by buildings on land, are out of 21 Jac. 1.

CHIEF JUSTICE LEE.—I concur entirely. These securities are to be considered as mortgages, not as hypothecations, &c., as has been properly observed by Burnet, J. And this is a question which must receive its determination from 21 Jac. 1, 13 Eliz. being only declaratory; and all the cases offered on that head have been already answered. I shall, therefore, confine myself to the statute 21 Jac. 1, as the ne plus ultra, the line being drawn thereby which is to govern here; and there are three points thereon.

First, Whether the mortgagee is not the true owner and proprietor, to whom there should have been delivery of the goods mortgaged? In the general preamble of this statute, notice is taken of divers defects in former statutes, in description of bankrupts, and in the power to commissioners to discover and distribute the bankrupt's estate; and, therefore, it enacts, that it should be taken most beneficially for that purpose; every word of the statute must be considered, both of the preamble and enacting clause. The present case is directly within the words of the preamble, the bankrupt himself having conveyed the goods to John Stephens; there is no occasion, therefore, to give any opinion in relation to that head of restraining the enacting clause by the words of the preamble, which is not material to the present, it falling within the preamble. To remove the difficulty with respect to commissioners of bankrupts, and to their power of making distribution, this short and plain direction is given to them in this statute, that, where persons are bankrupt, having in their possession, as reputed owners, and taking upon them the alteration as owners (which differs from the case of factors, who [*762] dispose, not as owners, but for others), *the commissioners may dispose of this for the benefit of the creditors. This statute, then, makes the reputed ownership as real, for the benefit of creditors in general: the persons' own misbehavior depriving them of the benefit of the conveyance, though made for

¹ 1 Eq. Ca. Ab. 8, pl. 8.

good consideration; and they shall not be in a better condition than other creditors. Consider, then, first, whether the mortgagee be the true owner and proprietor. There is a clause in 21 Jac. 1, relating to redemption of a mortgage by assignees, not only mortgage of lands, but goods on condition. In Co. Litt. 210, the effect appears of a feoffment on condition; and the reason of the difference there is, that the feoffer has only a bare condition, and no estate in the land which he can assign over, but feoffee has; which is saying that he is owner of the estate, as having the interest in it. The true owner is, in this Act of Parliament, in opposition to reputed owner. As to the cases cited on this point, to make a distinction between conditional and absolute sales: *Stone v. Grubham*, 2 Bul. 226, was determined entirely on the statute of Eliz. and common law, though the plan of that statute differs greatly from the plan of the statute of Jac. 1, this Act supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, but not to have any preference to other creditors, because he does not give notice to other creditors, by having that delivery to him to which he was entitled; so that this is more like the cases on the Register Act, where the person loses the benefit of the conveyance by not giving notice, arising from his own plain neglect. The donee is not to suffer donor, who has made the conveyance, to continue in the possession there described; which direction in that Act of Parliament is as necessary to be followed as in cases of the Register Act; and though *Stone v. Grubham* is not material to the present (nor is there anything from any part of that case inferring a difference between conditional and absolute sales), yet, what is said there may infer, that mortgagee must be considered as true owner; for if mortgagor is tenant at will to mortgagee, as said in **Bulstrode*, who is owner of this estate? If the property [*763] is transferred to mortgagee, the mortgagor can have only a condition, according to Co. Litt. 210; and the mortgagee has that interest as makes him owner or proprietor. The other cases cited for this have been fully answered already.

The second question is, whether the debts and chattels should not be delivered, as far as they are capable? Upon which *Stevens v. Sole* is in point, on the foot of a mortgage of a personal thing; and Lord Cowper's observation in the case, in the *Precedents in Chancery*,¹ is agreeable thereto, which two cases determine that question on the specific goods; and it will be the same as to the shares of the partnership stock, which are partly in possession, partly in action, and as to all debts, &c., which are conveyable in equity. The inquiry on the second point is, whether choses in action are not included under goods and chattels? And I agree, some books countenance the contrary opinion, particularly Swinb. 407. *Cayle's case*, 8 Co. 32, is like that also. This opinion was grounded on the legal notion in respect of choses in action that they are not

¹ *Bucknal v. Roiston*.

grantable as choses in possession; but this is now out of the question; choses in action will be included therein. *Fulwood's case*, 4 Co. 65, proves that a chose in action (as an obligation) is a chattel. So, Staunf. Prerog. 45, c. 16, that chattels comprehend a right of action to goods. There is no word in the statute to give this right of action but the word "chattels;" and, if forfeited, they must be considered as chattels in the person forfeiting. The same interpretation has been made in other statutes. So, *Ford and Sheldon's case*, 12 Co. 1. If, then, goods and chattels include choses in action, all the debts acquired to the partnership by sale of the joint stock must be distributable as the goods themselves; for which Burnet, J., has cited several cases, that the produce of specific goods follow the nature of the goods themselves. So in Swinb. 414.

The last question relates to the mortgage of Stephens, the partner, whether he has such a possession as will *exempt [*764] him from being considered as owner or proprietor, by whose consent the bankrupt has had in his possession the goods, as owner, altered, &c. I mean goods severed; for the fixed are part of the freehold, and, when mortgaged, remain so till the mortgage is satisfied. This mortgage to Potter in trust must be considered as a mortgage to Stephens; and though endeavored to be distinguished from other mortgages, because he was a partner and in possession, and wanted no delivery, the true answer has been given to that, that, though he held the possession, yet not such a possession as this statute requires; and, consequently, it is imputable to him, as owner, that he has let Harvest have possession in respect of that moiety, producing the same inconveniences, by creating a false credit. As to Stephens having a lien on the stock for the money due to him, and his being distinguished from other creditors, no case has been cited for that. That distinction would have been material in *Croft v. Pike*,¹ but it was not taken there, nor can it be here; for it was a transaction not concerning the stock of the partnership: they are as much disunited as any others: nor was this debt a debt created on the joint stock; nor can he, therefore, have any lien on the joint stock; and, though no judicial determination, yet I may cite a civil law authority, as Dom. lib. 1, fol. 155, concerning partnership, though not as authority on which a judgment is to be founded in our courts; yet, as said by Lord Raymond, may they be used as the opinions of learned men.

I am of opinion, therefore, that the statute of Jac. 1 is the rule to be followed in this case; and the intent thereof was to prevent the bankrupt's acquiring false credit; that, for the benefit of creditors in general, these goods shall be esteemed his, and distributable as his, so that they must come under the commission. Whether this is a wise provision or no, in this statute, is not for

¹ 3 P. Wms. 180.

the determination of the Court; for, while it continues a statute, it must be followed.

LORD CHANCELLOR HARDWICKE.—I am obliged to the *judges for their assistance and endeavors to give light in so intricate a case, which intricacy arises in respect of the want of a number of authorities as to the construction of this Act of Parliament, though made so long ago. But a greater intricacy occurs in respect of the conduct of William Harvest, in making these securities. All the authorities giving light to this have been exhausted by the judges, and it would be mis-spending of time to repeat what has been said. It is sufficient, therefore, to say, I concur in the opinion delivered; but as this is a case of great expectation and consequence, I will reduce the grounds to some general principle.

There arise two general questions: first, whether any mortgages or conditional disposition or conveyance of any goods and chattels are within the statute 21 Jac. 1, c. 19, ss. 10 & 11, as it is by misprint described in the statute; secondly, if any are, which are? A third has been made by a distinction on the mortgage of Harvest's moiety in trust for Stephens, whether that be within this clause.

As to the first, I will not enter into a particular discussion and argument of two points made at the bar: the one, whether the enacting clause extends to all goods whatsoever in the custody of the bankrupt (whether his own originally, or moving from others), or whether it is to be restrained by the preamble, and to extend only to goods originally the bankrupt's; which I will not argue.

The other is, whether choses in action are within this clause. Let the construction of the clause as to this be what it will, whether to be confined or not to goods originally the bankrupt's, this case, as to this point, is undoubtedly within the Act, because it cannot be disputed but that all the goods now in question were originally the bankrupt's, moved from him, conveyed and mortgaged by him. But I strongly incline to concur with the opinion of Holt, that this clause must be restrained by the preamble, as Lord Chief Baron seems to do, and differ from Lord Cowper, though the decree made by him was undoubtedly right.

*Choses in action are properly within the description of goods and chattels within this clause; and I will only add one argument, for the sake of which I mention it, which is, that this construction is strongly warranted by the next preceding clause, relating to bankrupts who by fraud make themselves accountant to the king, to defeat their private creditors, which plainly shows that the words *goods and chattels*, as used in this Act, take in all kind of personal property of the bankrupt, whether in possession or action only; which strongly supports the construction made by the Judges, and is agreeable to *Ford and Sheldon's case*, 12 Co. 1, where it is held, that, in an Act of Parliament,

goods and chattels take in *choses in action*. The reason of the other opinion in the books arises from hence, that this question has arisen on a grant or assignment, or bargain and sale, not being such goods and chattels as would pass by that assignment or conveyance; but in an Act of Parliament, which can pass anything, they are always included.

I go on four general principles in the construction of this Act.

First, the aim and intent of the legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible.

Secondly, that, to attain that end, these Acts of Parliament should be construed beneficially for the general creditors under the commission; and therefore it is, in an unusual manner, different from most Acts of Parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general under the commission.

Thirdly, it appears, the general view and intent of the provision now under consideration was, to prevent traders from gaining a delusive credit, by a false appearance of substance, to mislead those who should deal with them.

Fourthly, the legislature judged they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission, because, where the vendee or assignee leaves such goods *in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor who has only taken his bond or note. It is, in such case, put in the power of the bankrupt to sell the goods the next day; the former assignee could only have a personal remedy against the bankrupt.

All these grounds go to the substance of the case, and not upon niceties, and hold in case of a mortgage as well as an absolute sale; otherwise it would be contrary to the resolutions of *Stevens v. Sole*, and the opinion of Lord Cowper, in *Bucknal v. Roiston*,¹ and to his implied opinion in *Copeman v. Gallant*,² and would overturn this part of the statute, and restrain it to absolute sales. Traders, instead of absolute sales, would then make such mortgages, as there would be a greater opportunity; for traders might mortgage over and over again, as this case is a pregnant instance.

As to the most material and operative expression, the legislature has explained their own sense, by putting the word *true owner* in opposition to *reputed*, not *special owner*; and then these last words can only mean a person, who, by specious acts of possession, order, and disposition, gives himself an appearance of property he has not really (which is the present bankrupt's case), till the mortgage money is paid.

Then it follows that the mortgages to Reynel, Skip, and George Harvest, and so much of the assignment to Stephens as relates to the utensils not fixed to the freehold, which are made a further

¹ Prec. Ch. 285.

² 1 P. Wms. 314.

security to him, must be void within this clause, so far as they are claimed to be specific liens.

The distinction endeavored has been answered; and the distinction most labored, that a share of a partner in a partnership stock is only a sort of proportion arising on the balance of the partnership account, and incapable of being delivered, would let in that false, delusive credit (intended to be prevented) in all trades in partnership, and would extend to particular goods in partnership.

As to choses in action comprised in these securities, *where it is admitted none could pass but in equity, equity ought to follow the law in this case, if in any. Where [*768] property is established by Act of Parliament, equity follows it in like manner as where established by common law; for if not, it would cause great confusion; and it is always so taken on Acts of Parliament made concerning real and personal estate, regulating that kind of property; for which there is a strong instance in the statutes relating to Papists; for, though subject to penal laws, equity regulates in the same way, by the same rule, as the statutes lay down concerning legal property.

The third and last point is in the construction of Potter's mortgage, which is said to be directly as if made to Stephens; and, I think, upon the whole, it would be so; though, perhaps, if it was nicely scrutinized, some difference might be taken; but whatever legal interest, that vested in Potter. And the law would not have taken notice of the trust if the question was at law; and, therefore, if this Act of Parliament has made it void at law, this Court would never set it up contrary to law for the sake of Stephens, because he was a partner, but would let the law take place for the benefit of the general creditors. As to any of these goods in that mortgage, which equity only could pass, equity will follow the law; for, as to the profits arising from trade and choses in action, there could not be an equity upon an equity: equity would vest them in Stephens, and it would undoubtedly be considered as if the assignment had been directly to Stephens. And here the principal objection arises; it being said, it vested in Stephens as to these particulars, and that Stephens was partner then, and if he had not taken this mortgage, he would be entitled to have an allowance out of what would be coming to Harvest's moiety, and would have a specific lien on that moiety; and therefore Stephens, taking a mortgage of the other's share, would not be put in a worse condition than without it. This was the most plausible thing urged for the defendant, and would be right if the foundation was right; but I dispute the foundation, which must be, that the party so lending *gains a special lien on the partner borrowing, and should be allowed a preference to his separate creditors; but for [*769] this there is no authority or precedent after a bankruptcy; it is a different consideration, what a Court of equity might do between the parties themselves, which both remained capable of transact-

ing for themselves. But I might carry it further; for it is so after the death of a partner, where his effects come to be distributable as assets. In the case of *Meliorucchi v. Royal Exchange Assurance Company*,¹ the points determined are not material to the present; but there the attempt made was to subject stock after a bankruptcy to a debt contracted to the Company by a loan of money, and arguments were drawn from rules concerning partnership; but it was not contended for, that in case of a partnership, that could be carried further. And the case cited, of *Croft v. Pike*,² is as strong as any negative authority can be; for there it was not attempted to give the surviving partner a right of retainer, or bringing into the partnership account a bond debt, so as to be preferred to others, but only as executor; and therefore, the money taken by a deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If, then, by a new determination now, it should be admitted, and that one partner, by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and to defeat this statute; for then a person might be taken in as a partner into a moiety of a great stock and flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others; which tends plainly to great fraud and imposition on traders, and great mischief. It has been said, that great mischief might arise to trade and credit from such a determination as this, as tending to prevent making use of that credit persons have to support themselves [*770] in trade, as they cannot make a security *without exposing their circumstances to the world; and on the other hand it is contended, that the other construction would in fact repeal the Act of Parliament, and let in a mischief; some inconvenience might perhaps arise from a determination of this case on either side; but I agree with Chief Justice Lee, that, as this is a law, we must adhere to it, and while it is a law, be bound by it, and if any inconvenience results from it, that is for the consideration of the legislature. But this I will say, that, as some inconvenience may be to particular persons on one hand, great inconvenience may be on the other, by creating that appearance, as having the substance of which they remain in possession, though they have not at all the real property: and that this was the intent of the legislature, I am clear; and I may go so far as to say, that the simplicity of those times did not let in these large and airy notions of credit, as of late, which from the number of bankruptcies we have had of late years, is rather an evidence that the departing from the rule this law has laid down, and giving way to these notions, has been rather a mischief.

¹ 1 Eq. Ca. Ab. 8, pl. 8.

² 3 P. Wms. 180.

I agree, then, that these mortgages cannot prevail as specific liens and securities; therefore, as to the mortgages of lands and fixtures, they are not affected by the Act of Parliament: but what is affected by the direction therein is the assignment to Stephens (for Potter must be considered as a trustee for him) relating to any utensils not fixed to the freehold. So also are all the four mortgages of seventh part, by reason of the bankruptcy of William Harvest, made void by the statute, and can create no specific lien on the bankrupt's share of partnership stock, debts, and effects; but they must be considered only as general creditors.

"The great wisdom and policy of the sages and founders of our law," says Lord Coke, "have provided, that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*, for that would be the occasion of multiplying of contentions and *suits, of great oppression of the people, and chiefly of terre-tenants, and the sub- [*771] version of the due and equal execution of justice:" 10 Co. 48. See *Lampet's case*, 10 Co. 47. But it is to be observed, that the king was always an exception to this rule, for he might always either grant or receive a possibility or chose in action by assignment: Co. Litt. 232, b, n. 1; Com. Dig. "Assignment" (D.), 555; *Miles v. Williams*, 1 P. Wms. 252; *Stafford v. Buckley*, 2 Ves. 177, 181.

Formerly, it was doubted whether an annuity was assignable, though "assigns" were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a chose in action. See the cases in 2 Vin. Abr. 515, and 3 Vin. Abr. 151. But in a case in C. B., 3 Cha. 1, this objection, which, in strictness of law, carried force with it, was overruled: *Gerrard v. Boden*, Hetl. 80. It seems, too, that naming "assigns" is not essential to the making an annuity assignable, the principle of the objection to its being so being the same, whether "assigns" are mentioned or omitted. However, Perkins, in the special case of an annuity pro consilio impendendo, requires naming of "assigns:" Perk. s. 101. Even there, too, he questions the annuity being assignable. But this was settled in *Maund's case*, 7 Co. 28, b, one point resolved being, that express words would make such an annuity assignable: Co. Litt. 144, b, n. It may here be remarked, that a possibility, *coupled with an interest*, was devisable, and might be released: Watk. Convey. 219.

What amounts to an Equitable Assignment.—The reasons given by Lord Coke for this rule of law, which prevents the assignment of a possibility or chose in action, has been almost wholly disregarded by Courts of equity; and accordingly, from a very early period, assignments of a mere

naked possibility, or of a chose in action *for valuable consideration*, have been held valid in Courts of equity, which will carry them into effect upon the same principle as they enforce the performance of an agreement when not contrary to its own rules or public policy. See *Anon.*, Freem. Ch. Rep. 145: *Squib v. Wyn*, 1 P. Wms. 381. "Such an assignment," observes Lord Hardwicke, "always operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with another to transfer and make good that right or interest: *Wright v. Wright*, 1 Ves. 412; and, like any other agreement, the Court will cause it to be specifically performed (not leaving the assignee to his action for damages), when the assignor is in a condition to transfer the property, or to cause it to be transferred, to his assignee."

*A mere expectancy, as that of an heir-at-law to the estate of [*772] his ancestor (*Hobson v. Trevor*, 2 P. Wms. 191; *Wethered v. Wethered*, 2 Sim. 183, 192; *Smith v. Baker*, 1 Y. & C. C. C. 229; see vide *Carleton v. Leighton*, 3 Mer. 671), or the interest which a person may take under the will of another then living (*Beckley v. Newland*, 2 P. Wms. 182; *Bennett v. Cooper*, 9 Beav. 252; and see ante, Vol. 1, *596), or the share to which such person may become entitled to under an appointment (*Musprat v. Gordon*, 1 Anst. 34), or in personal estate, as presumptive next of kin of a person then living (*Hinde v. Blake*, 3 Beav. 235; *Meek v. Kettlewell*, 1 Ph. 347), is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced.

It is needless to cite any authorities to prove that in equity a person may assign a legacy or share of a residue. So, non-existing property, to be acquired at a future time, though not assignable at law (*Robinson v. Macdonald*, 5 Man. & Selw. 228), is clearly so in equity; the assignment, for instance, of future freight (*Brown v. Tanner*, 3 L. R. Ch. App. 597; *Wilson v. Wilson*, 14 L. R. Eq. 32), of the future cargo of a ship (See *In re Ship Warre*, 8 Price, 269, n.; *Curtis v. Auber*, 1 J. & W. 526; *Douglas v. Russel*, 4 Sim. 524: *S. C.*, 1 My. & K. 488; *Langton v. Horton*, 3 Beav. 464; 1 Hare, 549; *Lindsay v. Gibbs*, 22 Beav. 522; *Gardner v. Cazenove*, 1 Hurlst. & N. 423), of building materials to be brought on premises (*Brown v. Bateman*, 2 L. R. C. P. 272), or machinery at a future time to be added to or substituted for existing machinery (*Holroyd v. Marshall*, 10 Ho. Lo. Ca. 191, reversing the decision of Lord Campbell, C., 2 De G. F. & Jo. 596), is valid in equity. The able and instructive judgment of Lord Westbury, C., 10 Ho. Lo. Ca. 209, in which his lordship lays down the principle upon which Courts of equity act in cases of equitable assignments, deserves most attentive perusal.

Directors, however, under a power to charge existing property cannot assign property to be thereafter acquired. See *In re Sankey Brook Coal Company*, 9 L. R. Eq. 721, where it was held, that under a power to "pledge, mortgage, or charge the works, hereditaments, plant, property,

and effects of the company " in order to secure the repayment of moneys borrowed, the proceeds of a call already made, but not yet paid, might be charged, but not the proceeds of a future call. See also *Ex parte Stanley*, 33 L. J. N. S. (Ch.) 535.

There can be no doubt moreover that a covenant to charge, or dispose of, or affect lands hereafter to be acquired, operates in equity upon lands so afterwards acquired: (*Metcalf v. The *Archbishop of York*, 1 My. & Cr. 547; *Lyde v. Mynn*, 4 Sim. 505; *S. C.*, 1 My. & K. [*773] 683; *Wellesley v. Wellesley*, 4 My. & Cr. 579;) but no charge will be created except where the covenant refers to particular property, or where property has been acquired with an intention to perform or satisfy the covenant: *Countess of Mornington v. Keane*, 2 De G. & Jo. 292; *Roundell v. Breary*, *Ib.*, 319; and see *Beldring v. Read*, 13 W. R. (Exch.) 867.

Upon the same principle, although a mere contract may amount to an actual assignment, it must purport to confer an interest in the future chattels immediately by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence, and therefore an assignment of existing chattels, coupled with words which amount to a mere license to seize after-acquired property, will not be construed as an equitable assignment of the latter: *Reeve v. Whitmore*, 4 De G. Jo. & S. 1; 33 L. J. Ch. (N. S.) 63, wher Lord Westbury, C., affirmed the decision of Sir R. T. Kindersley, V. C., reported 32 L. J. Ch. (N. S.) 497. And see *Brown v. Bateman*, 2 L. R. C. P. 272, 283, 284.

And where there is a mere license to seize after-acquired goods for the purpose of selling them and discharging a debt, if the debt is released, as for instance, by virtue of a liquidation under the Bankruptcy Act, 186 the collateral license to seize will go with the debt: *Thompson v. Cohen*, L. R. Q. B. 527; *Cole v. Kernot*, *Ib.*, 534, n.

Where a life policy which was to become void, if the assured should commit suicide, unless the policy should have been "legally assigned," had been deposited to secure a sum of money, it was held to be a sufficient assignment to come within the exception, and that notice of it to the office was unnecessary: *Dufaur v. The Professional Life Assurance Office*, 25 Beav. 599; and see *Jones v. The Consolidated Investment Assurance Company*, 26 Beav. 256, where a letter charging the policy was held to be sufficient for the same purpose.

It may here be mentioned that, by 8 & 9 Vict. c. 106, s. 6, it has been enacted, "that, after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility *coupled with an interest*, in any tenements or hereditaments of any tenure, whether the object of the gift, or limitation of such interest, or possibility, be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of

any tenure, may be disposed of by deed ; but that no such disposition shall, by force *only* of this Act, defeat or *enlarge an estate tail." [*774] It also enacts, that dispositions by married women must be in conformity with 3 & 4 Will. 4, c. 74, and 4 & 5 Will. 4, c. 92.

This Act, it will be observed, does not render assignments of contingent interests, or possibilities in chattels, or mere naked possibilities *not coupled with an interest*, valid at law ; the exclusive jurisdiction, therefore, of Courts of equity as to such assignments is untouched by the Act.

Although it is usual in transferring a chose in action, as a debt or bond, to assign it by a deed in legal form, with a power of attorney to sue in the name of the assignor, it is clear, as is laid down by Lord Hardwicke, in the principal case of *Row v. Dawson*, that "no particular words are necessary." Any words, in fact, are sufficient which show an intention of transferring or appropriating the chose in action to or for the use of the assignee. See *Thompson v. Spiers*, 13 Sim. 469 ; *Burn v. Carvalho*, 4 My. & Cr. 690 ; *Cook v. Black*, 1 Hare, 390 ; *M'Fadden v. Jenkyns*, 1 Hare, 458 ; 1 Ph. 153 ; *Malcolm v. Scott*, 3 Hare, 39, 52 ; 6 Hare, 570 ; 3 Mac. & G. 29 ; *Myers v. The United Guarantee, &c., Company*, 7 De G. Mac. & G. 112 ; *Chowne v. Baylis*, 31 Beav. 351 ; *Gurnell v. Gardner*, 4 Giff. 626, 680.

The principle to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor (*Rodick v. Gandell*, 1 De G. Mac. & G. 776), or an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds will create a binding equitable assignment of so much money : *Burn v. Carvalho*, 4 My. & Cr. 702. Nor is it necessary in equity, as it would appear by some of the decisions at law (*Williams v. Everett*, 14 East, 582 ; *Baron v. Husband*, 4 B. & Ad. 611 ; *Ex parte Heywood*, 2 Rose, 355), that the party receiving the order should, in some way, enter into a contract to hold the funds for the equitable assignee : *Burn v. Carvalho*, 4 My. & Cr. 702, 703.

In *Yeates v. Groves*, 1 Ves. jun. 281, Dawson being indebted to Yeates and Browne upon a note of hand, in September, 1789, they gave up to him the note, upon his giving to them an order, directed to Groves and Dickinson, who had agreed to purchase some leasehold property of him, to pay the amount of the note and interest to Browne out of the purchase-money. The order was not accepted in writing, although it seems Groves and Dickinson verbally agreed that, when the assignments were prepared and the purchase-money was to be paid, Browne should receive notice to attend. In December, 1789, the assignments being prepared,

*Browne attended, in consequence of notice ; but before the trans- [*775] action could be gone through, Dawson went out of the room, and was arrested, and in January, 1790, a commission of bankrupt issued against him. Upon a bill being filed by Yeates and Browne, Lord Thur-

low held, that the order was an equitable assignment of the purchase-money. "This," said his Lordship, "is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. *The order fixed the money the moment it was shown to Groves and Dickinson.*"

In *Ex parte Alderson*, 1 Madd. 53, R. being pressed to discharge a debt on the 5th of August, 1813, gave to two creditors a draft on the executor of a debtor of hers, which draft the executor promised to discharge on receiving assets. A commission of bankrupt issued against R. on 17th of November, 1814. Upon a petition being presented by the two creditors, it was held by Sir Thomas Plumer, M. R., that they were entitled to the sum for which the draft was given, as against the assignees. "Is this draft," said his Honor, "to be considered in equity as an assignment of the debt, which is a chose in action? And did not the executor bind himself to pay it? I think this was a good equitable assignment of the debt, and that the executor bound himself to pay it when in possession of sufficient assets. . . . If R. had remained solvent, the petitioner might, by a bill in equity, have obtained the benefit of the assignment: *S. C.*, 3 Swanst. 392; affirmed on appeal, nom. *Ex parte South*; and Lord Eldon said, that the debtor would be bound by the order being shown to him, and that a contract on his part to pay was, in equity, not necessary."

In *Lett v. Morris*, 4 Sim. 607, A., having contracted to pay to B. 2360*l.* by installments, B. signed and gave to C., for valuable consideration, an order authorizing A. to pay parts of each installment to C., and 460*l.* was to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day on which it was signed. It was held, by Sir L. Shadwell, V. C., that the order operated as an equitable assignment of the sums therein mentioned.

In *Burn v. Carvalho*, 4 My. & Cr. 690, A., having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. *did direct B. to deliver over the goods to D., as the agent of C. at that port. Before the delivery of the goods, a commission [*776] of bankrupt issued against A., under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. Lord Cottenham, affirming the decision of Sir L. Shadwell, V. C. (7 Sim. 109), held, that C. had a good title in equity to the goods. And see *Smith v. Everett*, 4 Bro. C. C. 64; *Ex parte Steward*, 3 M. D. & De G. 265; *Crowfoot v. Gurney*, 2 Moo. & Scott, 473; *Diplock v. Hammond*, 2 Sm. & Giff. 141; 5 De G. Mac. &

G. 320; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Riccard v. Prichard*, 1 K. & J. 277; *Jones v. Farrell*, 1 De G. & Jo. 208; *Ex parte Imbert*, 1 De G. & J. 152; *Farley v. Turner*, 26 L. J. Ch., N. S. 710; *Rayner v. Harford*, 27 L. J. Ch., N. S. 708; *Chowne v. Baylis*, 31 Beav. 351; *Langton v. Waring*, 18 C. B., N. S. 315; *Thompson v. Simpson*, 9 L. R. Eq. 497; *Lariviere v. Morgan*, 26 L. T. Rep. (N. S.) 859.

A valid equitable assignment, if it be clearly proved, may be made verbally: see *Gurnell v. Gardner*, 9 Jur. (N. S.), 1220. There it appeared from the evidence of the plaintiff alone, which was uncontradicted, that Gledhill being indebted to the plaintiff, and having purchased some wool from Bradley, in consideration of the debt due to the plaintiff, and for the purpose of securing the payment, and with the intention of assigning and making over the wool, and vesting it in the plaintiff, in an interview with the plaintiff, said, "There is the wool that has gone to Doncaster, go and sell that wool, pay Bradley the balance due to him on such wool, and keep the remainder yourself." Gledhill died a few hours afterward, and letters of administration were granted to his brothers, who claimed the wool. The plaintiff removed the wool from the custody of a wharfinger at Doncaster, and sold it, and after paying Bradley, retained the balance in part satisfaction of his debt. It was held by Sir J. Stuart, V. C., that what had taken place amounted to a valid equitable assignment of the wool to the plaintiff: see also *Riccard v. Prichard*, 1 K. & J. 277, 279; *Field v. Megaw*, 4 L. R. (C. P.) 660.

It is not necessary to the validity of an assignment of a debt, as between the assignor and assignee, that notice should be given to the party from whom the debt is due (*Rodick v. Gandell*, 1 De G. Mac. & G. 780), and the death (*Gurnell v. Gardner*, 9 Jur. N. S. 1220) or bankruptcy (*Burn v. Carvalho*, 4 My. & Cr. 690) of the assignor before notice could be given of the assignment, or before it could be acted upon (*Ex parte South*, 3 Swanst. 392), is *immaterial. Nor will its validity be affected [*777] by the assignee subsequently arresting the assignor for the debt: *Ex parte Alderson*, 1 Madd. 53; 3 Swanst. 392; yet it is most usual and very expedient for the safety of the assignee that notice should be given, otherwise the debtor might pay the debt to the assignor; and of still greater importance is it, as will be hereafter shown, as between the assignee and third parties, that such notice should be given: see p. *794, *811 post. Moreover the omission to give such notice may operate as strong moral evidence of the intention and understanding of the parties, per Lord Truro, C., in *Rodick v. Gandell*, 1 De G. Mac. & G. 780.

When a debtor has received notice of an equitable assignment of the debt, he is bound to pay the debt to the assignee, although the assignor may have commenced proceedings against him at law to recover it, and although the equitable assignee refuses to indemnify him on receiving payment: *Jones v. Farrell*, 1 De G. & Jo. 208; and see *Hutchinson v. Heyworth*, 9 Ad. & Ell. 375. Secus, where an equitable assignment re-

lating to real property is invalid by the law of the country where the property is situated: *Sichel v. Raphael*, 34 L. J. (N. S.) Ch. 106; 10 Jur. N. S. 1165.

A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it: *Scott v. Porcher*, 3 Mer. 652, 664. Where, for instance, an order is given by a man to his bankers to pay over a sum to a third person to whom the order is not communicated, and the banker does not make the payment, and the order is afterward countermanded, the third party cannot insist on the banker paying to him the money: *Morrell v. Wooten*, 16 Beav. 197.

When, however, the agent communicates the mandate to the third person, and agrees to exercise it for his benefit, he converts himself into an agent for, and debtor to, the persons in whose favor the mandate was given. Thus in *Fitzgerald v. Stewart*, 2 Russ. & My. 457, where consignments had been made from abroad to answer an annuity which the owner of the property consigned was liable to pay, and the consignee in this country gave notice of the arrangement to the annuitant, and made payments in pursuance of it, it was held by Lord Brougham, C., affirming the decision of Sir L. Shadwell, V. C. (reported 2 Sim. 338), that the consignee was not afterward at liberty to discontinue such payments, so long *as he had any proceeds of the consignments in his hands. The principle upon which these cases proceed has been well laid down [*778] by Wigram, V. C. "Courts, both of law and equity," observes his Honor, "have repeatedly decided that, where a creditor on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and a debtor to, that creditor; and these cases have been decided upon the ground, that the creditor may, on the faith of the notice, have forborne to sue."

A mere power of attorney or authority to a person to receive money, *not addressed to the debtor*, and directing such person to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. Thus in *Rodick v. Gandell*, 1 De G. Mac. & G. 763, a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors of the company*, authorized them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money on receiving it. It was held by Lord Truro, C., affirming the decision of Lord Langdale, M. R. (reported 12 Beav. 325), that this did not amount to an equitable

assignment of the debt. "The extent of the principle," said his Lordship, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. . . . I think that a decision, that the authority to the solicitors contained in the letter to receive the debt due from the railway company, and to pay what should be received to the bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities; and I also think that the effect of such a decision upon the interest of persons giving orders of the like description might be very injurious, and would be contrary to the intention of the parties to the transaction. *If an assignment of the debts had been intended, it would have been quite as easy to have directed the order to the railway company as to the solicitors.* It rather seems to have been intended that the bank should have *no title or interest in the debts until the [*779] amount of the debts should have been adjusted, and some definite portion been adjusted and realized."

Upon the same principle, in *Bell v. The London and North-Western Railway Company*, 15 Beav. 548, where a railway contractor gave his bankers a letter directing the railway company to pass the checks which might become due to him "to his account with the bank," it was held by Sir John Romilly, M. R., that this was not an equitable assignment, but that it would have been so if the letter had directed the checks to be passed to the bank. "In *Ex parte South*, 3 Swanst. 392, and in *Lett v. Morris*, 4 Sim. 607," said his Honor, "the order was to pay the debt to the third party unconditionally, not to the third party on behalf of the creditor, or to be held by him for the benefit of the creditor as his mere agent to receive the money. An order of that description would always be revocable by the person giving it, but not so an order to pay to the third person absolutely. *Burn v. Carvalho*, 4 My. & Cr. 690, was the case of an order to pay to a third person absolutely. This was also the case of *Tibbitts v. George*, 5 Ad. & Ell. 107. If a creditor employ a person to collect the debts due to him, and inform the debtor that such person has authority to receive the debt due, this would not be an assignment of the debt to the agent, even though the agent should be a creditor of his principal; but the debtor might, with propriety, and without risk, afterward pay the debt to the creditor, or to any fresh agent whom he might appoint to receive it. If this were not so, the result would be that, when once any person had authorized an agent to receive a debt, the debtor could never safely pay another agent, or even the creditor himself, without receiving proof that the creditor did not owe any money to the

person whom he first had constituted his agent to receive it." See also *Thayer v. Lister*, 30 L. J. Ch. (N. S.) 427; *Flint v. Walker*, 5 Moore's P. C. C. 179.

A promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person. See *Field v. Megaw*, 4 L. R. (C. P.) 660, there the plaintiff having a cargo of wheat brought by a vessel called the *Maraquita* in the hands of a factor for sale, obtained from Wedd a loan of 500*l.*, for which he gave Wedd his acceptance at two months, describing the consideration to be "value received in wheat ex *Maraquita*," and they verbally agreed that the bill was to be renewed from time to time until the plaintiff should receive from the factor the proceeds of the wheat. The plaintiff *compounded with his creditors, and upon an action brought by him on behalf [*780] of his creditors to recover back the 500*l.* which had been paid to Wedd, it was held by the Court of Common Pleas, that what had taken place did not amount to a charge of the funds in the hands of the factor, so as to amount to an equitable assignment of, or an equitable charge upon, the fund. See *Malcolm v. Scott*, 3 Hare, 39.

Where an instrument is construed, not as a mere equitable assignment, but as an order for payment of a sum of money out of a particular fund, unless it be stamped as required by 55 Geo. 3, c. 184 (Sched. part. 1, Tit. Inland Bill), it cannot be enforced in equity (*Lord Braybrooke v. Meredith*, 13 Sim. 271; *Parsons v. Middleton*, 6 Hare, 261; and see *Pott v. Lomas*, 6 Hurlst. & N. 529): but where an instrument, though in form an order for the payment of money, operates as an equitable assignment, if properly stamped as an assignment it will be received by the Court: *Diplock v. Hammond*, 2 Sm. & G. 141; 5 De G. Mac. & G. 320; *M'Gowan v. Smith*, 26 L. J. N. S. (Ch.) 8.

Courts of common law have of late years borrowed, and will to a considerable extent act upon, the doctrines of equity with regard to the assignment of choses in action; *Brown v. Bateman*, 2 L. R. C. P. 272. And ever since *Winch v. Keeley*, 1 T. R. 619, courts of law have allowed the assignee to sue in the name of the assignor: *De Pothonier v. De Mattos*, Ell. Bl. & Ell. 467. See *Master v. Buller*, 4 T. R. 340. But still, in many cases, proceedings cannot be adopted, either so conveniently or effectually, at law as in equity. Where, for instance, the debtor assents to the transfer of a debt, an action may be brought at law against him by the assignee, on the implied promise to pay (*Israel v. Douglas*, 1 H. Black, 239; *Baron v. Husband*, 4 B. & Ad. 611; and see Addison on Contracts, 821, 6th ed.): but if he does not, it can only be brought in the name of the assignor, though in equity, as has been before shown, the assent of the debtor is not required, and proceedings may be there taken by the assignee in his own name. *Ib.*

But it has been decided in equity that, if a bill is filed in a simple case,

where the plaintiff has obtained from a person to whom a debt was due, a right to sue in his name for the debt, a demurrer will be allowed, unless it is alleged that the assignor refuses his name to be used, or obstructs proceedings against the debtor. And in *Hammond v. Messenger*, 9 Sim. 327, where there was no such allegation, Sir L. Shadwell, V. C., observed, that it was quite new to him that, in such a simple case as that, the Court allowed, in the first instance, a bill to be filed against a debtor, [*781] by the person who had become the assignee of the debt. But his Honor added, "I admit that, *if special circumstances are stated*, and it is represented that, notwithstanding the right which the assignee has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, a Court of equity will interfere, for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, the Court has jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor." See also *Keys v. Williams*, 3 Y. & C. Exch. Ca. 466; *Rose v. Clarke*, 1 Y. & C. C. C. 534.

The legislature has recently made life policies of life assurance (30 & 31 Vict. c. 144), and policies of marine insurance (31 & 32 Vict. c. 86), and the choses in action of bankrupts (32 & 33 Vict. c. 71), assignable at law.

By the Policies Assurance Act, 1867 (30 & 31 Vict. c. 144), it is enacted that "any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such persons or corporation to recover such monies" (sect. 1).

"No assignment made after the passing of this Act shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England, Scotland, or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed" (sect. 3).

"Every assurance company shall on every policy issued by them after

the 30th of September, 1867, specify their principal place or principal places of business at *which notices of assignment may be given [*782] in pursuance of this Act" (sect. 4).

"Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and every such written acknowledgment, if signed by any person being de jure or de facto the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance company of their having duly received the notice to which such acknowledgment relates" (sect. 6).

And it is provided "that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death entered into or to be entered into in pursuance of the provisions of 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, or either of those Acts, or to any engagement for payment on death by any friendly society" (sect. 8). See *The Scottish Amicable Life Assurance Society v. Fuller*, 2 L. R. Eq. 53.

By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), it is enacted that "whenever a policy of assurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name" . . . (sect. 1).

It has been recently decided that under this Act a policy of marine assurance can be assigned, after loss, so as to entitle the assignee to sue upon it in his own name: *Lloyd v. Fleming*, 7 L. R. Q. B. 299.

And by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), it has been enacted that "Where any portion of the property of the bankrupt consists of stock, shares in ships, shares or any other property transferable in the books of any company, office, or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the bankrupt might have exercised the same if he had not become bankrupt. . . . Where any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery of such things instituted by the trustee shall be instituted in *his official name, as in this Act provided; and such things shall, [*783] for the purpose of such action, suit, or other proceeding, be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity" (sect. 22).

Choses in Action of a Married Woman—how far assignable.—Nothing is clearer than that a husband only becomes entitled upon marriage to a qualified interest in the choses in action and reversionary personal property of his wife; and if he does not, during his lifetime, reduce them into possession, they will belong to his wife surviving him. Co. Litt. 351; *Scawin v. Blunt*, 7 Ves. 294; *Langham v. Nenny*, 3 Ves. 467; 1 Bright's Hus. & W. 36.

In order to reduce a wife's choses in action into possession, acts must be done which will have the effect of *changing* the property therein. Neither the mere intention of an executor to pay a chose in action to which the wife is entitled to the husband; nor an appropriation of a particular fund for that purpose (*Blunt v. Bestland*, 5 Ves. 515); nor the husband's receipt of the interest thereof (*Howman v. Corie*, 2 Vern. 190; *Blunt v. Bestland*, 5 Ves. 515; *Hart v. Stephens*, 6 Q. B. (N. S.) 937; 14 L. J. (N. S.) Q. B. 148; 9 Jur. 225), even although, where the chose in action was a promissory note, it has been handed to him (*Nash v. Nash*, 2 Madd. 133; and see *Day v. Pargrave*, 3 Mau. & Selw. 395, cited), amount to a reduction into possession; and a receipt of part of the fund by the husband will only amount to a reduction into possession pro tanto: *Nash v. Nash*, 2 Madd. 133, 139. A transfer of stock by trustees or executors into the name of the married woman (*Wildman v. Wildman*, 9 Ves. 174); or into the names of the husband and wife (*Prole v. Soady*, 3 L. R. Ch. App. 220); à fortiori where trustees of a fund belonging to the wife simply retain it in their own hands (*Twisden v. Wise*, 1 Vern. 161), will not amount to a reduction into possession. A mere agreement to sell a fund (*Harwood v. Fisher*, 1 Y. & C. Exch. Ca. 110), or a set-off of a debt of the husband's due to a testator against a legacy he has left to the wife, will not bar the wife's right to the legacy in case she survives her husband: *Harrison v. Andrews*, 13 Sim. 595; *Carr v. Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 249; *Ex parte O'Ferrall*, 1 G. & J. 347; *Eli-bank v. Montolieu*, 5 Ves. 737; *Reeve v. Richer*, 11 Jur. 960; *M' Mahon v. Burchell*, 3 Hare, 99. It is laid down, however, in a subsequent report of the last cited case, that where a debt to the estate of the testator may be set off by the *executors against a legacy bequeathed by the [*784] testator to the debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) to a settlement; *M' Mahon v. Burchell*, 5 Hare, 325; and see *Hall v. Hill*, 1 Conn. & Law. 135; 1 Dru. & War. 109.

The mere proof by a husband against a bankrupt indebted to his wife, will not amount to reduction into possession by the husband, if he die before a dividend be made. See *Anon.*, 2 Vern. 706; there J. S., indebted by bond to the wife of A., became a bankrupt. The husband proved the debt, and paid contribution money, but died before any dividend was made. The wife survived, and died also before any distribution. Lord

Cowper, L. C., held that the payment of contribution money by the husband did not alter the property of the debt, but that it remained a chose in action, and survived to the wife.

The receipt by the husband of his wife's chose in action, as, for instance, of a sum due to her on a mortgage in fee, will be a reduction thereof into possession (*Rees v. Keith*, 11 Sim. 388, 390), unless such receipt by the husband be in the character of trustee, when it will not have that effect: *Baker v. Hull*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413. A transfer of the wife's stock into her husband's sole name would be a reduction into possession: (1 *Bright's Hus. & W.* 54) and it has even been held, where the husband was a lunatic, that the payment by order of the Court of stock belonging to the wife to the credit of the lunacy, was as much a reduction into possession as a payment to the lunatic or his committee. (*In the matter of Jenkins*, 5 Russ. 183, 187), and, as a husband may, by transferring his wife's stock into his own name, reduce it into possession, so he may do so by transferring it into the names of trustees upon trusts inconsistent with his wife's title by survivorship: *Hansen v. Miller*, 14 Sim. 22; *Burnham v. Bennett*, 2 Coll. 254.

Where, however, a husband directs or consents to an investment of stock belonging to his wife, in a manner consistent with her equities, he will not be considered by such an act as destroying such equities, by its being a reduction into possession. Thus, in *Ryland v. Smith*, 1 My. & Cr. 53, the wife being under a will entitled to stock and to cash part of a residue, the executors, at the request of the husband, transferred the stock into the names of trustees for the wife's separate use, and paid the cash to the husband. The husband employed part of the cash in increasing the amount of the stock; he afterwards became bankrupt, and died. It was held by Sir C. C. *Pepys, M. R., that the stock transferred by the executors was not reduced into possession by the [*785] husband, and, therefore, belonging to the wife by survivorship, but that the assignees under the bankruptcy were entitled to the increase made by the husband.

Where the wife is possessed of choses in action, even such as promissory notes, or bills of exchange given to her *before marriage*, unless the contracts thereon be altered, as by taking a new security (*Yard v. Ellard*, 1 Salk. 117, pl. 8), the husband must bring an action upon them in the names of himself and his wife, and if he obtains judgment and sues out execution, he will thereby reduce such choses in action into possession (*Hardy v. Robinson*, 1 Keb. 440; *Tirell v. Bennet*, 2 Keb. 89; *Milner v. Milnes*, 3 T. R. 627; *Rumsey v. George*, 1 Mau. & Selw. 176; *Sherrington v. Yates*, 12 M. & W. 855); but if he die after judgment and before execution sued out, the judgment will survive to the wife, and she will be entitled to a scire facias thereon: *Bond v. Simmons*, 3 Atk. 21.

Where, however, the choses in action accrue to the wife *during the marriage*, and the husband elects to disagree to his wife's interest by com-

mencing an action in his own name only, if he dies after judgment, his representatives, and not his wife, will be entitled to the benefit thereof: *Oglander v. Baston*, 1 Vern. 396.

If, however, before the marriage the wife obtained a judgment, and she and her husband sued out a scire facias, and obtained an award of execution, and the wife died before the writ was executed, the property will be changed by the award, and belong to the husband: *Bright's H. & W.* p. 61.

Where an award was made by which a sum of money was ordered to be paid to the husband in respect of the personal estate to which his wife was entitled as residuary legatee, and the husband having died before anything further was done, it was held by Lord Jeffries, L. C., that the executor of the husband was entitled to such sum, and that it did not survive to the wife. "The award," said his Lordship, "is a sort of judgment, and the arbitrator having awarded that the money should be paid to the husband, that has changed the property, and vested it in the husband:" *Oglander v. Baston*, 1 Vern. 396. It is doubtful, however, whether this decision can be upheld, inasmuch as an award alone has not the effect of changing the property in personal chattels: *Hunter v. Rice*, 15 East, 100; *Thorpe v. Eyre*, 1 Ad. & Ell. 926; 3 Nev. & M. 214.

Where there is a decree in a joint suit by husband and wife, for money [786] claimed in her right, if the husband die before any other *proceedings, the benefit of the decree will survive to the wife (*Nanney v. Martin*, 1 Eq. Ca. Ab. 68); nor will her right by survivorship be prejudiced if nothing has been done in the suit to change the property: *Adams v. Lavender*, M'Clell. & Y. 41; *Bond v. Simmons*, 3 Atk. 20; *Macaulay v. Philips*, 4 Ves. 15; 10 Ves. 91, cited.

If, however, the property were changed, as, for instance, by the approval by the Court of a settlement to be made on the wife (*Macaulay v. Philips*, 4 Ves. 19), or by an order for payment to the husband, the wife's right to take by survivorship will be gone: *Heygate v. Annesley*, 3 Bro. C. C. 362.

If a husband fails to reduce his wife's choses in action into possession during her lifetime, he will be entitled to them on taking out letters of administration to her: *Bright's Hus. & Wife*, 41.

It is now well established, upon the principle that a husband can give no better right to another than he has himself, that all assignments made by the husband of the wife's choses in action or reversionary personal property, whether vested or contingent, which are not, or cannot be, then reduced into possession, whether the assignment be in bankruptcy, or under the Insolvent Act, or to trustees for payment of debts, or to a purchaser for valuable consideration, even although the wife joins therein, pass only the interest which the husband himself has, subject to the wife's legal right by survivorship.

The first case in which this subject was thoroughly discussed was

Hornsby v. Lee, 2 Madd, 16; there a husband and wife assigned a reversionary interest of the wife in certain trust stock, as a security for payment of an annuity granted by the husband. The husband afterwards took the benefit of the Insolvent Debtors' Act, and a general assignment was made of his property. The person on whose death the wife was to take, died, and then the husband died without having done any other act to reduce the stock into possession; it was held by Sir Thomas Plumer, V. C., that the wife was entitled by survivorship to the stock, as against both the particular and general assignee. "The husband," observed his Honor, "has a right to his wife's choses in action, provided he reduces them into possession. Is a deed assigning a reversionary interest a reduction into possession? It is impossible actually to reduce a reversionary interest into possession. Is it, then, a constructive reduction into possession? The assignment puts the assignee of the husband in the same situation as the husband; and if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife, and the assignee,* therefore, is not [787] entitled to the property. According to *Mitford v. Mitford* (9 Ves.

87), it is clear that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the Insolvent Debtors' Act; nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy." And see the important cases of *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ 65, where the reversionary interest of the wife was vested; and *Watson v. Dennis*, 3 Russ. 90; *Stamper v. Barker*, 5 Madd. 157; *Box v. Box*, 2 C. & L. 605; *Box v. Jackson*, 1 Dru. 55; *Prole v. Soady*, 3 L. R. Ch. App. 220; *Wilkinson v. Gibson*, 4 L. R. Eq. 162. In *Le Vasseur v. Scrutton*, 14 Sim. 116, a female infant being entitled to the reversion of a chose in action, expectant on the decease of the survivor of A. and B., she and her husband covenanted, in contemplation of their marriage, to assign it to trustees, in trust, as to one moiety for the husband absolutely, and as to the other moiety, for the wife and the issue of the marriage. The husband died first, and afterwards A. and B. died. It was held by Sir L. Shadwell, V. C., that the chose in action survived to the wife, and that she was entitled to have it transferred to her.

But a woman may, by her acts after the death of her husband, have shown such an intention to acquiesce in and adopt a settlement of her reversionary interest, made during her first coverture for the benefit of herself and children, as to render it binding upon any subsequently taken husband: *Ashton v. M'Dougall*, 5 Beav. 56; *Kingston v. Booth*, 4 I. R. Eq. 589, 605.

It must be remembered that under the Infants' Settlement Act (18 & 19 Vict. c. 43), an infant may now, with the approbation of the Court of Chancery, make a valid settlement of property, though it be in reversion,

remainder, or expectancy. See Morgan's and Chute's Chancery Statutes and Orders, p. 233, 4th ed.

There is a dictum of Lord Lyndhurst's in *Honner v. Morton*, 3 Russ. 69, "that where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession."

However, it seems now to be clearly established that, whether the husband after an assignment of his wife's choses in action dies in the lifetime of the person having a prior interest, whereby the chose in action *cannot*, as against the wife, be reduced into possession, or whether he survives and dies before it *is* *reduced into possession, the same result follows—the chose in action will survive to the wife. Thus, in *Ellison v. Elwin*, 13 Sim. 309, by articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate, to which she was entitled under the trusts of his will, to trustees, in trust for themselves and their children. After the lady had attained twenty-one a settlement was made, for the purpose of carrying the articles into effect, to which the husband and wife and the trustees were the only parties; but before the settled property was transferred to the trustees, the husband died. It was held, by Sir L. Shadwell, V. C., that the wife's right to the property by survivorship was not barred.

The principle of this decision was followed by the Vice-Chancellor Knight Bruce in *Ashby v. Ashby*, 1 Coll. 553. In that case, a husband, for a valuable consideration, assigned a legacy, to the payment of which his wife was entitled twelve months after the decease of the testator's widow. The husband survived the testator's widow more than twelve months, but took no steps to reduce the property into possession. His Honor, upon the authority of *Elwin v. Williams* (7 Jur. 337), held the assignment void as against the surviving wife: observing, however, that he did not say what would have been the effect upon the wife's rights or claims if the husband had, *bonâ fide* for valuable consideration, executed a deed of release of the legacy. See also *Hastings v. Orde*, 11 Sim. 205; *Ashton v. M'Dougall*, 5 Beav. 56; *Wilkinson v. Charlesworth*, 10 Beav. 324, 328; *Rowland v. M'Donnel*, 13 Ir. Ch. Rep. 365, 381; *Borton v. Borton*, 16 Sim. 552; *Michelmores v. Mudge*, 2 Giff. 183.

It has, however, been recently decided that a release by a husband of a reversionary chose in action of his wife is as inoperative to bind his wife by survivorship as his assignment would be: *Rogers v. Acaster*, 14 Beav. 445.

Where an annuity or life interest in a fund is given to a married woman, and is not settled to her separate use, the husband is not, with her concurrence, capable of effectually disposing of her life estate, except during his own life; for, if she outlive her husband, such part of it as would be enjoyed by her after the coverture determined, would be rever-

sionary only, and consequently the husband cannot, consistently with the cases of *Purdeu v. Jackson* and *Honner v. Morton*, make a title to such portion of the annuity or dividends of the fund as may accrue after his own death, and during the life of his wife surviving him. See *Stiffe v. Everitt*, 1 My. & Cr. 37; *Harley v. Harley*, *10 Hare, 325; *In re Godfrey's Trusts*, 1 I. R. Eq. 531; but see *Hore v. Becher*, 12 [*789] Sim. 465.

Where personalty, a reversionary interest in which is given to a married woman, is brought into existence for the purpose of securing a loan to her husband, the assignment by the husband and wife with the object of effecting such security will, pro tanto, defeat the wife's right by survivorship. Thus, in *Winter v. Easum*, 2 De G. Jo. & Sm. 272, a married woman entitled to income for her separate use, agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of the husband and wife, the wife assigned her separate income, and the husband the policy, by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums on the policy; and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of income; and a declaration by all parties that if the policy moneys became payable before the mortgage was paid, the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a chose in action not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. It was held by the Lords Justices of the Court of Appeal, that, although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of the mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security. See also *Stamford, Spalding, and Boston Banking Company v. Ball*, 31 L. J. (N. S.) Ch. 143.

Although a woman having a reversionary interest in personalty, obtain an assignment of the interest of every other person therein, she will not thereby convert her reversionary interest into an interest in possession, or enable her husband to do indirectly, what he could not do directly—assign her original interest, so as to bar her right by survivorship; and if the reversionary fund is in Court, it will not be paid out, although the consent of all other persons interested in it be obtained. After some con-

flicting decisions, this *has been finally determined by Lord Cottenham, in the important case of *Whittle v. Henning*, 2 Ph. 731, affirming the order of Lord Langdale, M. R., 11 Beav. 222. There, a fund in Court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son by deed surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. Upon a petition being presented by the husband, wife, and son, for payment of the fund to the son, it was dismissed by Lord Cottenham. "It is true," observed his Lordship, "that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that the reversionary life interest no longer exists, that it is in fact merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the Court should, by analogy to law, establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest, which it has hitherto afforded, which would be to permit a supposed analogy to the rules of law to defeat the rules and practice of this Court in the protection it affords to married women, although in all other cases it disregards the rules of law, and the rights of husbands when they interfere with such rules and practice. What this Court protects is, the reversionary life interest of the wife; and for that purpose it will consider it still as reversionary, notwithstanding other parties interested in the fund may, for the purpose of depriving her of such reversionary interest, by enabling her to dispose of it, endeavor to unite in her person all the other interests in it. I observe that the Vice-Chancellor of England, in *Hall v. Hugonin* (14 Sim. 595), says, that he does not put the case as one of merger; but the conveyancer who prepared the assignment in this case seems to have been aware that in no other way could the object of the parties be advanced; for it recites that the object was, that the life interest of the husband should be merged and extinguished in the interest of the wife. If there be no merger, the life interest of the wife remains reversionary, and would therefore be clearly within *Purdew v. Jackson* (1 Russ. 1), *Honner v. Morton* (3 Russ. 65), and the many other cases which have established the rule for the protection of the reversionary interests of wives. Is there, then, a merger which defeats this rule? Legal merger there cannot be; but if there had been, equity would not permit

[*790] a merger *at law to defeat equitable estates and interests. Such [*791] has been the rule at least since the time of Charles II., as is proved by *Thorn v. Newman* (3 Swanst. 603), *Nurse v. Yerworth* (3 Swanst. 618). Will it, then, when there is no legal merger, introduce the doctrine of merger into trusts, solely for the purpose of defeating equities, and destroying its own jurisdiction in the protection of the interests

of married women? I cannot, also, but refer, upon this part of the case to the able argument of Mr. Rendall in *Hall v. Hugonin* (14 Sim. 595), showing how impossible it was to prejudice the wife in her own reversionary interest by others bestowing upon her gifts which she might afterward disclaim, and thereby revive her reversionary interest, after this Court, if it should make the order prayed, had destroyed it by treating it as an interest in possession." And see *Richards v. Chambers* 10 Ves. 580; *Story v. Tonge*, 7 Beav. 91; *Brandon v. Woodthorpe*, 10 Beav. 463; *Cresswell v. Dewell*, 4 Giff. 460; *In re Butler's Trusts*, 3 Ir. R. Eq. 138. The cases, therefore, of *Hall v. Hugonin*, 14 Sim. 595, *Creed v. Perry*, 14 Sim. 592, and *Bishop v. Colebrook*, 16 Sim. 39, may be considered as overruled.

But although the Court of equity will not give effect to an assignment by the husband, of his wife's reversionary chose in action, so as to defeat her legal right by survivorship, it will be good against him if he survive his wife (*Hornsby v. Lee*, 2 Madd. 20), and when it becomes an interest in possession it will be subject to the wife's equity to a settlement. See *Greedy v. Lavender*, 13 Beav. 62, and note to *Lady Elibank v. Montolieu*, Vol. 1, p. *445; and see *Clarke v. Woodward*, 25 Beav. 455.

Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterwards obtained a decree of judicial separation, and is living apart from her husband, upon the property coming into possession she is entitled to it absolutely under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8: *In re Insole*, 1 Law Rep. Eq. 470; 35 Beav. 92. A chose in action also survives to the wife where she has obtained a divorce, for her rights then are the same as if at the date of the divorce the husband had died, and restored her to the position of a feme sole: *Wells v. Malbon*, 31 Beav. 48. See also *Wilkinson v. Gibson*, 4 L. R. Eq. 162; *Prole v. Soady*, 3 L. R. Ch. App. 220.

If the chose in action either is originally, or becomes an interest presently attainable, it may be reduced into possession by actual payment to the husband or his assignees: and the wife's right by survivorship and her equity to a settlement may be thereby defeated: *Cunningham v. Antrobus*, *16 Sim. 436; *Allday v. Fletcher*, 1 De G. & J. 82. See [*792] ante, Vol. 1, p. 471.

As to the form of the stop order on the assignment of the wife's reversionary chose in action, see *Moreau v. Polley*, 1 De G. & Sm. 143.

Where a married woman, domiciled abroad, is entitled to reversionary interests in personalty, her rights or powers over such interests, or those of her husband, will be regulated by the law of their domicile. See *Guepratte v. Young*, 4 De G. & Sm. 217; *Duncan v. Cannan*, 18 Beav. 128, and the cases there cited.

Where a married woman is a joint tenant of a reversionary interest, if she die during the life of her husband, before the reversion becomes an

interest in possession, the other joint tenants and not her husband will take by survivorship. Thus, in *In re Trusts of Barton's Will*, 10 Hare 12, a woman, joint tenant of a reversionary interest in a legacy of 2000*l.* stock, married, and after the marriage, the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving; it was held by Sir G. Turner, V. C., that by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife, and that upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund.

A recent Act, 20 & 21 Vict. c. 57, Malins' Act (which does not extend to Scotland), enables married women, in certain cases, to dispose of reversionary interests in personal estate, in the same manner as they can now dispose of their real estates.

It enacts that, "After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by *which the same shall be effected, nor un-
[*793] less the deed be acknowledged by her as hereinafter directed: *Provided always*, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be *restrained from alienating or affecting the same.*" Sect. 1.

It is then enacted that, "Every deed *to be executed in England or Wales* by a married woman for any of the purposes of this Act shall be acknowledged by her, in the manner prescribed by 3 & 4 Will. 4, c. 74 (the Fines and Recoveries Act); and every deed *to be executed in Ireland* by a married woman for any of the purposes of this Act shall be acknowledged by her in the manner prescribed by 4 & 5 Will. 4, c. 92 (the Irish Fines and Recoveries Act); and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to

such powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests or powers over land." Sect. 2.

It is then provided, "That the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition." Sect. 3.

And also, "That the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage." Sect. 4. See *Clarke v. Greene*, 2 Hem. & Mill. 474.

It will be observed that the operation of this Act is of a very limited character. In the first place, it only applies to reversionary interests in personalty to which married women may become entitled after the 31st of December, 1857. And with regard to this, it has been decided, that where a married woman takes a reversionary interest under an appointment executed after the 31st day of December, 1857, and made in pursuance of a power contained in an instrument dated before that day, she will not, under Malin's Act, be able to dispose of such reversionary interest as if she *had become entitled to it under an instrument made after the 31st day of December, 1857. *In re Butler's Trusts*, 3 Ir.R. Eq. [*794] 138. In the next place, reversionary interests in personal estate comprised in any settlement, or agreement for a settlement, on marriage are excepted from the operation of the Act. And lastly, all persons conferring reversionary interests in personalty on married women, "by any deed, will or instrument," may restrain her from alienating or affecting the same.

A husband may make a valid assignment of his wife's reversionary interest in leaseholds (*Donne v. Hart*, 2 Russ. & My. 360), unless the interest be of such a nature that it cannot by possibility vest in the wife in possession during the coverture: *Duberley v. Day*, 16 Beav. 33.

How far notice is requisite in order to perfect an assignment of Choses in Action.—Notice of an assignment is not necessary to render it perfect as between the assignor and assignee (*Donaldson v. Donaldson*, Kay, 711; *Roberts v. Lloyd*, 2 Beav. 376; *Re Way's Trusts*, 2 De G. Jo. & Sm. 365). Nor is it necessary as against third parties, who simply stand in the same position as the assignor, as a creditor under a judgment at common law: (*Beavan v. Lord Oxford*, 6 De G. Mac. & G. 492; *Kinderley v. Jervis*, 22 Beav. 1; *Eyre v. M'Dowell*, 9 Ho. Lo. Ca. 619, 642;) or under a garnishee order under the Common Law Procedure Act, 1854:

• *Pickering v. The Ilfracombe Railway Company*, 3 L. R. C. P. 235; *Crow v. Robinson*, 3 L. R. C. P. 264; overruling *Watts v. Porter*, 3 E. & B. 743. In other cases, in order that *third* parties may be bound, it is necessary, with regard to a chose in action, to do all that can be done to perfect the assignment.

Thus, if the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or incumbrancer giving notice of his assignment will thereby acquire priority; and it is of no importance, in the question of priority, whether the interest of the assignor be vested or, contingent, present or reversionary. *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 1, are the leading cases upon this subject. In *Dearle v. Hall*, Brown, being entitled for life to the yearly sum of 93*l.*, being the dividend arising from the moiety of a sum of money invested in the names of the executors of his father's will, by an indenture, dated the 19th of December, 1808, assigned it to Dearle, to secure an annuity granted in consideration of 204*l.*; and by another indenture, dated the 26th of September, 1809, *he assigned the same yearly sum to [*795] Sherring, to secure an annuity granted in consideration of 150*l.* No notice of the assignments was given by either Dearle or Sherring to the executors. By an indenture, dated the 20th of March, 1812, Brown, in consideration of 711*l.* 3*s.* 6*d.*, assigned the same annual sum absolutely to Hall, who, previous to making the purchase, called for every information respecting the fund and the title from the acting executor, and on the 25th of April, 1812, served the executors with a written notice to pay him, as assignee of Brown, a moiety of the dividends of the fund during Brown's life, and they accordingly paid him a sum of money on account thereof. On the 17th of October following, the executors, for the first time, received notice of the assignments to Dearle and Sherring, and refused to make any more payments until the rights of the different parties should be ascertained. Sir Thomas Plumer, M. R., after an elaborate consideration of the authorities, dismissed the bills filed by Dearle and Sherring, holding, that Hall had a better equity to the fund, and that the assignment to him, though posterior in date, was entitled to priority, in consequence of his having given, and of Dearle and Sherring having neglected to give, notice to the trustees. "The question," said his Honor, "here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up; or rather, the question is, shall these plaintiffs now have equitable relief, to the injury of Hall? What title have they shown to call on a Court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually pre-

vented all the mischief which has followed. Is a plaintiff to be heard in a Court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is, not as in *Evans v. Bicknell* (6 Ves. 174), whether a Court of equity is to deprive the plaintiffs of any right—whether it is to take from them, for instance, a legal estate, or to impose any charge upon them: it is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities: a third party has innocently advanced his money, and has perfected his security, as far as the nature of the subject permitted him. Is [*796] this Court to interfere to postpone him to them.

“They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who, in the way of purchase or mortgage, contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall v. Rowles* (1 Ves. 348; 1 Atk. 165), before Lord Hardwicke and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognized even in Courts of law. In *Twyne's case* (3 Rep. 80), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences.

“‘When a man,’ says Lord Bacon (Maxims of Law, Max. 16), ‘is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.’

“It is true that a chose in action does not admit of tangible actual possession, and that neither Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the 93*l.* a

year. But, in *Ryall v. Rowles*, the Judges held, that, in the case of a chose in action, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest [*797] in the matter under an obligation to treat it as your *property.

For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person.

"Is there the least doubt, that, if Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall v. Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case, it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title—to give a complete right in rem, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you will allow him to remain, notice is not necessary; for, against him, the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession, must take his chance."

In *Loveridge v. Cooper*, 3 Russ. 30, R. J. being, under the will of his uncle, entitled to a reversionary interest in one-fourth of 6250*l.* 4*l.* per Cent. Stock, contingent upon the event of his surviving the testator's widow, who had a life interest in the fund, by an indenture, dated the 5th of September, 1816, assigned 700*l.* 4*l.* per Cent. Stock, part of his share in the 6250*l.* 4*l.* per Cent Stock, to trustees, for Mrs. W. to secure an annuity granted to her. On the 24th of August, 1819, the annuity, [*798] being considerably in *arrear, was assigned to H. L. Notice of the assignment, of the 5th of September, 1816, was not given

to C., the surviving trustee and executor of the testator, in whose name the stock was standing, until the 29th of April, 1818. R. J., however, by an indenture, dated December 3, 1816, for valuable consideration assigned his one-fourth part of the 6250*l.* 4*l.* per Cent. Stock to W. H. absolutely, who, previous to making the purchase, inquired of C., the surviving trustee, whether there was any charge or incumbrance on the interest of R. J. in the 6250*l.* stock, and received for answer, that he, C., knew of no such charge or incumbrance. And on the 28th of March, 1817, a copy of the indenture of the 3d of December, 1816, was sent to C. Upon a bill being filed by H. L., to prevent the stock from being transferred to W. H., and to compel a transfer of it to himself, Sir Thomas Plumer, M. R., dismissed the bill, observing, that upon the same principles on which he determined *Dearle v. Hall*, he must decide that H. L. had made out no title to relief in a Court of equity. The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, were afterwards affirmed by Lord Chancellor Lyndhurst, upon appeal (3 Russ. 48), who observed that, in cases like the present, the act of giving the trustee notice was, in a certain degree, taking possession of the fund; it was going as far towards equitable possession as it was possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. And see *Foster v. Blackstone*, 1 My. & K. 297; *S. C.*, *Foster v. Cockerell*, 9 Bligh, N. S. 332; 3 C. & F. 456; *Stocks v. Dobson*, 5 De G. & Sm. 760; *Dunster v. Lord Glengall*, 3 Ir. Ch. Rep. 47.

In *Martin v. Sedgwick*, 9 Beav. 333, the defendant held shares in the Rock Life Assurance Office, as a trustee for Dunlop, and executed a declaration of trust, but no notice thereof was given at the office of the Company; the defendant afterwards mortgaged the shares to secure his private debt. Notice of this mortgage was given to the Company, and entered in their books. It was held by Lord Langdale, M. R., that the mortgagee had priority over the cestui que trust. "The first question," said his Lordship, "made here is this, whether, inasmuch as by the constitution of the Company a shareholder is a partner, and as by the ordinary rule of law notice to one partner is notice to the others, it must not be assumed that, at the time when the transfer was made to Sedgwick upon trust, the whole Company had such distinct notice of the creation of the trust, that the same effect is to be given to it as if there had been a regular formal notice given in the usual manner. I am of opinion that that is not the case. It *would put an end to that important [*799] doctrine, by which security is afforded to assignments accompanied with notice to the trustee or holder, and by which a good assignment and security is effected, so as to prevent its being defeated by any subsequent assignment. There was nothing to hinder Dunlop from giving that notice, which would have perfectly secured him against any subsequent dealing with the fund by the defendant. That notice was not given. The result was, that these shares remained standing in his name

in the books of the Company unfettered by any such notice; and he was left entirely at liberty, without the possibility of any other parties guarding themselves against his improper acts, to dispose of those shares in any manner which the rules of the Company allowed." See also *Ex parte Boulton*, 1 De G. & J. 163; *Pierce v. Brady* 23 Beav. 64; and 30 & 31 Vict. c. 144, ss. 3, 4, 6, ante p. 781, 782.

As between two equitable assignees, the time when notice is given is of no importance, if both notices are given previous to the time when the relation of trustee and cestui que trust is created, where that relation is not constituted until the money is actually received by or is due from the trustee. Thus, in *Buller v. Plunkett*, 1 J. & H. 441, an officer in the army covenanted to assign to the trustees of a settlement any moneys which he might receive from the sale of his commission, and subsequently executed a second covenant to assign the same proceeds to another person who had no notice of the settlement. The second assignee gave the first notice to the army agent of the regiment, but the trustees also gave notice before the fund reached the army agent's hands. It was held by Sir W. Page Wood, V. C., that the trustees of the settlement had priority. "It was said," observed his Honor, "that the first notice was given by the mortgagee, but at that time there was no trustee. The army agent was a person who might sell the commission, and into whose hands the money might come, but it was a matter of uncertainty whether that would be so; and it would be carrying the doctrine of notice to trustees too far, to say that an incumbrancer who first gives notice to a person who is likely to become the holder of a fund shall thereby exclude the prior claim of other persons who are guilty of no negligence, and who, in fact, in the present case, themselves gave notice before the army agent had become a trustee of the fund. The earlier covenant, therefore, created a lien in priority to the mortgagee's claim; and, as both claimants had given notice before the fund had reached the hands of the stakeholder, that priority had not been displaced. See also *Webster v. Webster*, 31 Beav. 393.

*And where one equitable assignee gives notice before the fund [*800] comes into possession of a trustee, as for instance, an army agent, as such notice is wholly inefficient, he will be postponed to a subsequent assignee, who has given notice after the fund has come into possession; *Addison v. Cox*, 20 W. R. 853; *Somerset v. Cox*, 33 Beav. 634.

And where notice was given by one incumbrancer at a banker's and army agent's after the bank was closed, and notice was given by another incumbrancer on the following day as soon as the bank opened, the notices were treated as contemporaneous, and the incumbrances took effect according to their dates: *Calisher v. Forbes*, 7 L. R. Ch. App. 109.

An assignee in bankruptcy or insolvency neglecting to give notice of the bankruptcy or insolvency to trustees of a fund, in which the bankrupt or insolvent had an interest, has been postponed to a subsequent assignee for value of the fund, who gave notice to the trustees of the assignment

before the assignees. *In re Barr's Trusts*, 4 K. & J. 219; *In re Atkinson*, 2 De G. Mac. & G. 140; *Lloyd v. Banks*, 4 L. R. Eq. 222; *In re Brown's Trusts*, 5 L. R. Eq. 88. See, however, *Re Mary Coombe*, 1 Giff. 91.

Where, however, an assignment of a chose in action takes place before the bankruptcy, and notice thereof is not given until after the bankruptcy, but before any notice is given by the assignee in bankruptcy, the choses in action will belong to the assignee in bankruptcy as being in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner: *Ex parte Caldwell*, *In re Currie*, 13 L. R. Eq. 188. The case of *Stuart v. Cockerell*, 8 L. R. Eq. 607, seems not to have been rightly decided: there a tenant for life of a fund in Court mortgaged his interest, and afterwards became bankrupt. After the bankruptcy, the mortgagee obtained a stop order on the dividends. The assignee in bankruptcy did not obtain a stop order. It was held by Sir R. Malins, V. C., that the mortgagee was entitled to priority over the assignee in bankruptcy.

Where an assignee has done all in his power towards taking possession, he will not lose his priority. Thus in *Feltham v. Clark*, 1 De G. & Sm. 307, the owner of a vessel made a mortgage of it and of the cargo, in London, to the plaintiffs, whilst the vessel was on a whaling voyage to the South Seas, subject to two prior mortgages thereof, and the third mortgagees forthwith gave notice of their mortgages to the two prior incumbrances. The master of the vessel afterwards putting into Sydney, transhipped the oil taken on the voyage, to another vessel, *consigned to consignees in London, who honored his bill of exchange on [*801] them upon having a lien on the consignment. The mortgagor induced Dowers, one of the defendants, to advance him 1000*l.* on a mortgage of the cargo so transhipped, and consigned without notice of any other charge thereon, except the lien of the consignee. Dowers gave notice of his mortgage to the consignee. The plaintiffs, as soon as they knew of the consignment (but subsequent to Dowers' notice), gave notice to the consignee of the mortgage to them; and, after such notice, the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to Dowers. It was held, by Sir James Parker, V. C., that the plaintiffs having done all they could do towards possession, were entitled to priority over Dowers. "The plaintiffs," said his Honor, "were not bound to send letters to meet the master wherever the vessel might possibly be; and it has not been shown that the plaintiffs could reasonably have been expected to do any act which they have not done: *Lex neminem cogit ad vana seu inutilia peragenda*. The consequence is, that the plaintiffs have done nothing to forfeit or lose their priority over the defendant Dowers." See also *Langton v. Horton*, 1 Hare, 549.

The rule laid down in *Dearle v. Hall* does not apply in favor of a judgment creditor. A judgment creditor, therefore, will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding

such creditor has, since the mortgage but before the notice thereof to the trustee of the fund, obtained, under 1 & 2 Vict. c. 110, s. 14, an order charging the fund. *Scott v. Lord Hastings*, 4 K. & J. 633.

As between volunteers notice to the debtor of an assignment of a debt will not affect priorities: *Justice v. Wynne*, 12 Ir. Ch. Rep. 289.

Assignments of debts are not governed by the same rules as bills of exchange and promissory notes, so as to make it obligatory upon the assignee of a debt to give notice to the assignor of non-payment by the debtor. See *Glyn v. Hood*, 1 De G. F. & Jo. 334. There Larpent, a partner in the firm of Bell and Co., retired from it, and shortly afterwards borrowed from the plaintiffs, Messrs. Glyn and Co., 20,000*l.* on his promissory note, payable on the 31st of May, 1848, and agreed, by way of collateral security, to give them a lien on his share of the assets of the partnership, which had not yet been ascertained and paid. In furtherance of this, Bell, one of the continuing partners, in July, 1847, at Larpent's request, and with the consent of the other continuing partners, gave the plaintiffs an order on Cockerell and Co., the agents of Bell and Co., directing *them to pay to the plaintiffs, out of the funds of Bell [802] and Co. in their hands, the sum of 5000*l.* and engaged to pay to the plaintiffs the residue of Larpent's share. Cockerell and Co. had not at the time, nor afterwards, nearly so much as 5000*l.* of Bell and Co.'s money in their hands. In August, 1847, the plaintiffs presented the order to Cockerell and Co., and were informed they had not funds to pay it. The plaintiff's gave Bell no notice of this. In September, 1847, Cockerell and Co. became insolvent, without having paid any part of the 5000*l.* The promissory note was dishonored. Bell died in February, 1849. The share of Larpent was finally ascertained in the year 1853, and Larpent died in March, 1855. In November, 1855, the plaintiffs filed this bill to enforce their lien. It was held by the Lords Justices of the Court of Appeal, that the equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange, and that, as the plaintiffs could not have obtained payment of the 5000*l.* from Cockerell & Co., they could not be charged with that sum. It was also held that the plaintiffs were not, under the circumstances, barred from relief by delay, there being no statutory bar, and that the loss occasioned by the failure of Cockerell and Co., having money of Bell and Co. in their hands, was to be treated as a loss of the new firm of Bell & Co., not affecting the share assigned to the plaintiffs.

It seems, however, that the assignee of a debt in such a case is chargeable for wilful default, as every mortgagee must be. Per Lord Justice Turner, *Glyn v. Hood*, 1 De G. F. & Jo. 309.

A mortgagee of a ship, being under the mortgage entitled to the freight as a chose in action (*Kerswill v. Bishop*, 2 C. & J. 529), is, by taking possession, or doing an act equivalent to taking possession, before the freight becomes payable, entitled to receive it as against the mortgagor or

his assignees in bankruptcy: (*Rusden v. Pope*, 3 L. R. Ex. 269; *Wilson v. Wilson*, 14 L. R. Eq. 32) or for value. See the case of *Liverpool Marine Credit Company v. Wilson*, 7 L. R. Ch. App. 507, where it was held by the Lords Justices of the Court of Appeal that the first registered mortgagee of a ship, by taking possession of her before the freight was completely earned, obtained a legal right to receive the freight, and to retain thereout not only what was due on his first mortgage, but also the amount of any subsequent charge which he might have acquired on the freight, in priority of every equitable charge of which he had no notice; and that it was immaterial that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.

*So a mortgagee of ship and general freight taking possession [*803] of the ship before any freight has become payable from the charterers to the owners, has been held to be entitled to freight in priority of a subsequent particular assignee of freight, although he may have given notice of his assignment to the charterers before the mortgagee took possession of the ship: *Brown v. Tanner*, 3 L. R. Ch. App. 597, reversing *S. C.*, 2 L. R. Eq. 806. See also *Cato v. Irving*, 5 De G. & Sim. 210; *Wilson v. Wilson*, 14 L. R. Eq. 32; 20 W. R. (V. C. M.) 436.

It was decided, in the principal case of *Ryall v. Rowles*, that debts are chattels, and are within the meaning of the statute (21 Jac. 1, c. 19, s. 11). The consequence is, that if they remain in the possession, order, and disposition of the bankrupt at the time of the bankruptcy they will pass to the assignees. Therefore, in order completely to divest the bankrupt of such debts, he must have done everything that is equivalent to a delivery of chattels personal; that is, of movable goods; and the Judges, at least one, Sir Thomas Parker, says, *that which is equivalent to delivery of movables, is, in the case of a debt, an assignment and delivery of the security (if any), and notice to the debtor of the assignment*. It might, perhaps, have been a question whether, after assignment and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition, merely *because there was no notice to the debtor of the assignment*. Probably, that requisite was added, as, otherwise, the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. The debtor would be *bond fide* in making the payment; and it would be impossible to make him pay it again: per Sir W. Grant, M. R., in *Jones v. Gibson*, 9 Ves. 410; and see *North v. Gurney*, 1 J. & H. 509.

Accordingly, upon the same principle, on an assignment of a policy of assurance, it was held to be necessary to give notice to the insurance office, of the assignment, in order to take it out of the order and disposition of the assured; otherwise the assignment would not have been valid as against his assignees. See *Thompson v. Speirs*, 13 Sim. 469; *Waldron v. Sloper*, 1 Drew. 193.

The Bankruptcy Act, 1869, has, however, made an important change

in the law of reputed ownership, by confining it to traders, and excluding from its operation all choses in action other than debts which have become due to the bankrupt in the course of his trade. It is as follows. "The property of the bankrupt divisible amongst his creditors, and in [*804] this act referred to as the property of *the bankrupt, shall comprise the following particulars:—All goods and chattels being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, *other than debts due to him in the course of his trade or business*, shall not be deemed goods and chattels within the meaning of this clause." (Sect. 15, art. 5.)

It has been recently held that shares in a company are not things in action within sect. 15, subs. 5 of the Bankruptcy Act, 1869: *Ex parte Union Bank of Manchester; In re Jackson*, 12 L. R. Eq. 354.

It seems, that the Court, as heretofore, will make the order directing the goods and chattels to be sold, as being "in the possession, order or disposition" of the bankrupt; but the trial of the right to the goods and chattels, if disputed, may be before the Court either with or without a jury. Section 72 of the Bankruptcy Act, 1869. See Roche and Hazlitt's Bankruptcy Act, 1769, p. 14, n.

As to the doctrine of reputed ownership before the Act of 1869, under the 125th Section of 12 & 13 Vict. c. 106, deriving its origin through other Acts from the 10th and 11th Sections of 21 Jac. 1, c. 19, referred to in the principal case of *Ryall v. Rowles*, see *Joy v. Campbell*, Tudor's L. C., M. L. 2nd ed. 445, and note.

To whom notice should be given of an Assignment.—Notice of an assignment of personalty vested in trustees, or of debts, should as a general rule be given to the trustees or debtors in writing. Parol notice, however, is sufficient (*Smith v. Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 D. & C. 357; *Browne v. Savage*, 4 Drew. 640; *Re Tichener*, 35 Beav. 317); but a statement made in a mere casual conversation is not sufficient: *Re Tichener*, 35 Beav. 317.

Notice to one of several co-trustees or obligors is, it seems, sufficient notice to all, so long as the circumstances of the case remain unaltered; but it would not be sufficient on the death of that trustee or obligor, or his otherwise ceasing to continue a trustee: *Smith v. Smith*, 2 C. & M. 231; *Timson v. Ramsbottom*, 2 Kee. 35; *Meux v. Bell*, 1 Hare, 73; *Wise v. Wise*, 2 J. & L. 403; *Ex parte Rogers*, 8 De G. Mac. & G. 271; *Willes v. Greenhill*, 29 Beav. 387.

Although as a general rule notice to one of several trustees is, with the limitations before mentioned, notice to all, yet where one of such trustees is also a beneficiary, and assigns his beneficial interest in the trust fund to

a *stranger, the notice acquired by such trustee *as assignor* will not constitute notice to the trustees so as to prevail over subsequent incumbrances, it being the interest of such trustee *as assignor* to conceal the assignment; but where such trustee assigns his beneficial interest to one of his co-trustees, the notice which that co-trustee acquires as assignee constitutes during his life notice to the trustees, it not being his interest as assignee to conceal the assignment, and therefore it will prevail over subsequent incumbrancers with notice; *Browne v. Savage* 4 Drew. 635; *Willes v. Greenhill*, 29 Beav. 376, 391; *Commissioners of Public Works v. Harby*, 23 Beav. 508; *Re Selby*, 8 De G. Mac. & G. 271. But see *Ex parte Stewart, In re Shelley*, 34 L. J. (Bk.) N. S. 6. [*805]

If the trustee is himself a person who has advanced money to a beneficiary, and has taken an equitable assignment, inasmuch as he could not give notice to himself, he will be entitled to priority over any person taking a subsequent assignment: *Elder v. Maclean*, 3 Jur. N. S. 284, *per Kindersley*, V. C. Sed vide *The Commissioners of Public Works v. Harby*, 23 Beav. 508; 26 L. J. N. S. (Ch.) 472; 3 Jur. N. S. 478.

Notice of an assignment to the solicitor of trustees has been held sufficient: *Rickards v. Gledstones*, 3 Giff. 298; *Willes v. Greenhill*, 29 Beav. 392; but see *Re Durand's Trusts*, 8 W. R. (L. C. & LL. J.) 33.

The assignee in the case of the assignment of such things as shares in a public company, or of a policy of assurance, should give actual notice to the office of the company, for notice to a shareholder will not be held constructive notice to the company. Thus, in *Thompson v. Spiers* (13 Sim. 469), B., in 1808, effected a policy in the Equitable Assurance Office, and several years afterward, upon the marriage of his daughter, he executed an assignment of it to T. and F., by which one-fourth of the proceeds was settled in trust for his daughter, her intended husband, and their children. B. kept the policy and assignment in the safe of the banking firm of L., B. & F., of which he was a partner. In June, 1835, L., B. & F. became bankrupt, and their assignees possessed themselves of the policy and the assignment; whereupon the plaintiff, the surviving trustee of the settlement, gave them notice of the assignment, and a few days afterward sent a formal notice of it to the assurance office. Upon a bill being filed by the surviving trustee, it was held, by Sir. L. Shadwell, V. C., that, from the time of the assignment till the bankruptcy, the policy remained in the order and disposition of the bankrupt. "On reconsideration," said his Honor, "I am of opinion that the decision in *Duncan v. Chamberlayne* *(11 Sim. 123) ought not to be supported, because, in order to take a policy of insurance out of the order and disposition of the [*806] assignor, it is essential to the interests of mankind that something should be done of a decisive nature, which may effectually prevent the payment of the proceeds to any other person than the assignee. The Equitable Assurance Company is a very numerous and wealthy body, and therefore it would be idle to say, that because the assured happens to be a member

of the Company in a legal sense, any act which he does with reference to his own particular policy is to be taken to be a partnership act, so as to affect the whole body with notice of it. Formerly, the Equitable Assurance Company took no notice of the assignment of their policies, but now it appears that they do.

"In consequence of the decision in *Ex parte Hennessey* (1 C. & L. 561), by the Lord Chancellor of Ireland (Sir Edward Sugden), I had a conversation with his Lordship upon the subject, and we agreed that Courts of Equity ought to lay down some rule which should not be founded on so unsubstantial a basis as the technical doctrine of implied or constructive notice, but which should make it morally impossible for the assignor to have dominion over the policy without the assent of the assignee.

"I have read over the case of *Ex parte Wilkinson* (13 Sim. 475), in which the point arose distinctly, before the Chief Judge in Bankruptcy, and his Honor considered that the notice (which was the same as in the present case) was not sufficient." And see *Re Thomas and William Styant*, 1 Ph. 105; *Thompson v. Tomkins*, 2 Drew. & Sm. 8; *Re Carew's Estate Act*, 31 Beav. 39; *Edwards v. Martin*, 1 Law Rep. Eq. 121.

Notice, however, of the assignment of shares, when given to the secretary (*Ex parte Stright* and another, in the matter of *Eyles*, 1 Mont. 502), to a director and actuary (*Ex parte Watkins*, 1 Mont. and Ayr. 689; 4 D. & C. 87; see also *Ex parte Hennessey*, 1 C. & L. 559), to a director and auditor (*Ex parte Waithman*, 4 D. & C. 412, see also *Ex parte Hennessey*, 1 C. & L. 559), has been held good. But a mere casual mention thereof to a clerk in the office of the company has been held not to be constructive notice to the company in whose employ he is: *Ex parte Curbia*, 4 D. & C. 354; 1 Mont. & Ayr. 693, n.

As to the mode of giving notice of the assignment of a policy prescribed by 30 & 31 Vict. c. 144, see ante, p. 781.

If notice be given to the master, of the assignment of the future cargo of a ship, and possession of the cargo be delivered according to the terms of the assignment, the title of the assignees will not be defeated [*807] by a judgment. Thus, in *Langton v. Horton*, 1 Hare, 549, whilst a ship was on her voyage, B., the owner, executed a deed of assignment by way of mortgage of the ship, together with her tackle and appurtenances, and all oil, head matter, and other cargo, which might be caught or brought home in such ship. Notice of the assignment was sent to the master of the ship, and on his return the master delivered up possession of the ship and cargo to the mortgagees. It was held by Sir J. Wigram, V. C., that the assignment was valid in equity as against the assignor, as well of the future cargo to be taken during the particular voyage, as of the cargo, if any, which existed at the time of the assignment; and that the equitable title of the mortgagees was perfected, and could not be defeated by a judgment creditor of the assignor, who afterward sued out a writ of *fi. fa.*, and proceeded to take the ship and cargo in execution. "I

rely, in this case," said his Honor, "on the general principle, that there having been such a contract as would, in equity, entitle the plaintiffs, as against B., to the cargo when it arrived, and the title under that contract having been perfected by a possession lawfully taken under the deed, which there is no attempt on the part of B. to impeach, the subsequent judgment creditor cannot take that property from the plaintiffs." See, also, *S. C.*, 3 Beav. 464.

Where, by reason of the death of the person in whose name stock was standing, without legal representatives, there was no trustee to whom notice could be given, it was held, by Sir J. L. Knight Bruce, V. C., that a second incumbrancer, without notice of the first, by serving a note of *distringas* on the Bank of England, thereby obtained priority: *Elty v. Bridges*, 2 Y. & C. C. C. 486.

Where a fund is not in the hands of trustees, but in Court, then a person taking an assignment of it should obtain a stop order, otherwise a subsequent assignee will gain priority by obtaining the first stop order (*Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463), although the person taking the first assignment be a trustee of the fund (*Elder v. Maclean*, 5 W. R. 447, 3 Jur. N. S. 283); but the order should be left at the Accountant-General's office (*Waller v. Wildridge*, 3 Ir. Ch. Rep. 155).

A mere notice to the Accountant-General of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser without notice: *Warburton v. Hill*, Kay, 470. See remarks on this case in *Haly v. Barry*, 3 L. R. Ch. App. 456, 457.

Where the mortgagee of a share of a fund in Court obtains a stop order, which in effect prevents *the division of the fund without notice to him, and an order is subsequently made for the distribution of the [*808] fund, and the share of the mortgagor is carried over to the account of him and his incumbrancers, a subsequent incumbrancer will not gain priority by obtaining a stop order on the share so carried over, because the Court would hold the fund as a trustee for the persons entitled thereto in the order of their priorities: *Lister v. Tidd*, 4 L. R. Eq. 462, 463.

Where, however, notice of an assignment has been given to trustees of a fund which is afterward paid into Court, a subsequent assignee will not by obtaining a stop order gain priority over the first. Thus in *Livesey v. Harding*, 23 Beav. 141, a first incumbrancer on a reversionary legacy gave due notice to the trustees. A fund was afterward brought into Court to provide for the legacy, and a second incumbrancer obtained the first stop order. It was held by Sir John Romilly, M. R., that he did not thereby obtain priority over the first incumbrancer. "It has been contended," said his Honor, "that when a fund is paid into Court, the first person who obtained a stop order obtained a priority. Without disputing this, as a general proposition, it does not apply to the case. Due notice was given to the trustees before the suit was instituted, and *Brearcliff v.*

Dorrington (4 De G. & Sm. 122) proves, that in such a case the order in which the stop orders are obtained does not affect the prior incumbrancer, who had given due notice of his security." See also *In re Atkinson*, 2 De G. Mac. & G. 140. In *Day v. Day*, 1 De G. & J. 144, Mr. Tucker, the solicitor of the plaintiffs in an administration suit, assigned his costs as a security for a debt. Notice of this assignment was given to the plaintiffs and to the executors of the testator in the cause. In August, an order was made on further directions for payment to Tucker of the plaintiffs' costs out of the funds brought and to be brought into Court, after satisfying certain prior demands. In October, Tucker became a bankrupt. The fund in Court, at the times of the order on further directions and of the bankruptcy, was insufficient to pay the charges prior to Tucker's costs, but in January following a fund was brought in by the executors applicable to the payment of those costs. No stop order was ever obtained by the assignee of the costs. It was held by the Lords Justices, reversing the decision of Sir J. Romilly, M. R. (reported 3 Jur. N. S. 403), that this fund did not pass to the assignees in bankruptcy as having been within the order and disposition of the bankrupt with the consent of the true owner, but belonged to the assignee of the costs. "If,"

said Lord Justice *Knight Bruce, "the notices were given which [*809] I have supposed, all was done that could be done; for not only was there no fund in Court, but no order for payment of any costs had been made. I am of opinion that the petitioners were not bound to apply to the Court before the 4th of August, nor to know when the cause was heard for further directions, but that it was the duty of Tucker and the executors to see that an order was not made for disposing of the fund in derogation of their rights. In a sense, the fund may have been within the order and disposition of Tucker at the time of his bankruptcy, but was it so with the consent of the true owners? I am of opinion that it was not, for that they had omitted nothing which it was reasonably incumbent on them to do. I think, therefore, that, consistently with the cases which we followed in *Bartlett v. Bartlett* (1 De G. & J. 127), this case may be decided in favor of the petitioners, but on materials which were not before the Master of the Rolls."

Although in general, where a fund is in Court, a stop order should be obtained by the assignee to take it out of the order and disposition of the assignor (*Bartlett v. Bartlett*, 1 De G. & J. 127), notice to an executor of an assignment of a fund, part of his testator's estate, paid into Court in a suit for the administration of the estate, or under the "Trustee Relief Act," will be sufficient for that purpose without a stop order: *Thompson v. Tomkins*, 2 Drew. & Sm. 8. If indeed any subsequent incumbrancer gets a stop order before such notice is given, such stop order takes priority: Per Kindersley, V. C., in *Thompson v. Tomkins*, 2 Drew. & Sm. 20.

But the notice given to the executor is good for all portions of the

testator's estate, as against all persons becoming incumbrancers after such notice was given. *Ib.*

The only proper effect of a stop order, whether general or particular, is confined to the amount on which the order is founded, and does not extend further. Thus, in *Macleod v. Buchanan*, 33 Beav. 234, A. purchased of X. one-seventh part of a fund in Court, and obtained a general stop order on the whole fund. A. afterward purchased another one-seventh of Y., but obtained no further stop order. Y. subsequently mortgaged to B. for a pre-existing debt the one-seventh which he had already sold and assigned, and two years afterward B. obtained a stop order on Y.'s share. It was held by Sir John Romilly, M. R., whose order was on appeal affirmed by the Lords Justices (4 De G. Jo. & Sm. 265) that B. had priority over A. in respect of Y.'s share.

It was at one time supposed that a bankrupt's reversionary interest in a chose in action not falling into possession until after *his bankruptcy was exempt from the rule as to order and disposition. [*810] See *In re Rawbone's Bequest*, 3 K. & J. 300; and see *Ex parte Hulme*, 3 Sm. & Giff. 325. Such interests, however, have been held to be within the rule. Thus, in *Bartlett v. Bartlett*, 1 De G. & J. 127, a reversionary interest in a share of a fund in Court was assigned to Mr. Tucker, who obtained a common stop order. Tucker afterward mortgaged his interest in the fund to Miss Holmes (afterward Mrs. Money Penny), but no fresh stop order was obtained. Tucker became a bankrupt before the reversionary interest came into possession. It was held by the Lords Justices, reversing the decision of Sir J. Stuart, V. C. (reported 3 Sm. & Giff. 542), that the interest of Tucker passed to his assignees in bankruptcy free from the mortgage, as having been within his order and disposition at the time of his bankruptcy, with the consent of the true owner, and that this result was not prevented by the fact that Tucker had acted as the solicitor of Miss Holmes in the mortgage transaction, who relied on his doing what was necessary to make the security perfect, or by the fact that the original assignor knew of the mortgage. This case was followed by Sir W. Page Wood, V. C., on a rehearing of his own decision of *In re Rawbone's Trust*, 3 K. & J. 476, in which he had previously arrived at a different conclusion: *Ib.* 300. But see *Grainge v. Warner*, 13 W. R. (V. C. S.) 833. Such interest does not now come within the order and disposition clause of the Bankruptcy Act, 1869, sect. 15, art. 5; see ante, pp. 803, 804.

Where funds assigned are affected by successive trusts, the assignee ought to give notice of the assignment to the trustees having the control of the funds: see *Bridge v. Beadon*, 3 L. R. Eq. 664; there it was held that the priority of assignments of the equitable interest in personal estate settled upon such trusts as a person should appoint, and appointed by such person to trustees in trust for the assignor, depended upon priority of notice to the trustees of the original settlement, so long as the

trust estate was under their control; consequently that a mortgagee of such interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees under the original settlement, was postponed to a subsequent mortgagee without notice of the prior mortgage, who gave notice to both sets of trustees.

Where stock standing in the names of trustees has been given as a specific legacy, and no assent has been given to it by the executor, notice to one of the trustees, not being an executor, is not sufficient to vest in [*811] the parties claiming by assignment from the legatee *that equitable possession of the fund which is required in order to postpone a subsequent incumbrancer, who has taken the precaution of giving such notice to the executor: *Holt v. Dewell*, 4 Hare, 447.

Where two charges on a chose in action are contained in one deed, and a notice is given to the trustees which specifies one only, the trustees have not constructive notice of the contents of the deed, so that notice of both the charges is to be imputed to them; *Re Bright's Trusts*, 21 Beav. 430.

The doctrine of notice applicable in determining the priority of purchasers, or incumbrancers of choses in action, does not prevail as to equitable estates or interests in land, whether freehold or leasehold: see *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; *Peacock v. Burt*, Coote on Mortgages, 693; *Lee v. Howlett*, 2 K. & J. 531; and see *Wiltshire v. Rabbits*, 14 Sim. 76. There a testator bequeathed a leasehold estate to trustees, upon trust, as therein mentioned; and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate. The daughter afterward mortgaged her annuity, first to A., and afterward to B., but B. gave the trustees notice of his mortgage before A. did. It was held, by Sir L. Shadwell, V. C., that the annuity was not a chose in action, but a chattel interest, and that B. had not gained any priority over A.

The registration of an assignment of a legacy charged upon land is unnecessary, and will not postpone a prior unregistered assignment of the same legacy: *Malcolm v. Charlesworth*, 1 Kee. 63.

Where, however, a person is entitled to moneys to arise from the sale of real estate (*Lee v. Howlett*, 2 K. & J. 531; *Foster v. Cockerell*, 3 C. & F. 456), or to a portion to be raised by trustees out of real estate by sale, mortgage, or otherwise (*Re Hughes' Trust*, 2 Hem. & Mill. 89), such person is not considered to have an interest in land, and the assignees of such moneys, in order to retain priority over subsequent assignees for value, must give notice to the trustees, and previous to the Bankruptcy Act, 1869, they were also required to give such notice, to prevent the application of the doctrine of reputed ownership.

Assignee of a Chose in Action takes it subject to Equities.—The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor. Thus, in *Turton v.*

Benson, 1 P. Wms. 496, where a son on his marriage was to have 3000*l.* portion with his wife, and privately, without notice to his parents, who *treated for the marriage, gave a bond to the wife's father to [*812] pay back 1000*l.* of the portion seven years after, and the bond was afterward assigned for the benefit of creditors, it was held, by Sir Joseph Jekyll, M. R., and on appeal, by Lord Macclesfield, that the bond being void in equity, it would not be made better by the assignment. See *S. C.*, 2 Vern. 764; *Coles v. Jones*, 2 Vern. 692; *Davies v. Austen*, 1 Ves. jun. 247; *Hamil v. Stokes*, 4 Price, 161; *Priddy v. Rose*, 3 Mer. 86; *Molloy v. French*, 13 Ir. Eq. Rep. 261; *Dibbs v. Goren*, 11 Beav. 483; *Houlditch v. Wallace*, 5 C. & F. 629; *Ward v. Ward*, 4 Ir. Ch. Rep. 215, 220; *Cockell v. Taylor*, 15 Beav. 103; *Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & Jo. 294; *Graham v. Johnson*, 8 L. R. Eq. 36.

So, an assignee of a company's debenture takes subject to all equities subsisting between the assignor and the company at the date of the assignment. Thus a shareholder of a company, after it has commenced to be wound up, can only assign a debenture of the company subject to a right of set-off by the Company of all calls which may be made subsequently to the assignment and previously to the payment of the debt due on the debenture. *In re China Steamship Company, Ex parte Mackenzie*, 7 L. R. Eq. 240; *In re Natal Investment Company*, 3 L. R. Ch. App. 355.

So, if a man assigns over a satisfied bond as a security for a just debt, the assignee could not set up the bond in equity, which, being satisfied before, could receive no new force from the assignment: *Turton v. Benson*, 1 P. Wms. 497.

And if a creditor assigns over a debt which has been partially satisfied, the assignee, although without notice, will take subject to the state of accounts at the date of the assignment (*Ord v. White*, 3 Beav. 357; *Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520); and if the assignee does not give notice of the assignment to the debtor, he will be obliged to allow the payments which the debtor subsequently makes to the creditor. *Norrish v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 De G. M. & G. 11.

So, if an executor assign his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore, if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust: *Morris v. Livie*, 1 Y. & C. C. C. 380; *Barnett v. Sheffield*, 1 De G. Mac. & G. 371; *Irby v. Irby*, 25 Beav. 632; *Wilkins v. Sibley*, 4 Giff. 442.

*Upon the same principle an assignee of money to arise under a contract will only be entitled to it subject to the conditions of [*818] the contract: see *Tooth v. Hallett*, 4 L. R. Ch. App. 242; there a builder

assigned to Tooth 200*l.* of what should be coming to him under a building contract with Hallett and Abbey. The contract provided that the building should be finished by a certain day, and if not, that Hallett and Abbey might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterward the builder executed a creditors' deed. The trustee of this deed, Mr. Woollett, completed the building with his own money, and was repaid by Hallett and Abbey. Allowing this repayment as proper, nothing remained due on the contract. Tooth then filed his bill to enforce payment of the 200*l.* It was held by the Lords Justices, affirming the decision of Sir R. Malins, V. C., that the payments by Woollett, the trustee, were proper, and that the bill ought to be dismissed with costs. "Under the circumstances which existed," said Lord Justice Gifford, "nothing at all could be coming to the assignor from the contract. It is not, I think, carrying the principle of the cases of *Myers v. United Guarantee and Light Assurance Company* (7 D. M. & G. 112), and *Bristow v. Whitmore* (9 Ho. Lo. Ca. 391), too far to apply it to the present case."

When a trustee or executor receives notice that a legatee has charged his legacy in favor of a stranger, the trustee is bound to withhold all further payments to that legatee, unless made with the consent of the mortgagee of the legacy (*Stephens v. Venables*, 30 Beav. 627).

All rights of set-off and adjustment of equities between the legatee and the executor already existing at the date of the notice have priority over the charge, and may properly be deducted from the amount coming to the mortgagee; but the trustees can create no new charge or right of set-off after that time (*Ib.*); and see *Willes v. Greenhill*, 29 Beav. 376; *Cavendish v. Geaves*, 24 Beav. 163, 173.

In *Moore v. Jervis*, 2 Coll. 60, T. being under a will trustee of 800*l.* for two persons, in moieties, leaves that sum outstanding, on the promissory note of J.; the note is payable to T. only, and not to T. or order. In 1839, T., becoming embarrassed, indorses the note to his banker, M. (who is also the banker of J.), as a security for advances, M. having no notice of the trust. In 1840 T. becomes beneficially entitled to one moiety of the 800*l.* In 1841 J. becomes a creditor of T. for goods sold, and claims set-off against the note. On the 7th April, 1842, J. has notice, through *his agent, of the indorsement of the note to M. In July, 1842, [*814] T. becomes bankrupt. It was held by Sir J. L. Knight Bruce, V. C., first, that as to the moiety of the 800*l.* which was held by T. in trust, the trust must prevail against the banker's security; secondly, that as to the other moiety, the set-off of J. must prevail against the banker's security up to the 7th of April, 1842; thirdly, that, subject to the trusts and the set-off, M. had a lien on the moneys of J. in his hands, which would operate pro tanto in discharge of the debt secured by the promissory note, and so assigned to M.

But although the rule generally holds good, that whoever takes an

assignment of a chose in action takes it subject to all its equities, it has been held that the rule must yield where a contrary intention appears from the nature or in the terms of the contract. *In re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *In re Blakely Ordnance Company*, 3 L. R. Ch. App. 154.

Nevertheless, any person may release those equities who is entitled to the benefit of them, and he may do so, either positively, by words in writing, or by the whole course of his conduct: *In re Northern Assam Tea Company*, 10 L. R. Eq. 458, 463; *In re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Higgs v. The Northern Assam Tea Company*, 4 L. R. Ex. 387; *In re General Estates Company, Ex parte City Bank*, 3 L. R. Ch. App. 758; *In re Blakely Ordnance Company*, 3 L. R. Ch. App. 154.

And parties entitled to equities may lose their right to enforce them against the assignee, by neglecting to give him timely notice of any fact to which they have been accessory, tending to mislead him as to the real interest of the assignor: see *Mangles v. Dixon*, 1 Mac. & G. 437; 1 Hall & T. 542, which case, however, was reversed by the House of Lords, 3 H. L. Cas. 702.

An exception to the rule also occurs in the case of negotiable instruments, as promissory notes (*In re General Estates Company, Ex parte City Bank*, 3 L. R. Ch. App. 758), an indorsed bill of lading (*Rodger v. The Comptoir d'Escompte de Paris*, 2 L. R. P. C. 405), or bills of exchange. Thus, in an anonymous case, Com. Rep. 43; 2 Eq. Ca. Abr. 85, pl. 3, it was held by Lord Keeper Somers, that a drawer of a bill of exchange, though given without consideration, was not entitled to relief against a third person, to whom it was assigned for an honest debt; the Lord Keeper observing, that he would not give relief, "because it would tend to destroy trade, which is carried on everywhere by means of bills of exchange, and he would not lessen an honest creditor's security."

Although a bond may be given *with the intention that it is to be used as a negotiable instrument, an assignee, for value of such [*815] bond, will take it subject to all its equities, if such intention do not appear upon the face of the bond: *Graham v. Johnson*, 8 L. R. Eq. 36.

The indorsee of an overdue bill of exchange or note takes it subject to all equities attaching to the bill or note itself: see *Holmes v. Kidd*, 3 H. & N. 891; there the acceptor had accepted a bill of 300*l.*, depositing with the drawer certain canvas, which he was to be at liberty to sell as the means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterward the canvas was sold by the drawer, but did not wholly pay the bill. The question was whether the indorsee could recover. Mr. Justice Erle said: "The question is, whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency."

So, in *Cook v. Lister*, 13 C. B. (N. S.), 543, it was decided that the actual payment of an accommodation bill was an equity attaching to the bill itself, and therefore a good defence to an action against the acceptor. See also the recent case of *In re European Bank*, 5 L. R. Ch. App. 358. There, D. Pappa, the manager of the Oriental Commercial Bank, abstracted moneys of the bank, and bought with them, on the 21st March, 1867, certain overdue bills of exchange. On the 4th of April, 1867, the Eastern Commercial Bank, promoted by D. Pappa, was registered, of which, till July in that year, D. Pappa was the sole director. On the 6th of April, 1867, D. Pappa sold these bills to the Eastern Commercial Bank, and paid himself for them out of their funds. The Eastern Commercial Bank were still the holders. The bills having been proved against the European Bank, on which they were drawn, it was held by Lord Justice Giffard, first, that the Eastern Commercial Company were not affected with notice of the title of the Oriental Commercial Bank through the knowledge of D. Pappa, inasmuch as he could not be taken to have disclosed to that bank his own fraud; secondly, that the claim of the Oriental Commercial Bank to the bills, as having been purchased with their money, was an equity attaching to the bills; that the Eastern Commercial Bank, having purchased them when overdue, took subject to this equity, and that the Oriental Commercial Bank was entitled to the benefit of the proof. "The want of notice," said his Lordship, "is [*816] not conclusive in this case. The bills were overdue when the Eastern Commercial Bank took them, there were equities affecting the bills, and the Eastern Commercial Bank has no better title, either legal or equitable, than D. Pappa had. The law on this subject cannot be better stated than is done by Vice-Chancellor Malins in his judgment in *Ex parte Swan*, 6 L. R. Eq. 359, 360."

But equities to affect an indorsee of an overdue bill must be such as attach to the bill itself, and not claims arising out of collateral matters, such as the statutory right of set-off: *Sturtevant v. Ford*, 4 Man. & G. 101; *Oulds v. Harrison*, 10 Ex. 572; *Burrough v. Moss*, 10 B. & C. 558; and the important decision of Sir R. Malins, V. C., in *re Overend, Gurney & Co.*, *Ex parte Swan*, 6 L. R. Eq. 344.

Where a person receives a bill of exchange unindorsed (though for value) he acquires no better title under it than the person from whom he receives it himself has. Thus where A. had fraudulently obtained a bill or check, payable to order, from B., and handed it to C. in satisfaction of a bona fide debt, but without indorsing it, it was held by the Court of Common Pleas that C. could not acquire a legal title to sue upon the instrument by obtaining A.'s indorsement after he had notice of the fraud: *Whistler v. Forster*, 14 C. B. (N. S.) 248.

It seems that as bonds are within the equity of the statute 5 & 6 Will. 4, c. 41, which makes securities valid in the hands of bona fide holders without notice of a gambling debt, the obligor will not be able to object

to a bond assigned for valuable consideration without notice, that it was given to secure money lost by a wager on a horse-race: *Hawker v. Hallewell*, 3 Sm. & Giff. 194.

In equity, the transfer of goods for valuable consideration, by a consignee, for a limited purpose, does not destroy the consignor's right of stoppage in transitu, ultra the particular lien of the transferee. Thus, in *Spalding v. Ruding*, 6 Beav. 376, A. consigned goods to the value of 1800*l.* to B., who transferred the bill of lading to C. to secure 1000*l.* B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title, to stop in transitu, a right to retain the whole, in satisfaction of a general balance due to him from B. It was held by Lord Langdale, M. R., first, that he was not entitled beyond the 1000*l.*; and, secondly, that A.'s remedy against C. for the surplus was in equity. See *S. C.*, affirmed by Lord Lyndhurst, 15 L. J. Ch. 374; *Berndtson v. Strang*, 4 L. R. Eq. 481; and *Meyerstein v. Barber*, 2 L. R. C. P. 38, 53; 2 L. R. C. P. (Ex. C.) 661.

*And the lien of a solicitor for his costs in a fund recovered [*817] by his exertions, cannot be affected by an assignment of the fund made by the client, nor by a stop order obtained by the assignee: *Haymes v. Cooper*, 33 Beav. 431.

Assignments contrary to Public Policy.—As in the case of agreements, a Court of equity, upon the ground of public policy, will not give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of its duties. Thus the half-pay or full-pay of an officer in the army (*Stone v. Lidderdale*, 9 Anst. 533; *M'Carthy v. Goold*, 1 Ball & B. 389; *Collyer v. Falton*, T. & R. 459, 474; *Priddy v. Rose*, 3 Mer. 102); the salary of an assistant parliamentary counsel for the Treasury (*Cooper v. Reilly*, 2 Sim. 560); and of a clerk of the peace (*Palmer v. Bate*, 6 Moore, 28; 2 Brod. & Bing. 673), have been held not assignable. See also *Hill v. Paul*, 8 C. & F. 295; and the assignment by a retired military officer of his pension, though for valuable consideration, is void, under 47 Geo. 3, c. 25 (*Lloyd v. Cheetham*, 3 Giff. 171); but that Act does not apply to a pension granted by the late East India Company; *Heald v. Hay*, 3 Giff. 467; *Carew v. Cooper*, 4 Giff. 619; 12 W. R. 586, where the Lords Justices differed in opinion. So the pension of a retired officer of the Indian navy for past services has been held liable to sequestration: *Dent v. Dent*, 1 L. R. P. & D. 366. And a pension of a retired officer of the army in consideration of wounds seems to have been held to be assignable: *Knight v. Bulkeley*, 27 L. J. N. S., Ch. 592.

Upon the same principle, the salary of a judge, given to him for the support of the dignity of his office, would not be assignable. This seems to have been taken for granted in the case of *Arbuthnot v. Norton*, 5



Moore, P. C. C. 219, which case, however, was held not to fall within the principles before laid down. There Sir John Norton, a puisne judge of the Supreme Court at Madras, assigned a sum "equal to the amount of six months' salary," directed by 6 Geo. 4, c. 85, to be paid to the "legal personal representatives" of such judge, in case he shall die in and after six months' possession of office. It was held by the Judicial Committee of the Privy Council, that the assignment was valid, not being within the 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126. "In giving this opinion," said Dr. Lushington, P. C., "we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public [*818] offices; *on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of those principles; and we think so, because this is not a sum of money which, at any time during the lifetime of Sir John Norton, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with decorum and propriety the high rank of life in which he was placed in India. We do not see that any of the evils, which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his lifetime his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were."

In *Davis v. Duke of Marlborough*, 1 Swanst. 74, it was held by Lord Eldon, that the pension granted by 5 Ann, c. 4, "for the more honorable support of the dignities" of the Duke of Marlborough and his posterity, payable out of the revenues of the Post-office, was inalienable. "In that case," observes Lord Langdale, M. R., in *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 550, "the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost; and so, in the course of that case, Lord Eldon said, in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office."

In the principal case of *Row v. Dawson*, Lord Hardwicke entertained jurisdiction on the ground that the officer admitted the money to be in his hands for the use of the person under whom the litigating parties made their claim: *Priddy v. Rose*, 3Mer. 103.

But, where no particular services are to be rendered to the public, an assignment of an interest or pension, though derived from the Crown or the public, will be supported. Thus, in *Alexander v. The Duke of Wellington*, 2 Russ. & My. 35, it was held, that prize-money was assignable in equity before any interest had vested by grant from the Crown.

And in *Tunstall v. Boothby*, 10 Sim. 542, a pension granted by Government, in compensation for the loss of a place in the Customs, was held assignable. In *Feistel v. King's College, Cambridge*, 10 Beav. 491, Lord Langdale held, that an assignment of the emoluments of a fellow of a college in the university was valid, and gave effect to the security thereon, out of the *dividends apportioned to such fellow, from time to time, in [*819] respect of his fellowship. Sir. L. Shadwell, V. C., seems, however, to have come to a different conclusion in *Berkeley v. King's College*, cited 10 Beav. 499. In *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544, a canon of Windsor granted the canonry profits and emoluments thereof to secure a sum of money. There was no cure of souls, and the only duties were residence within the Castle, and attendance in the chapel, twenty-one days in the year. Lord Langdale, M. R., held that the security was valid, and appointed a receiver of the profits. "If," said his Lordship, "in this case the residence in Windsor Castle, and the attendance on divine service, had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the sovereign, for the benefit of the public, I should have thought the case worthy of a very different consideration. But from all which is stated in this answer, that is not the case: it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying that there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiffs is valid." It appears that, in *Butcher v. Musgrove*, 2 Beav. 550, n., being an action by another mortgagee, the Court of Common Pleas, on the 23d June, 1840, decided that an action of ejectment would not lie for the canonry in question, it being a mere office of which the sheriff could not give possession; and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared to be vested in the Corporation, and not in the canon.

It may be here mentioned that under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 134, a portion of the pay, half-pay, salary or pension, of a bankrupt was applicable for his creditors. This Act has been repealed by 32 & 33 Vict. c. 83; and somewhat similar provisions have been re-enacted in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, ss. 89, 90). See Robson on Bankruptcy, 332, 333, 334, 335.

Courts of equity will not give effect to assignments which partake of the nature of champerty or maintenance. Thus, in *Stevens v. Bagwell*, 15 Ves. 139, one-fifth part of the share of prize-money, the subject of a suit then depending in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to Navy agents, in consideration of their indemnifying them from all costs on account of any suit touching the said prize-money, and paying to them the remaining four-fifths, if it

should be *recovered; it was held by Sir W. Grant, M. R., that [*820] the assignment was void, as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; and see *Skapholme v. Hart*, Ca. t. Finch, 447; *Strachan v. Brander*, 1 Eden, 303; *Wood v. Downes*, 18 Ves. 120, 123; *Stone v. Yea*, Jac. 426; *Bayly v. Tyrrell*, 2 Ball & B. 362; *Conry v. Caulfield*, 2 Ball & B. 268; and see *Earle v. Hopwood*, 9 C. B. (N. S.) 566.

And the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity: *De Hoghton v. Money*, 2 L. R. Ch. App. 164; 1 L. R. Eq. 154.

So, the assignment of a *bare right* to file a bill in equity for a fraud committed upon the assignor, will be held void, as contrary to public policy, and as savoring of maintenance; see *Prosser v. Edmonds*, 1 Y. & C. Exch. Ca. 481, and the elaborate judgment of Lord Abinger, C. B., in which he fully examines the doctrine and its policy. "What," said his Lordship, "is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but that of all countries (see Voet. Comm. ad Pandect. lib. 41, tit. 1, s. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice;" and see *Powell v. Knowler*, 2 Atk. 226; *Kenney v. Browne*, 3 Ridg. P. C. 462, 498, 501; *Bayly v. Tyrrell*, 2 Ball. & B. 363; *Stanley v. Jones*, 7 Bing. 369; *Sprye v. Porter*, 7 Ell. & B. 58; *Twiss v. Noblett*, 4 I. R. Eq. 64; and it has been decided in the United States, that a mere right of action for a tort is not, for the like reason, assignable: *Gardner v. Adams*, 12 Wend. R. 297.

But the purchase of an interest *pendente lite* (*Williams v. Protheroe*, 5 Bing. 309; 3 Y. & J. 129; *Wood v. Griffith*, 1 Swanst. 56; *Knight v. Bowyer*, 2 De G. & Jo. 421, 445); or a mortgage *pendente lite* (*Cockell v. Taylor*, 15 Beav. 103, 117); or the advance of money for carrying on a suit, even though there be a covenant to indemnify the assignor against [*821] *past and future costs of a suit and proceedings, if the parties have a common interest (*Hunter v. Daniel*, 4 Hare, 420, and the remarks of Sir J. Wigram, V. C., disapproving of *Harrington v. Long*, 2 My. & K. 590; and see *Wallis v. The Duke of Portland*, 3 Ves. 503); or if there exists between the parties the relationship of father and son, or heir-apparent (*Burke v. Greene*, 2 Ball & B. 521; and see *Moore v. Fisher*, 7 Sim. 384), or master and servant (*Wallis v. The Duke of Portland*, 3

Ves. 503), at any rate where the advance is made from wages in the hands of the master, or the master is in fear of losing the services of the servant through attachment or otherwise (Viner's Ab. Maintenance, K., Master for Servant), or it seems where the cause of action arose out of some ministerial act done in the character of a servant (*Elborough v. Ayres*, 10 L. R. Eq. 367, 371, 375), will not be considered as maintenance or champerty. See also *Wilson v. Short*, 6 Hare, 366; *Dickinson v. Burrell*, 35 Beav. 257; 14 W. R. (M. R.) 412.

A purchase by an attorney pendente lite of the subject-matter of the suit is invalid: *Simpson v. Lamb*, 7 Ell. & Bl. 84; and see *Hall v. Hallett*, 1 Cox, 134; *Wood v. Downes*, 18 Ves. 120.

An assignment, however, of the subject-matter of a suit pendente lite to an attorney by way of *security*, as for instance for payment of his costs, will be valid, although according to the authorities before cited a sale to him would have been void: *Anderson v. Radcliffe*, 6 Jur. N. S. 578; 28 L. J. (Q. B.) N. S. 32.

An assignment of a debt even to an attorney, *after* a judge's order for payment, but before the order is made a rule of Court, if there be no other objection to the transaction, *will* be valid, as not being within the mischief of the rule which prevents parties assigning property in a suit to an attorney while the proceedings are pending: *Smith v. Selwyn*, 5 W. R. 682 (Q. B.).

In *Hartley v. Russell*, 2 S. & S. 244, where a creditor who had instituted proceedings at law and in equity against his debtor, entered into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavors to assist in adjusting his accounts with the holder of the securities, and in recovering his securities, it was held by Sir J. Leach, V. C., that the agreement did not amount to champerty, but would have done so, if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to *be derived by [822] the debtor from the suit.

Although the suit of a person claiming under a title founded on champerty and maintenance will fail, a person who has originally a good title to sue will not lose it by having entered into a bargain savoring of champerty and maintenance with the solicitor he employs in the suit. See *Hilton v. Woods*, 4 L. R. Eq. 432. There the plaintiff agreed with Mr. Wright, a solicitor, to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings. It was held by Sir R. Malins, V. C., that although the contract amounted to champerty and maintenance, the plaintiff was not disqualified from suing the person in possession of the mines, because his title was anterior to the

illegal contract, but that if the solicitor had been the party suing, his bill would have been dismissed, inasmuch as he would have claimed through such contract. "I have," said his Honor, "carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit, or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff, suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill. This would have followed from the decisions in *Harrington v. Long*, 2 My. & K. 590; *Stanley v. Jones*, 7 Bing. 369; *Reynell v. Sprye*, 8 Hare, 222; 1 D. M. G. 660; *Sprye v. Porter*, 7 E. & B. 58; *Simpson v. Lamb*, Ib. 84; *Earle v. Hopwood*, 9 C. B. (N. S.) 566. I do not refer in detail to those cases, but some of them are cases in which the plaintiff sues by virtue of a title under a contract, which amounts to maintenance, and others, as in *Reynell v. Sprye*, are bills to set aside the contracts on the ground that they are tainted with that objection. In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into the improper bargain with Mr. Wright, and I cannot, therefore, hold him to be disqualified to sustain the suit. *But as any [*823] decree I may make for the defendant to pay costs would in effect go to exonerate Mr. Wright from the consequences of the improper contract he has entered into with the plaintiff, and would to that extent be for his benefit, the decree I shall give the plaintiff will be without costs."

Although by 33 & 34 Vict. c. 28 (the Attorneys' and Solicitors' Act, 1870), attorneys and solicitors may, under certain restrictions, make agreements with their clients as to remuneration in lieu of costs, the law as regards contracts void as between attorney and client for champerty or maintenance appears to be unaffected thereby. See Section 12, which enacts that, "Nothing in this act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding."

An agreement by an heir-at-law and devisee out of possession, where it is doubtful in which of them the right is vested, to recover the estate and divide it between them, is contrary to the policy of the law, as well as the

statute of 32 Hen. 8, c. 9 (repealed as to sect. 5, by the Statute Law Revision Act, 1863, 26 & 27 Vict. c. 125), against pretended titles. See *Lord Cholmondeley v. Clinton*, 4 Bligh, 1, 42, 45, 90, 123, where Lord Redesdale observed, that such persons are incompetent to make a bargain upon the subject affecting any person except the person in possession; that they are both competent to make a composition with him if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of the common law upon the subject of pretended titles by adding penalties: Sugd. Prop. 74.

Where a legatee too poor to sue assigned the legacy for less than it was worth to the plaintiff, who bought it for the purpose of enforcing payment by suit, it was held that this did not amount to champerty or maintenance: *Tyson v. Jackson*, 30 Beav. 384.

WHAT MAY BE ASSIGNED.—It is an axiom in jurisprudence that a grant can only pass what the grantor owns, and will fail if he has no right or title; see *Lunn v. Thornton*, 1 C. B. 379; *Rice v. Stone*, 1 Allen, 566. Hence a mere possibility cannot be granted, nor the expectancy of an heir; *Needles v. Needles*, 7 Ohio, N. S. 482; *Mitchell v. Winslow*, 2 Story, 630; *Skipper v. Stokes*, 42 Alabama, 255; *Rice v. Stone*, 1 Allen, 566, 569; *Moody v. Wright*, 13 Metcalf, 17; *Jones v. Richardson*, 10 Id. 481; *Bayler v. The Commonwealth*, 4 Wright, 37, 42; *infra*, 1606. At common law, the rule embraced rights which, though existing at the time, depended on a future and uncertain event and might never vest; *Lampet's Case*, 10 Coke, 46, a, 48, b. "First," says Lord Coke, "in this instance, was observed the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title

or thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppressions of the people, chiefly of terre tenants, and the subversion of the due and equal administration of justice. And as they cannot be granted by the act of the party, so a right of action shall not be transferred by act of law. * * * * But all rights, titles and actions may, by the wisdom and policy of the law, be released to the terre tenant, for the same reason of his repose and quiet and for avoiding contentions and suits;" see *D'Wolf v. Gardiner*, 9 Rhode Island, 145; *Jeffers v. Lampson*, 10 Ohio, N. S. 101; *Miller v. Emans*, 19 New York, 384.

In *Lampet's Case*, an estate for years was granted to one for life, with a limitation over on his death, and it was resolved that the executory devisee might release his interest to the first taker, but could not

have assigned it to a third person; *D'Wolf v. Gardiner*, 9 Rhode Isl. and, 145.

FUTURE AND CONTINGENT INTERESTS.—Agreeably to some of the authorities, when the right is not merely contingent but the person unascertained, it can neither be assigned nor released; *Lampet's Case*, 10 Coke, 51, a. Such a case may arise where there is a future gift or devise to the survivor or survivors of a class, and it cannot be known who will take until the time arrives; *Pelletreau v. Jackson*, 11 Wend. 110; 13 Id. 178. In *Pelletreau v. Jackson*, the land in controversy was devised to the testator's son, Joseph Eden, in fee, and other land, in fee, to his son, Medcef Eden. A subsequent clause provided that if either should die without issue, his share should go to the survivor. Here, the gift over to Medcef could not take effect unless he survived and Joseph left no children; and it was held to be a possibility which did not pass under a conveyance to which both were parties, although operating as a grant by one, and a release of the interest of the other. The weight of authority, nevertheless, is that "such a possibility not being a bare expectancy, but having a foundation and an original inception of right, may be released to the terre tenant, although it cannot be assigned to a stranger;" *Jeffers v. Lampson*, 10 Ohio, N. S. 101, 106; *D'Wolf v. Gardiner*, 9 Rhode Isl. and, 145; *Miller v. Emans*, 19 New York, 384.

It has notwithstanding been held that such possibilities, and even the

expectancy of one who has no present claim of any kind, may be assigned in equity; or rather that a court of equity will interpret such an assignment as a contract to convey when the estate or interest vests, which may be enforced specifically if shown to have been made in good faith, and for a valuable consideration; see *Bispham Eq. Jurisprudence*, 165; *Hobson v. Trevor*, 2 P. Williams, 191; *Bickley v. Newland*, Ib. 182; *Stover v. Ecclesheimer*, 46 Barb. 84; 4 Abbott's Appeal, 309; *Wright v. Wright*, 1 Vesey, 409; *Varick v. Edwards*, 1 Hoffman Ch. 282; 11 Paige, 290; 5 Denio, 664; *Nimmo v. Davis*, 7 Texas, 26; *Graham v. Henry*, 17 Id. 164; *M'Williams v. Nisly*, 2 S. & R. 518; *Bayler v. Commonwealth*, 4 Wright, 37. A sale of a son's interest in the estate of his father, during the life of the latter, and with his assent, was sustained on this ground in *Fitzgerald v. Vestal*, 4 Sneed, 25; and the cases of *Stover v. Ecclesheimer*, 46 Barb. 84; 4 Abbott's Appeal, 309, and *M'Donald v. M'Donald*, 5 Jones Eq. 21, are to the same effect.

In *Wilson's Estate*, 2 Barr, 325, a conveyance by a woman in contemplation of marriage, of all the estate which she then had or should thereafter acquire, for her separate use during life, and after her death to her children, was held to confer an equitable title to property which was subsequently bequeathed to her by an uncle. Gibson, C. J., said: "The settlement was executed in the lifetime of the testator, and consequently before any title had vested in her; whence an argument

that the settlement was inoperative. It is certain that though a contingent limitation by will after the death of the testator, or by deed, is a legitimate subject of grant, even at law, yet the hope or expectation of succeeding to the property of another by descent or devise, is not so. But it is equally certain that such an interest may be bound by a settlement in equity. The point is settled by *Beckley v. Newman*, and *Hobson v. Trevor*, 2 P. Williams, 181, as well as by other cases in which the doctrine was assumed. Indeed, it is no more than the familiar principle, that he who executes a conveyance on valuable consideration purporting to pass a title before it is in him, will be bound to make it good whenever he acquires it." This doctrine was recognized in *Bayler v. The Commonwealth*, 4 Wright, 37; but it was at the same time held that a chancellor will not intervene, unless the grantee is a purchaser for value, and consequently not where the instrument in question is a mortgage for the antecedent debt of a third person.

The burden is on the complainant to show that such was the intent; and when the grantor has a present interest which passes by the conveyance, it will not be supposed that he meant to transfer one which did not vest until a subsequent period, unless such is the plain import of the instrument: see *Varick v. Edwards*, 1 Hoffman Ch. 282; 11 Paige, 290; 5 Denio, 665; *ante*, vol. 1, 829; where the Court of Errors would seem to have gone on this ground in overruling the decree of the chancellor.

There is a manifest difference between a right which, though contingent, depends on a deed or contract, and must vest if the event happens on which it is conditioned, and a mere hope or anticipation of receiving that to which the grantor has no right, and which may be withheld from him at pleasure; see *Field v. The Mayor of New York*, 2 Selden, 179. It has accordingly been held in some instances, that one cannot transfer land which belongs to another, although he hopes to inherit it at his decease. Such an anticipation does not partake of the nature of property, and is too vague and uncertain to be the subject of a contract; *Needles v. Needles*, 7 Ohio, N. S. 432; *Robinson v. Robinson*, Brayton (Vt.), 59. An opposite view was taken in *Stover v. Ecclesheimer*, 46 Barbour, 84; 4 Abb. App. Dec. 309; on grounds which do not appear satisfactory.

When such an assignment is sanctioned by the father, it may be regarded as a stipulation on his part, that what he leaves to the child shall pass to the purchaser, and be specifically enforced after his decease; *Fitzgerald v. Vestal*, 4 Sneed, 200; *ante*, vol. 1, 828.

In *Needles v. Needles* the court held the following language in giving judgment:—"It has been said that where the wife hath any right or duty which by possibility may happen during the coverture, the husband may, by release, discharge it; Sheppard's Touchstone, 151. It is true, as a general thing, that a contingent and executory interest, and contingent estates of inheritance, as well as springing and executory

uses and possibilities coupled with an interest, are assignable and releasable. But it is also a general rule that a naked or remote possibility cannot be released, for the reason that a release must be founded on a right in being, vested or contingent; 8 Bacon's Ab. 280; *Pelletreau v. Jackson*, 11 Wend. 110. Where there is a present existing right, although to take effect in future, and even then only on a contingency, it may be released; 9 John. Rep. 123. But in case of a mere possibility, or a remote possibility, which is termed in law a possibility on a possibility (4 Kent. Com. 206), there is no right in being which can be the subject of release.

"The word possibility," says Smith on Real and Personal Property, 'has a general sense in which it includes even executory interests which are the objects of limitation. But in its more specific sense it is that kind of contingent benefit which is neither the object of a limitation like an executory interest, nor is founded in any lost but recoverable seizin, like a right of entry. And what is termed a bare or mere possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir apparent or presumptive has of succeeding to the ancestor's estate;' Smith on Real and Personal Property, 192. And it appears to be well settled that a person unascertained, or a mere possibility, as distinguished from a

contingent interest in a person who is ascertained, or the mere hope or chance of succession of an heir apparent, cannot be released; *Shepard's Touch*. 322 and 328. It is manifest, therefore, that at the time of the execution of the instruments in question, there was no right or interest in being which could have been the subject-matter of release. But it is said, that although such a release or assignment of the mere possibilities or expectancies of heirs apparent is wholly invalid at law, yet that a court of equity will regard it and give effect to it as a contract to release when the interest becomes vested, and consequently that when the interest does so become vested, the claim of the releasee will be enforced, not, indeed, as a trust, but as a right under a contract. Or, in other words, that the hope or chance of succession would be barred by estoppel. It might be a sufficient answer to this to say that no claim is set up in this proceeding, on behalf of either of the husbands, to any interest in his wife's inheritance from her father's estate; and that the instruments in question, if regarded in equity as contracts to be enforced, must be treated as the contract solely of each of the husbands, and as creating no estoppel against the wife. But for my own part, I feel no hesitation in questioning the validity of such a contract. What is the real character of the contract before us? Philemon Needles, in his lifetime, made certain advancements to four of his daughters, and took from the husband of each a receipt for the amount ad-

vanced, in which the husband acknowledged the same 'to be in full of all claims he could have against the estate of said Philemon Needles, after his death, as one of his heirs,' and stipulating for himself and his heirs, 'not to set up any further claim.' Where is the mutuality, either of consideration or of obligation, for this agreement? The advancement was a voluntary act, and whether Philemon Needles should thereafter give any more of his property to these children depended on his own pleasure. He could, by his will, so distribute his property as to wholly deprive them of any further share in his estate, or he could, as he actually did subsequently choose to do, in the distribution of his property by will, give them a further share in his estate. The stipulation only conceded to Philemon Needles that which was an inherent legal right of his own in the disposition of his own property. The real nature of the contract was such as to impose no binding legal obligation. If Philemon Needles chose afterward to make further donations to these children, this contract could not prevent their accepting it; and if he was disposed to give all the residue of his property to others, he had the legal right and full power so to do without any such agreement."

The presumption in this case was that the parent refrained from making a will, and suffered the estate to descend in consequence of the agreement with his sons-in-law, and they could not therefore conscientiously claim any interest in the estate after he had been removed by death.

But the court would seem to have thought that the daughters were not parties to the contract, and could not be estopped by reason of their coverture.

A right of entry for condition broken is not assignable at law or in equity; but this rule does not apply after entry, nor to conditions in absolute avoidance of estates for years; *Warner v. Bennett*, 31 Conn. 468; *Southard v. The Central R. R. Co.*, 2 Dutcher, 13; *M'Mahon v. Allen*, 34 Barb. 56; *Gwyne v. Jones*, 2 Gill. & John. 81, 173; 1 Smith's Lead. Cases, 127, 7 Am. ed.

AFTER-ACQUIRED PROPERTY.—

A right which did not exist, or was not vested at the time of the grant, might pass at common law by the force of an estoppel. Thus, where Cartwright demised land not his own to Weston for six years, and Rawlins, who owned the land, demised it to Cartwright for twenty-one years, and Cartwright re-demised it to Rawlins for ten years, it was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion, and that when Rawlins demised to him, his interest was bound by the conclusion, and when Cartwright re-demised to Rawlins then was Rawlins bound also; *Rawlins' Case*, 4 Coke, 53; *Doe v. Oliver*, 5 M. & R. 202.

It was determined, on like grounds, in *Doe v. Oliver*, that where a contingent remainderman levied a fine, and the estate subsequently vested in him, the estoppel was fed by the accruing interest, and the conclusion not only bound the parties but passed the title as

against all the world. Agreeably to some of the American authorities, the title to land may also pass by the operation of a deed with warranty; *Dickerson v. Talbot*, 14 B. Monroe, 64; *Gough v. Bell*, 1 Zabriskie, 164; *Moore v. Rake*, 2 Dutcher, 574; *Vreeland v. Blauvelt*, 8 C. E. Green, 483; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 3 Barb. Ch. 567; *Tift v. Munson*, 63 Barb. 31, 38; see *Mark v. Willard*, 13 New Hamp. 389; *Jarvis v. Aikens*, 25 Vermont, 635; *Shotwell v. Harrison*, 22 Michigan, 410; *M'Osaker v. M'Evoy*, 9 Rhode Island, 528; but such a result is at variance with the policy of the recording acts, and has no sufficient foundation in the technical rules of the common law; see Rawle on Covenants for Title, 374, 4 ed.; 2 Smith's Lead. Cases, 691, 7 ed.; *Calder v. Chapman*, 2 P. F. Smith, 359. The true doctrine, as enunciated by Chief Justice Gibson in *Chew v. Barnett*, 11 S. & R. 389, is that a conveyance before the grantor has acquired the title, operates as an agreement to convey, which may be enforced in chancery between the parties and against purchasers with notice; see *M'Williams v. Nisby*, 2 S. & R. 389; *Bayler v. The Commonwealth*, 4 Wright, 37, 42; *Vreeland v. Blauvelt*, 8 C. E. Green, 483.

A contract for the sale or delivery of chattels which the vendor does not own, is valid, and may be made the foundation of an action for damages; *Hibblewhite v. M'Morine*, 5 M. & W. 462; *Mortimer v. M'Callan*, 6 Id. 58; *Stanton v. Small*, 3 Sandford, 230; *Head v.*

Goodwin, 37 Maine, 181; *Otis v. Sill*, 8 Barb. 102; but it will not take effect on the goods when subsequently acquired, or confer a title to them on the purchaser. If A. sells a ship in which he has no present interest to B., and afterward becomes the owner of it by gift or purchase, B. may maintain assumpsit against A., but not trover or replevin; see *Lunn v. Thornton*, 1 C. B. 379; *Jones v. Richardson*, 10 Metcalf, 481; *Potter v. Kellogg*, 7 Cushing, 456; *Head v. Goodwin*, 37 Maine, 181.

In *Lunn v. Thornton*, the plaintiff gave to defendant a bill of sale of all his chattels, household furniture and effects, then being, or which should at any time thereafter be, in his dwelling-house at Stratford, and the defendant in the month of October following seized all the goods on the premises, and among them certain goods which had been purchased and placed on the premises since the sale, and the court held that the right of property in them could not pass by the prior grant without some new act done with that intent by the grantor. Tindal, C. J., said:—

"It appeared at the trial that the plaintiff did, by a deed-poll, dated the 4th of August, 1843, in consideration of a sum of money lent and advanced to him by the defendant, 'bargain, sell, and deliver unto the defendant, all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other effects whatsoever, then remaining and being, or which should at any time thereafter remain and be, in,

upon, or about his dwelling-house at Stony-Stratford aforesaid, and also all other his effects elsewhere.' The goods in dispute were not goods 'remaining and being on the premises' at the time of the execution of the deed of bargain and sale, but were goods which had become the property of the plaintiff, and had also been brought upon the premises, subsequently to the execution of that instrument, and were remaining thereon at the time of the seizure under the bill of sale.

"Under these circumstances, it was contended by the defendant's counsel, that the bill of sale covered these goods, as being goods remaining and being in or upon the dwelling-house at the time of the seizure: and the question is, whether the property in these goods passed under this bill of sale. It is not a question whether a deed might not have been so framed as to have given the defendant *a power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt; but the question before us arises on a plea which puts in issue *the property* in the goods, and nothing else; and it amounts to this, whether, by law, a deed of bargain and sale of goods can pass the property in goods which are not in existence, or at all events are not belonging to the grantor, at the time of executing the deed.

"On the part of the plaintiff, the authorities were strong to show that no personal property could pass by grant, other than that which belonged to the grantor at the time of the execution of the deed. Per-

kins, tit. Grants, § 65, says: 'It is a common learning in the law, that a man cannot grant or charge that which he hath not.' So in Hobart's Reports, page 132, it is laid down, that 'a man cannot grant all the wool that shall grow upon his sheep *that he shall buy hereafter*; for, there he hath it neither actually nor potentially:' a distinction which seems to be adopted by Perkins, tit. Grants, § 90, that if a man grant all the wool of *his sheep* for seven years, the grant is good. By which is evidently intended, the wool of the sheep which the grantor at that time has. And, still further, the plaintiff relied on the authority of Bacon's Maxims, Reg. 14: '*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio procedens, quæ sortiatur effectum, interveniente novo actu.*' Upon which it is observed, that Lord Bacon takes the first branch of the maxim, namely, that a disposition of after-acquired property is altogether inoperative, as 'a proposition of law, that is to be considered as beyond dispute; and only labors to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired; for, he says: 'The law doth not allow of grants, except there be a foundation of interest in the grantor; for, the law will not accept of grants of titles, or of things in action, which are imperfect interests; much less will it allow a man to grant or encumber that which is no interest at all, but merely future.'

"The principal contention on the part of the defendant was, that the facts of this case brought it within the exception in Lord Bacon's rule; that the bringing of these goods on the premises of the plaintiff, where they were seized, at a time subsequent to the execution of the bill of sale, was the new act done by the plaintiff which gave the declaration contained in the previous bill of sale its effect. But to this it appears to be an answer, that the evidence at the trial is altogether silent upon the circumstances which accompanied the bringing of the goods on the premises; so that it is impossible to say whether it was the act of the plaintiff or not. And, further, the new act which Bacon relies upon, appears, in all the instances which he puts, to be an act done by the grantor for the avowed object, and with a view of carrying the former grant or disposition into effect. Lord Bacon's language is: 'There must be some new act or conveyance, to give life and vigor to the declaration precedent;' which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition. Thus, the instance put, that if there be a feoffment by a disseizee, and a letter of attorney to enter and make livery of seizin, and yet he had no other thing than a right at the time of the delivery of the charter; 'because,' as Lord Bacon says, 'a deed of feoffment is but a matter of declaration and

evidence, and there is a new act, which is the livery subsequent; therefore it is good in law.' So, if I covenant to purchase land, and to levy a fine to certain uses expressed in the indenture; this indenture to lead the uses, being but matter of declaration and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely, the fine (Bacon's Maxims, Regula. 14). The same observation arises as to the instance put (Ib.), of an authority given to J. S. to demise for years lands whereof I shall be afterward seized, and I purchase lands, and J. S., my attorney, doth afterward demise them; this is a good demise, because the demise by my attorney is a new act, and all one with a demise by myself.

"We think, therefore, this case is not brought within the exception to the fourteenth rule or maxim; there being no new act done by the grantor, indicating his intention that the goods should pass under the former bill of sale; but that the case falls under the general rule, and that no property in the goods passed to the defendant."

The law has been held the same way in numerous instances, which are conclusive of the question when arising in a court of law and on merely legal grounds; *Jones v. Richardson*, 10 Metcalf, 431; *Moody v. Wright*, 13 Id. 17, 32; *Barnard v. Eaton*, 2 Cushing, 294; *Hamilton v. Rogers*, 8 Maryland, 301; *Colkins v. Lockwood*, 16 Conn. 276; *Head v. Goodwin*, 37 Maine, 481; *Chapman v. Weiner*, 4 Ohio, N. S. 481; *Mogg*

v. *Baker*, 3 M. & W. 195; *Gale v. Burnell*, 7 Q. B. 850.

It is a necessary sequence from these decisions that a transfer of that which the grantor does not own, will be invalid as against a sale or levy made after he has acquired the title, or even against one who, like an assignee in bankruptcy, is a mere volunteer; see *Moody v. Wright*; *Hamilton v. Rogers*; *Calkins v. Lockwood*; *Potter v. Kellogg*, 7 Cushing, 456; and in the case last cited it was held to be immaterial, that the grantor has bought the goods which he attempts to convey, if the right of property has not passed under the sale; and a mortgage executed by a purchaser before the goods had been delivered or set apart, was consequently postponed to a levy made after he had acquired the legal title.

A potential ownership may nevertheless be the subject of a transfer, which will pass the right of property when it matures; *Macomber v. Parker*, 14 Pick. 497; *Jones v. Richardson*, 10 Metcalf, 481, 488. A sale by a tenant of the next year's crop is within this principle; see *Forman v. Proctor*, 9 B. Monroe, 124; *The Philada., W. & B. R. Co. v. Woelpper*, 17 P. F. Smith, 371; and so is a sale of the future increase of a flock of sheep, or of their wool; *Forman v. Proctor*; *M'Carty v. Blivins*, 5 Yerger, 195; *Petch v. Tutin*, 15 M. & W. 110. In *Petch v. Tutin*, a lessee for years assigned "all his live stock, hay and corn, as well in stack as then growing upon the farm," and also "all his tenant right and interest yet to come and unexpired in and

to the farm and premises," in trust, to sell the same, and apply the proceeds to the payment of an antecedent debt; and it was held that the tenant's interest in crops grown in future years of the term passed to the landlord by virtue of the assignment. The case of *Grantham v. Hawley*, Hobart, 132, was relied on as establishing that one who has an estate in land "may grant all fruits that may arise upon it after, and the property should pass as soon as the fruits are extant. As (21 Hen. 6, a), a parson may grant all the tithe wool he should have in such a year, yet perhaps he should have none. So, if a man grant *vesturam terræ*, the grantee shall have the corn, grass, underwood, sweepage and the like;" 1 Institutes, 4, b. Pollock, C. B., said, the distinction seems to be this: "The party cannot grant the next year's wool of sheep he has not got, but he may grant the next year's wool of the sheep he has got."

An assignment of the freight of a ship for an existing voyage, or for one on which she is about to depart, is within this rule, and may be the subject of an assignment that will be valid in equity and even at law; in *re Ship Warre*, 8 Price, 269; *Douglas v. Russell*, 4 Simons, 524; 1 Mylne & Keen, 488.

In *Mitchell v. Winslow*, 2 Story, 631, the authorities on this head were reviewed as follows by Mr. Justice Story: "In *re the Ship Warre*, 8 Price, 269, note, in reference to the doctrine of Lord Ellenborough in *Robinson v. Macdonnell*, 5 M. & Sel. 228, Lord Eldon said, that he should find it extremely

difficult to say that the freight of a future voyage might not become the subject of an equitable agreement as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid. Again, in *Curtis v. Auber*, 1 Jacob & Walker, 506, 512, where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said: 'In one case I think it was held, that although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces. But still it was a good equitable assignment and rendered the future earnings liable in equity.'

"The same doctrine was maintained by Mr. Vice Chancellor Shadwell in *Douglas v. Russell*, 4 Simons, 524; and his decree was afterward affirmed by the Lord Chancellor, 1 Mylne & Keen, 488, upon appeal, as to an assignment of freight earned and to be earned on an outward and homeward voyage, then about to be undertaken; and it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of *Leslie v. Guthrie*, 1 Bing., New Cases, 697, 708, 709, where the whole subject was argued at large, in a suit of the assignees under a bankruptcy.

"But the latest case, and certainly one of the most important and satisfactory in its reasoning, as well as

its conclusion, is that of *Langton v. Horton* (1 Hare. 549), before Mr. Vice Chancellor Wigram. There a deed of assignment by way of mortgage was made of a whale ship and her tackle and appurtenances, and all oil, and head matter, and other cargo which might be caught and brought home in the ship on and from her then present voyage; and the question arose between an execution creditor of the assignor, and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned Vice Chancellor decided that it was. Upon that occasion he said: 'Is it true then that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined on in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts when they are founded on valuable considerations,

and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements which shall be there at the time specified; and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted.' But it is not necessary that I should refer to such cases as these, for Lord Eldon, in the case of the ship *Warre*, 8 Price 269, and in *Curtis v. Auber*, 1 J. & W. 526, has decided all that is necessary to dispose of the present argument; and admitting that those cases are not specifically and in terms like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of 5000*l.* to pay the crew and furnish an outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a court of equity, upon a contract so framed, would

hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the assignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, which have been cited, throw any doubt upon the point, that *Birnie*, the contracting party, would be bound by the assignment to the plaintiffs."

It results from a like principle, that when goods which have been hypothecated or appropriated as a security for a debt, are converted by a sale, the lien will attach to the resulting fund, and may not only be enforced between the parties, but against one who, like an assignee in bankruptcy, is a volunteer; see *Fletcher v. Morey*, 2 Story, 555, 566; *Colyer v. Fallon*, 1 Turner & Russell, 469; *Legard v. Hedges*, 1 Vesey, Jr. 478. So a mortgage of the stock of a shopkeeper may cover goods which have been substituted for those held at the execution of the instrument; *Abbott v. Goodwin*, 20 Maine, 408.

It has also been held that the rolling stock of a railway company is potentially included in the franchise as essential to the use and enjoyment of the privilege conferred, and will consequently pass by a mortgage of the road, although acquired or manufactured subsequently to the execution of the

instrument; see *The Philada., W. & B. R. R. Co. v. Woelpper*, 14 P. F. Smith, 366; *Pierce v. Emery*, 39 New Hamp. 484; *Morrill v. Noyes*, 56 Maine, 458, 471; *The Farmers' Loan Company v. Hendrickson*, 25 Barb. 484; *Seymour v. The Railway Company*, Ib. 285, 303; *Philips v. Winslow*, 18 B. Monroe, 431; *Pennock v. Coe*, 23 Howard, 117.

In *Pennock v. Coe* such a mortgage was likened to an assignment of the future freight or cargo of a ship, while in *The Farmers' Loan Company v. Hendrickson* the locomotives, carriages, snow-plows, etc., of a railway company were declared to be as much fixtures as the rails or ties, and therefore incident to the fee. According to the latter view, the mortgagee has the legal title to subsequent acquisitions, and may enforce it against all the world; agreeably to the former, his title is equitable and will yield to that of a *bona fide* purchaser; see *The Philada., W. & B. R. R. Co. v. Woelpper*, 14 P. F. Smith, 366, 372; 2 Smith's Lead. Cases, 209, 214, 233; notes to *Elwes v. Mawe*, 7 Am. ed. The difference is a material one, and shows that the limits of the doctrine are not accurately defined.

There is no doubt that a ship on the stocks, a machine during the process of construction, and in general any chattel that is being made, may be the subject of an assignment that will pass the title to the completed thing, including the labor and materials that have been expended since the execution of the deed.

In *Macomber v. Parker*, 4 Pick.

497, it seems to have been held that one who is in possession of a brick-yard, with a right to use the clay for the manufacture of bricks, may pass the legal title to them by anticipation before they are actually made; but this is carrying the doctrine of potential ownership very far; see *Jones v. Richards*, 10 Metcalf, 481, 488.

It is well settled that, although one cannot dispose by anticipation of personal property which he does not own, he may give a power or license to seize such chattels as he may thereafter acquire answering to the description in the deed, which will be effectual when executed, and confer a title not only as between the parties, but against subsequent purchasers; *Congreve v. Evetts*, 10 Exchequer, 298. There the plaintiff assigned his growing crops of grain to the defendant by indenture, as a security for money lent, and it was declared that it should be lawful for the defendant to take possession of the crops thereby bargained and sold, and of all such crops as should or might from time to time be found on or about the farm. The court held that, although the deed was not so worded as to pass the title to future crops, still, when they were raised by the defendant, he was in the same position as if the debtor himself had delivered them to him, and might consequently appropriate them to the payment of the debt. Parke, B., said, in delivering judgment: "There are two questions in this case. The first, whether, supposing that Mr. Small, the debtor, had not become insolvent, the plain-

tiff had a good title to the growing crops as against the execution creditor. The second, whether his having become insolvent makes any difference.

"Under the bill of sale it was conceded on both sides, that, though the *then* growing crops passed on the execution of the deed, yet the future crops did not. As to those, the plaintiff was authorized to seize and take possession of all or any that might be substituted for those then existing, and to sell and dispose of them, and pay the costs, etc., and apply the residue in payment of the debt secured by the bill of sale. And under this power the plaintiff seized and took possession of the growing crops in question on the 21st of February, and the day after a writ of *fi. fa.* on the defendant's judgment, endorsed to levy 310*l.* 17*s.* 3*d.*, was delivered to the sheriff, who seized, and afterward sold them for 294*l.*, which came to the hands of the defendant.

"The plaintiff contended, that, having actually taken possession of the growing crops before the delivery of the writ, he was lawfully in possession of them, and could bring an action against any one for taking them, and that his title ought to prevail against that of the defendant. And we think that he was so entitled.

"If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed, not

fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect, *after actual possession* by the creditor, is the same."

To render the exercise of such a power valid, it must, nevertheless, take place while the right of property is in the grantor, and before it has gone from him to an assignee or purchaser. Although a power or license given in pursuance of a contract, or for value received, is irrevocable by the donor, it is necessarily limited in its effect to the interest which he has, or is able to convey, at the time when the power is executed; see *Hunt v. Rousmanier*, 8 Wheaton, 174; 2 American Lead. Cases, 550, ed. As between one claiming under an authority given by A. to enter and take possession before he was an owner, and one to whom he conveyed after he had acquired the title, the law is consequently with the latter. A power to seize and sell such goods as the debtor may subsequently acquire, and apply the proceeds to the payment of a debt, may therefore be defeated by a sale or assignment made after the acquisition of the title, and before the power is executed; *Carr v. Acraman*, 11 Exchequer, 566; *Moody v. Wright*, 13 Metcalf, 17.

If one who has sold goods which he does not own, delivers them after he acquires the title, there is obviously a new act on his part, which may operate as a ratification of the sale; *Chapman v. Weimer*, 4 Ohio, N. S. 48; and the principle is the same when the purchaser takes the goods under an express or implied authority from the vendor. Under these circumstances the contract and the possession taken under it are as much parts of one transaction as if both had occurred on the same day. In this aspect *Lunn v. Thornton* is not easily reconcilable with *Congreve v. Evetts*, because a mortgage of the implements and stock of a farm, or of the tools and machinery of a workshop, including all chattels of a like kind which may be subsequently acquired and brought on the premises, implies an authority to do all that may be requisite to render the security effectual, and consequently to enter and dispose of the goods, if the debt be not paid; see *Pratt v. Chase*, 40 Maine, 269; *Moody v. Wright*, 13 Metcalf, 17, 32. "A stipulation," said Dewey, J., in *Moody v. Wright*, "that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character, that the creditor with whom it is made may under it take the property into his possession when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any

alienation thereof, such creditor, under his executory agreement, may hold the same; but until such an act be done by him he has no title to the same; and that such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner in such case is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally."

It was held in like manner in *Rowan v. The Sharp's Rifle Manufacturing Co.*, 29 Conn. 283, "Where a mortgage of a factory and its equipments embraced in its terms such machinery and stock as should be thereafter purchased and placed upon the premises, and the mortgagee afterward took possession of the factory, with such subsequently acquired property, that, whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee." This decision was cited

and followed in *Walker v. Vaughn*, 33 Conn. 577.

Whatever the rule may be at law, it is clear that a sale or mortgage of that which is not owned at the time, may be treated in equity as a covenant to convey, and specifically enforced on the subsequent acquisition of the title by the grantor: *The Philadelphia, W. & B. R. R. Co. v. Woelpper*, 14 P. F. Smith, 366, 372; *Page v. Gardner*, 20 Missouri, 307; *Baxter v. Bush*, 3 Williams, 465, 469; *Seymour v. The Railway Co.*, 25 Barb. 285, 303; *Mitchell v. Winslow*, 2 Story, 631.

In the case last cited, the mortgagors, being engaged in the manufacture of cutlery, in 1839 borrowed of the mortgagee a sum of money, payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging, together with all the tools and machinery for the use of the said manufactory which they might at any time purchase for four years from date, and also all the stock which they might manufacture or purchase during the said four years.

In July, 1842, and subsequently to the commission of an act of bankruptcy on the part of the mortgagors, the mortgagee took possession of the property for a breach of the condition of the mortgage, including machinery, tools and stock in trade which had been made and purchased after the execution of the mortgage. The case came before the court upon a petition of the assignee in bankruptcy for an order

authorizing him to take possession of the mortgaged chattels, which was refused, on the ground that such a stipulation with regard to after-acquired property operated as an equitable mortgage, which would be enforced against volunteers, and any one who did not claim as a purchaser for value and without notice. Story, J., said, that it was established under "the authorities, that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

The course of decision is in accordance with this judgment; see *Seymour v. The Philada. W. & B. R. R. Co.*, 25 Barbour, 285; *Holroyd v. Marshall*, 10 House of Lords, 191. In the case last cited, the machinery of a mill was conveyed by Taylor in trust to secure a debt to Holroyd, and the deed contained a covenant that all the machinery which should be placed in the mill during the continuance of the trust should vest in the trustee, and be held for the same purposes. Taylor sold some of the old machinery and purchased new, and rendered an account of these sales and purchases to Holroyd, but possession was not claimed or taken by the latter, or on his behalf, until after the property had been levied on under a judgment against Tay-

lor. It was held, on appeal in the House of Lords, reversing the decision of the chancellor, that although there had been no *novus actus interveniens*, Holroyd's title was preferable to that of the execution creditor.

The Lord Chancellor said: "If the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed. But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence is as a conveyance void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterward becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract,

and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good, and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterward obtained.

'Applying these familiar principles to the present case, it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagee, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was trustee of the property in question."

In *Smithurst v. Edmunds*, 1 Carter, 408, the lessee of a hotel sold, assigned and transferred all the furniture on the premises to the lessor as a security for the rent; and covenanted and agreed to sell, assign and transfer all other articles of furniture which he should thereafter purchase and place therein, or cause to be purchased and placed on the demised premises

during the term ; it being declared to be the agreement and intention of the parties that when and so often as any additional furniture should be purchased and placed on the premises by the lessee, it should be deemed and considered as belonging to the lessor, as a collateral security ; and the lessee covenanted that said furniture, as well that then on the premises as that which should thereafter be placed there by him, should not be sold or disposed of, or removed from said premises, during the term, but should remain thereon as the property of the lessor. The lessee afterward purchased a large amount of furniture, which was placed in the hotel ; and it was held that the contract operated as an equitable mortgage of such after-acquired property, which would be enforced, and protected as against a subsequent execution creditor of the lessee.

When a court of equity is asked to enforce a transfer which does not pass the legal title, regard may be had to the nature of the transaction and the end in view, and the bill should be dismissed if the contract is unreasonable, and no good purpose will be served by carrying it into effect ; see *In re Ship Warre*, 8 Price, 273. In *Robinson v. Macdonald*, 5 M. & S. 223, the freight, earnings and profits of the ship Warre were assigned by deed as a security for a debt, and the ship afterward sailed to the South Seas, and obtained a quantity of oil from whales captured during the voyage, and it was held that as the oil was not

actually or potentially in existence at the execution of the deed, it did not pass under it to the assignee, and he could not maintain trover against the defendant who had converted the cargo to his own use. Lord Ellenborough said, that if the deed extended to all the freight, earnings and profits in subsequent voyages, it was open to the objection made by the Lord Chancellor in *Spielat v. Lechmere*, 13 Vesey, that it would forever separate the ship and her earnings. The plaintiff subsequently went into equity for relief, and obtained a decree. Lord Eldon said, in giving judgment : "There is a case in 13 Vesey, in which I am represented in the Court of King's Bench to have thrown out an objection that, if the defendant was to take the earnings of a ship, and not the ship itself, those earnings would separate the ship from the earnings forever, so that they could not be re-united. Now, I do not withdraw from the declaration so generally stated ; for if the ship was not then also the subject of absolute assignment, it seems to be extremely difficult to maintain that the ship can be absolutely assigned to one man, and the earnings of that ship, as long as that ship should exist, should be assigned to another. But it is a very different question when the assignment is made by way of security for money advanced. When the ship's future freight and earnings are intended to be assigned to A. for the purpose of securing to him 150*l.* or any larger sum (the *quantum* of debt makes no alteration in the application of the principle), all

the freight of the voyage then existing being already assigned, I am not aware that it has ever been ruled in equity, and I apprehend that it has not, that the freight of a voyage that is intended to be made, although not an existing voyage, may not be assigned in equity. I should find it extremely difficult, in considering the question, to say that the freight of a future voyage might not become the subject of an equitable assignment, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid."

To authorize a decree for the specific performance of a contract relating to land or chattels, the property which the parties had in view, or intended to convey, must appear with a clearness that does not admit of a reasonable doubt; and it has been said that a mortgage of such implements or machinery as shall subsequently be used on, or placed in a mill, is invalid on this ground, if for no other cause; *Winslow v. The Merchants' Ins. Co.*, 4 Metcalf, 306; *Morrill v. Noyes*, 56 Maine, 445, 446. But such an opinion can hardly be maintained, because that is certain which is susceptible of being reduced to certainty; and when chattels answering to the description given in the deed are brought on the premises, and appropriated to the purposes for which these are employed, the

court may justly direct that they shall be appropriated to the payment of the debt which the parties meant to secure; *Halroyd v. Marshall*, 10 H. L. 208; *ante*, 1619.

In *Halroyd v. Marshall*, Lord Westbury said: "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for a valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor became a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which could be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person."

It would seem that this language goes too far. A court of equity will not ordinarily enforce a contract for the sale of a specific chattel, because an adequate remedy may be had by a suit for damages. There is an obvious difference when credit is given on the faith of an equitable pledge or hypothecation, and the aid of a chancellor may then be requisite to prevent a failure of justice, *ante*, vol. I, 1095, 1108.

CHOSES IN ACTION.—Agreeably to the doctrine of the common law, a right of action was insusceptible of assignment, even when arising *ex contractu*, and would not vest in the assignee although the obligation of the contract was not denied by the party whom it charged, and the question arose between the parties to the transfer.

The rule applied *a fortiori* where the possession was held adversely to the right; *ante*; see Coke Lit. 214; *Greenby v. Wilcox*, 2 Johnson, 1; and one who had been disseized could not execute a valid conveyance until he had regained the premises by a re-entry, or obtained a judgment against the disseizor. A feoffment was accordingly invalid unless the feoffor was in possession of the land and could hand it over to the feoffee; and a constructive possession was not less essential when the interest lay in grant. The motive, agreeably to Blackstone, was to prevent a transfer of pretended titles to men who might use undue means, or be too great for the law; and a further safeguard was afforded by holding that a feoffment commencing by

disseizin was void. So an action of trespass *quare clausum fregit* must be brought by him who was the owner at the time of the injury, and not by him to whom the premises are afterward conveyed; *Shephard v. The Commonwealth*, 3 Penrose & Watts, 509, 514; *Clarke v. Calcot*, 8 Taunton, 742; *Rogers v. Spence*, 11 M. & W. 191; 13 Id. 571; 12 Cl. & Fin. 700. The rule applies where personal property is in question, and an action of trover or replevin will fail if it appears that the goods were taken or converted before the sale through which the plaintiff acquired his title. *Gardiner v. Adams*, 12 Wend, 297; *Dunklin v. Wilkins*, 5 Alabama, 199; *McGoon v. Augheney*, 11 Illinois, 558; *O'Keefe v. Kellog*, 15 Id. 347.

The rule was gradually modified through the growth of commerce, and the influence of the Court of Chancery; see *Price v. Stone*, 1 Allen, 566. That tribunal held that an agreement for the sale of land conferred a right which was equivalent to ownership, and might pass by descent, devise or assignment. Conveyances by way of bargain and sale are the offspring of this doctrine, and after uses had been clothed with the legal title, it was applied wherever there was a valid contract to convey real estate, or it was subject to a trust; *ante*, 1154; see *Fells v. Carpenter*, 1 Dev. & Bat. Eq. 257; *Ensign v. Kellogg*, 4 Pick. 1; *Champion v. Brown*, 6 Johnson, Ch. 398; *Lowry v. Flue*, 3 Barb. Ch. 40; *Baker v. Whiting*, 3 Sumner, 475, 482. In like manner pe-

cuniary demands, and demands arising under contracts for the sale of chattels, or for the performance of work or services, were regarded as conferring a right which partook of the nature of property, and might consequently be the subject of a sale or transfer. Although the assignment of a *chase in action* did not pass the legal title, it was regarded by a chancellor as a contract to convey, which would be enforced by authorizing the assignee to bring suit in the name of the assignor, and enjoining the latter from claiming the proceeds when recovered; see *Mitchell v. The Manufacturing Ins. Co.*, 2 Story, 666; *Hoppis v. Eskridge*, 2 Iredell Eq. 54.

This doctrine is now recognized and enforced by the courts of law in every particular, except that of allowing the assignee to sue in his own name; and he will be protected against a release from the assignor, or a payment made to him after notice to the debtor; *Westoby v. Day*, 2 Ellis & Bl. 605, 624; *Johnson v. Bloodgood*, 1 Johnson Cases, 51; *Andrews v. Beeker*, Ib. 411; *Raymond v. Squire*, 11 Johnson, 47; *Briggs v. Dorr*, 19 Id. 95; *Danforth v. Sheeter*, 2 Williams, 490; *Edwards v. Parkhurst*, 21 Vermont, 472; *Conover v. Cutting*, 50 New Hamp. 47; *Garland v. Harrington*, 51 Id. 410. In the case last cited a cause of action arising from the wrongful conversion of goods was held to pass by an assignment *pendente lite*, and entitle the assignee to prosecute the action to judgment, and recover the proceeds from the

attorney who had issued an execution in the name of the assignor, and received the amount from the sheriff.

To bring a cause of action within the scope of this doctrine, it must result from an injury to an existing right of property, or from the breach of a contract which would have conferred such a right if it had been fulfilled; and the right to compensation in damages for injuries which are merely personal, as affecting the sufferer in mind, body or reputation, cannot be assigned in equity or at law; *Rice v. Stone*, 1 Allen, 566; *Hoyt v. Thompson*, 1 Kernan, 320. In general, a demand which would survive to the personal representatives of the party at his death, may be the subject of an assignment during his life; *Comegys v. Vasse*, 1 Peters, 213; *Grant v. Ludlow*, 8 Ohio, N. S. 137; *Zabriskie v. Smith*, 3 Kernan, 322, 335; *Purple v. The Hudson River Railroad Co.*, 4 Duer, 78. "The proper test of assignability," said Duer, J., in the case last cited, "is whether the right would survive to the executor. It may be assigned if it would survive, but not otherwise."

In applying this criterion, it is necessary to consider the former law, and the changes that have been made by statute. It was a maxim that *actio personalis moritur cum persona*. Personal actions, in this sense, are actions for torts, and actions *ex contractu* which do not concern the estate; *Lettimore v. Simmons*, 13 S. & R. 183, 185. An executor might bring an action of trespass on the case for a breach of

promise, but he could not recover for the asportation of the testator's goods during his life, nor for a trespass on his real estate, although resulting in the destruction of his growing crops, or his dwelling; see *Lettimore v. Simmons*; *Raymond v. Fitch*, 2 C. M. & R. 588, 589. The anomaly was rectified by the statutes of 4 Edward 3, c. 7, and 8 and 4 William 4, c. 42, and a cause of action will now survive, whether it be in tort or contract, if the damage is to the real or personal estate, and not the person; *Penrod v. Morrison*, 2 Penrose & Watts, 126; *Raymond v. Fitch*; see *Adam v. Adam*, 2 Ad. & El. 389; 1 Wm. Saunders, 317, note. An executor cannot maintain an action for the breach of a promise of marriage, because it would not have been assets, if fulfilled; see *Chamberlain v. Williamson*, 2 M. & S. 408; *Lattimore v. Simmons*, 13 S. & R. 183, 186; *Smith v. Sherman*, 4 Cushing, 408; and so of a promise to serve as a courier or valet. But it seems that the right to compensation for the breach of an agreement to act or sing in the testator's theatre, or to be the foreman of his shop or factory, will survive to executors; see *Beckham v. Drake*, 8 M. & W. 848; 9 Id. 79; 11 Id. 315. Such at least would seem to be the reasonable inference from *Beckham v. Drake*, where it was held that the assignees of a bankrupt might recover for wrongful dismissal from the defendant's service, contrary to the terms of the contract under which he had been engaged for seven years.

It follows that the capacity of a cause of action for assignment de-

pends not on whether it is for a tort or breach of contract, nor on the form of the remedy, but on whether the injury complained of is to the estate or person. Hence the right to damages for a libel or slander, for an assault and battery, or for a personal injury resulting from the defendant's negligence, is not assignable; see *Zabriskie v. Smith*, 3 Kernan, 322; *Purple v. The Hudson River Railroad Co.*, 4 Duer, 74; *Rice v. Stone*, 1 Allen, 566, 568; and in *Lamplere v. Hall*, 26 Howard Pr. 509, a right of action against a sheriff's deputy for falsely reading a summons, in consequence of which the party failed to appear at the proper time, and lost his suit, was held to be in the same category. So it may be presumed, although the point does not appear to have been expressly determined, that a demand arising from the breach of promise to marry, or to render professional services as a physician, is not susceptible of assignment; *ante*; see *Lattimore v. Simmons*, 13 S. & R. 183, 185.

On the other hand, demands for the conversion or asportation of chattels, for trespasses on land, and, in general, for all injuries to real or personal estate, whereby it is impaired in value, partake of the nature of property, and may be the subject of a sale or contract that will be specifically enforced by a chancellor, and recognized and protected by the courts of law; *Jackson v. Loser*, 4 Sanford Ch. 381; *Danforth v. Streeter*, 2 Williams, 490; *Gillett v. Fairchild*, 4 Denio, 80; *Hudson v. Platt*, 11 Paige, 180; *North v. Turner*, 9 S. & R. 24;

Butler v. The Railroad, 22; *M'Kee v. Judd*, 2 Kernan, 622; *The Grocers' Bank v. Clark*, 48 Barb. 26, 110. In like manner, one who has been induced to sell by a false representation, may assign the right to compensation in damages, or to rescind the contract and recover back the goods; *Johnston v. Burnett*, 5 Abbott Pr., N. S. 331; *Byzbie v. Wood*, 24 New York, 607; and there can be little doubt that an assignment by a purchaser of the right to proceed against the vendor for fraud or breach of warranty, is also valid; *Haight v. Hoyt*, 19 New York, 464; see *Hoyt v. Thompson*, 1 Selden, 320; *Zabriskie v. Smith*, 1 Kernan, 480; *Hyslop v. Randall*, 4 Duer, 660. "All choses in action," said Bosworth, J., quoting from Paige, J., in the case just cited, "embracing demands which are considered as matters of property or estate, are now assignable either at law or in equity. Nothing is excluded but mere personal torts which die with the party. A claim, therefore, for property fraudulently or tortiously taken or received, or wrongfully withheld, and even for an injury to either real or personal property, may be assigned."

The principle is the same where property is lost or injured through the negligence of an agent, bailee, or common carrier; and hence the transfer of such a cause of action will confer an equitable right on the assignee; *Grant v. Ludlow*, 8 Ohio. N. S. 37; *Smith v. The New York & New Haven R. R. Co.*, 28 Barb. 605.

It has nevertheless been held that the right to damages for a false

representation by a third person, who is a stranger to the sale, is merely personal and cannot be assigned; see *Zabriskie v. Smith*, 1 Kernan, 480; *Hyslop v. Randall*, 4 Duer, 660. Such a view can hardly be sustained. Whether the fraud is practiced by the purchaser, or by one who has no interest in the transaction, the loss to the vendor is the same, and falls on his estate. When the question is as to the liability of the executor, it may be material to show that the goods came to the hands of the testator, and should be accounted for by his representatives; but the consideration has no bearing on the capacity of the right to pass by operation of law or to vest in an assignee.

There is an intermediate class of cases where, though the cause of action is nominally for the injury to the estate, it is still mingled with merely personal considerations, and the damages may largely exceed the pecuniary loss; and it has been held that these are within the rule "*moritur cum persona*," and will neither survive to the executor, nor pass to an assignee; see *Brewer v. Dew*, 11 M. & W. 625. Such is the demand of a father or master for the seduction of his child or servant, "*per quod servitium amisit*," and such the right of action for an excessive distress; *The People v. Tioga*, 19 Wend. 73; *O'Donnell v. Seybert*, 13 S. & R. 54; or against an officer for the fraudulent service of, or a false return to, a writ; *Lampher v. Hall*, 26 Howard Pr., 509.

It was held in like manner, in *Somner v. Wilt*, 4 S. & R. 19, that the right to damages for an abuse

of process by issuing a *fi. fa.* contrary to agreement, was too merely personal to pass by an assignment in insolvency, because, although the injury was direct to the estate, the jury might give consequential and exemplary damages. The case of *Brewer v. Dew*, 11 M. & W. 625, is to the same effect.

It has nevertheless been held that as the right of action which has been conferred by statute on the family of one who has perished through the negligence of the defendants, is confined to the pecuniary loss resulting to the plaintiffs from his death, and does not extend to compensation for their grief for the sufferings of the deceased, it is not within the scope of these decisions, and may pass in equity by an assignment; *Quin v. Moore*, 15 New York, 432.

It was held in *Sibbald's Estate*, 6 Harris, 249, that a claim against the government for preventing one from felling the trees on his land, and thereby depriving him of the benefit of a contract into which he had entered for the sale of the timber, did not pass by an assignment of "all his estate, real, personal and mixed, and of his goods, moneys and effects, and the debts due or to become due to him." The court said that where the wrong-doer derived no benefit from the act, it would not survive to his executors, and could not therefore pass by an assignment. But it was at the same time held that such a claim might pass by virtue of any order, writing or act which makes a specific appropriation of the whole or a part of the amount to be recovered.

It is not easy to discern any sufficient ground for such a distinction. An equitable assignment of a demand in tort or contract is virtually an irrevocable power of attorney to bring suit in the name of the assignor, and receive the proceeds; see *Bromley v. Holland*, 7 Vesey, 28; *Bergen v. Bennett*, 1 Caine's Cas. in Error, 10; *The People v. Tioga*, 19 Wend. 73. It is not therefore a transfer of the thing which has been injured or withheld, but of the right to compensation for the damages. If this right can be transferred consistently with public policy, a court of equity will sustain an assignment of the demand; if it cannot, the demand is not assignable. It will not be contended that the rule which precludes the assignment of a cause of action growing out of a slander, or assault and battery, can be evaded by a transfer of the damages before they have been reduced to certainty by a verdict and judgment.

The doctrine of *Sibbald's Estate* derives some countenance from *The People v. Tioga*, 19 Wend. 73, where it was held that the court will not protect the assignee of a cause of action for a merely personal tort, against a release or entry of satisfaction by the assignor; but the latter may, notwithstanding, be made answerable in damages, for the breach of the undertaking implied in such a transfer that nothing shall be done to defeat the right which it purports to confer. Cowen, J. said, "Assignments of personal injuries must still be regarded as mere covenants or promises, which we cannot directly protect against

the interference of the immediate party, though the defendant have full notice of the effort to assign. If the person professing to assign will do prejudice to the right, by extinguishing or impairing it, the party with whom he deals must be left to his action for damages according to the nature of the undertaking." This reasoning seems to be not less fallacious than that in *Sibbald's Estate*. Where the sale of a chose in action is not contrary to public policy, it may be specifically enforced by a chancellor; when it is, it should not be made the foundation of a recovery at law.

It is well settled that an assignment of the right under a contract is not less valid because the obligation is executory, and depends on the fulfillment of the consideration; *Hawley v. Bristol*, 39 Conn. 26; *Scott v. Morris*, 4 Simons, 607; *Bracket v. Blake*, 7 Metcalf, 335; *Field v. The Mayor of New York*, 2 Selden, 179; *Philada. v. Lockhardt*, 23 P. F. Smith, 211; *Parsons v. Woodward*, 2 Zabriskie, 196; *Cochran v. Collins*, 29 California, 129; *St. Louis v. Clemens*, 42 Missouri, 69; see *Beckham v. Drake*, 8 M. & W. 846; 11 Id. 315; but one cannot assign a contract which he has not yet made, or the right to compensation for services which he is under no obligation to perform; *Skipper v. Stokes*, 42 Alabama, 255; *Jermom v. Moffitt*, 25 P. F. Smith, 399; *Thayer v. Kelley*, 2 Williams, 91; *Farnsworth v. Jackson*, 32 Maine, 419; *Mulhall v. Quinn*, 1 Gray, 107. "None of the cases," said Shaw, C. J., "go so far as to hold that the mere possibility of

being again employed by the city, and of earning wages under that employment at a future time, is capable of being assigned. The debt may be conditional, uncertain as to amount, or contingent, but to be the subject of an assignment, there must be an actual or possible debt due or to become due." It was further held that the rule cannot be evaded by giving a power of attorney to collect the amount when due, with a stipulation that it shall not be revoked; see *Hall v. Jackson*, 20 Pick. 194.

Agreeably to this decision, no right passes under a general assignment of future wages, or even of the wages which the assignor expects to earn under an employer into whose service he has not yet entered, and who has contracted no obligation to him; see *Jermom v. Moffitt*.

It has, notwithstanding, been determined in Massachusetts, that wages "to be earned" under an existing service or employment are not less susceptible of an effectual transfer because the assignor is not under an obligation to remain, and may be dismissed before the work is performed; *Taylor v. Lynch*, 5 Gray, 49; *Harby v. Taply*, 2 Id. 565; *Emery v. Lauman*, 8 Cushing, 151; *Tripp v. Broomal*, 12 Id. 376; *Augur v. The New York Belting Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 New Hamp. 409.

In *Taylor v. Lynch*, an order drawn by a workingman in consideration of necessities, and accepted by his employer, was accordingly held to be valid against a subsequent attaching creditor, although

he was working by the piece, and might have withdrawn at any time. The case of *Garland v. Harrington*, 51 New Hamp. 410, is to the same effect; and in *Wallace v. The Haywood Chair Co.*, 16 Gray 209, it was held to be immaterial that the term for which the assignor had agreed to serve expired before the assignment took effect, and that he had been re-engaged at a lower rate. A similar view was taken in *Boylan v. Leonard*, 2 Allen, 407; but in *Twiss v. Cheever*, 2 Allen, 40, the court held that an assignment of the salary of a policeman, or other person engaged in the public service, cannot extend beyond his existing term of office, and take effect on the wages earned subsequently to his reappointment.

In *Field v. The Mayor of New York*, 2 Selden, 179, Bell, who was habitually employed as a printer by the City of New York, assigned the amount which might become due to him for such work, as security for a debt. He subsequently entered into a contract with the city for printing, which was fulfilled on his part, and it was held that the assignor was entitled to the sum thus earned, and might enforce his claim by a bill in equity. Welles, J., said: "It is contended by the counsel for the appellants that the assignment of Bell did not pass any interest which was the subject of an assignment, for the reason that there was no contract, at the time, between Bell and the corporation of the city, by which the latter was under any binding obligation to furnish the former with job printing or to purchase of him paper or stationery;

and that, therefore, the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and, therefore, it did not, and could not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did, nevertheless, create an equity which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle an assignment of freight to be earned in future, will be upheld, and enforced against the party from whom it becomes due. Story's Eq. Jur. § 1055, and authorities there cited; *Langton v. Horton* and *Mitchell v. Winslow*, *supra*; Story on Bailments, § 294. Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but which, upon examination, will be found to have been overruled, or to have turned upon the question of public policy." This decision seems to be in accordance with *Taylor v. Lynch*, but is not easily reconcilable with the rule laid down in *Mulhall v. Quinn*.

An assignment of the right to compensation under a contract with a municipal corporation, is not less valid, if the work be actually performed, because the contract was informal, and might have been repudiated by the corporation. *Wetmore v. San Francisco*, 44 California, 294. See *Bracket v. Blake*, 7 Metcalf, 335; *Philadelphia v. Lockhardt*, 23 P. F. Smith, 211, ante, 1628.

It was held in *Hassie v. The Congregation*, 35 California, 378, that an assignment of the amount that may become due under an executory contract confers no interest that can be attached by the creditors of the assignee, until the work has advanced sufficiently to give rise to a present debt, although it need not be due.

When it is said that an executory contract for work and labor may be assigned, what we are to understand by the phrase is the right to compensation for the work when done, and not the right to perform the work. A trust or confidence cannot be delegated, nor can one who has covenanted to do an act requiring skill and proficiency, put another in his place without the consent of the opposite party; *Lansden v. M'Carthy*, 45 Missouri, 106; *Flanders v. Lamphear*, 9 New Hamp. 201; *Bethlehem v. Annis*, 40 Id. 34, 40; *Burger v. Rice*, 3 Indiana, 125; *Richardson v. Mellish*, 2 Bing. 229.

For like reasons the right to the services of a laborer or servant cannot be assigned, nor can he be compelled to work for a different

master or employer from him to whom he engaged himself; *Davenport v. Gentry*, 9 B. Monroe, 429; *Bethlehem v. Annis*, 40 New Hamp. 34.

So a license to shoot, fish, or exercise any other right on the land of another which is not in the nature of property, is a personal trust or confidence which cannot be transferred to a third person; see *Cowles v. Kidder*, 24 New Hamp. 564; 2 American Lead. Cases, 550, 5 ed. But such a license may be so worded as to operate as the grant of a *profit à prendre*, and will then be assignable; see *Wickham v. Hawker*, 7 M. & W. 63.

Agreeably to the English authorities which have been generally recognized in the United States, the pay or salary of an officer of the government, or a pension given as a reward for public services, cannot be assigned by anticipation, or attached by his creditors; *Emerson v. Hall*, 13 Peters, 409; *Billings v. O'Brien*, 45 Howard Pr. 392; 14 Abbott Pr. N. S. 238. But in the *State Bank v. Hastings*, 15 Wisconsin, 75, an order drawn by the judge of a Circuit Court on the State Treasurer, directing the "said bank, on the 1st of October next, to pay the amount of my quarterly salary commencing on that day," was held to vest the right irrevocably in the payee; see *Merriweather v. Herran*, 8 B. Monroe, 162, 164; *Couch v. Delaplaine*, 2 Comstock, 397. So in *Brocket v. Blake*, 7 Metcalf, 335, the quarter's salary of the City Marshal, which was to become due on the first of January, 1844, was declared to

be a possibility coupled with an interest, and as such capable of being assigned.

CHAMPERTY AND MAINTENANCE.

—The rule that land held adversely shall not be granted, was too deeply fixed in the common law to yield to the novel doctrine that rights of action are not less objects of commerce than rights attended with possession, and the assignment of a right of entry, or a contract made in consideration of such a transfer, is still, in many of the States, invalid; see *Berry v. Adams*, 3 Allen, 493; *Hoppiss v. Eskridge*, 2 Iredell, Eq. 254, 255; *Michael v. Doe*, 1 Carter, 481; *Galbreath v. Doe*, 8 Blackford, 366; *William v. Hickman*, 1 Indiana, 192; *Loud v. Darling*, 7 Id. 206; *West v. Raymond*, 21 Id. 305; *German v. Grier*, 32 Id. 249; *Kincaid v. Meadows*, 3 Head, 192; *Early v. Garland*, 13 Grattan, 1; *Brickner v. Lawrence*, 1 Douglas, 19; *Poe v. Davis*, 29 Alabama, 576; *Wadsworth v. James*, 2 Johnson's Cases, 417; 2 Caine's Cases, 296; *Whitaker v. Cone*, 2 Johnson's Cases, 58; *Hoyle v. Login*, 4 Devereux, 495; *Williams v. Council*, 4 Jones, 265; *Webster v. Van Steenburgh*, 46 Barb., 211; *Vroom v. Shepherd*, 14 Barb., 441; *Jackson v. Kitchen*, 8 Johnson, 479; *Jackson v. Andrews*, 7 Wend., 452; *Ring v. Gray*, 6 B. Monroe, 368; *Graham v. Webb*, 29 Georgia, 320.

Agreeably to some of the authorities, the prohibition does not apply unless the right is adverse as well as the possession; see *Laverty v. Moore*, 33 New York, 658; *Bowie v. Brahe*, 3 Duer, 35; *Corning v.*

The Troy Factory, 39 Barb., 311; *Newton v. M'Lean*, 41 Id. 285; *Kent v. Harcourt*, 33 Id. 49; *Jackson v. Hill*, 5 Wend., 532; *Gregory v. Ford*, 5 B. Monroe, 471; *Causey v. Driver*, 13 Alabama, 818; and the fact that one of several adjacent owners, or occupiers of land holding under the same title, has built or encroached on the land of another, will not preclude the latter from conveying the premises to a third person, or from entering into an agreement with him to bring or maintain a suit; *Orary v. Goodman*, 22 New York, 170; *Halles v. Bell*, 53 Barb., 247. But this distinction has been disregarded in other instances, and an adverse possession, although without color of right, held to avoid the deed; see *Kincaid v. Meadows*, 3 Head, 188; *Pickens v. Delozier*, 2 Humphrey, 400; *Harmon v. Jones*, 7 Smedes & Marshall, 111; *Barry v. Adams*, 3 Allen, 493; *Sherwood v. Waller*, 20 Conn., 262.

It is held in some of the States that a conveyance by a disseizor is valid as between the parties, and a recovery by the grantor, or in his name, will inure to the benefit of the grantee; *Den v. Geiger*, 4 Halsted, 225; *Jackson v. Demont*, 9 Johnson, 55; *Livingston v. Proseus*, 2 Hill, 526; *Howard v. Howard*, 17 Barbour, 663; *Hamilton v. Wright*, 37 New York, 502; *Edwards v. Roy*, 18 Vermont, 473; *The University v. Joslyn*, 21 Id., 52; *Den v. Shotwell*, 3 New Jersey, 465; *Stockton v. Williams*, 1 Douglas, (Mich.), 546; *Abernethey v. Boardman*, 24 Alabama, 189.

This interpretation virtually nul-

lifies the rule, and it is held with more reason in Massachusetts that such a grant is invalid for all purposes, and will not preclude the grantor from conveying the premises to a third person, after he has regained possession by re-entering, or through the judgment of a court of law; *Brinely v. Whiting*, 5 Pick. 348; *Gibson v. Shearer*, 1 Murphy, 114.

As a conveyance of land held adversely is void as against the terre tenant, so it cannot be relied on by him as a defence to an ejectment by the grantor. See *Berry v. Adams*, 3 Allen, 493; *Loud v. Darling*, 7 Id. 206; *Kincaid v. Meadows*, 3 Head, 192; *Wilson v. Nance*, 11 Humphrey, 189; *McMahon v. Allen*, 34 Barbour, 56; *Dearmond v. Brooking*, 37 Georgia, 5; *Hotchkiss v. Auburn Railroad Co.*, 36 Barbour, 600.

The doctrine did not take root in Pennsylvania, where it was held, from the first settlement of the Province, that "owing to the equality of conditions," "there was no danger of maintenance from the interference of powerful individuals, and it had never been made a question whether the grantor or devisor was in or out of possession;" *Shoever v. Whitman*, 6 Binney, 416, 421. Such also is the common law of Ohio and New Hampshire; *Haddock v. Wilcott*, 5 New Hamp. 181, 188; *Hall v. Ashby*, 9 Ohio, 96; *Cassinger v. Welch*, 15 Id. 156; *Borland v. Marshall*, 2 Ohio, N. S. 308.

It was declared in like manner in *Sims v. De Graffenreid*, 4 McCord. 253, that from the earliest

times, in South Carolina, one who had a good title to lands might convey them to a stranger without entry by himself or any previous possession by his ancestors, or ever having received rents; and the subsequent course of decision is to the same effect; *Rugge v. Ellis*, 1 Bay. 107; *Poyas v. Wilkins*, 12 Richardson, 420, 428.

In Illinois the disability has been removed by statute, and there is no rule which prohibits the purchase of claims or titles on speculation, or for the purpose of prosecuting them in the courts; *Fetrow v. Merriweather*, 53 Illinois, 275; *Shortall v. Hinkley*, 31 Id. 219; and such would also seem to be the case in Virginia, Michigan, California, Mississippi and Texas; *Cassidy v. Jackson*, 45 Mississippi, 397; *Matthewson v. Fitch*, 22 California, 86; *Roberts v. Cooper*, 20 Howard, 467; *Butwick v. Franklin*, 38 Texas, 458; *Carrington v. Goddin*, 13 Grattan, 587. So a right of entry may now be assigned in England under the 8 & 9 Victoria, c. 106, s. 4; although this enactment does not authorize the assignment of a right to enter for condition broken; see *Hunt v. Bishop*, 8 Exchequer, 675; 1 Smith's Leading Cases, 127, 7 Am. Ed.

The doctrine that controverted or litigated rights should not be assigned lest the defendant should be oppressed by violence or undue influence, would have been of little avail if such aid could have been procured by the promise of a reward or through an agreement to divide the spoils. Contracts savoring of champerty or maintenance were ac-

cordingly regarded with disfavor by the common law, and forbidden by statute, and such a grant or assignment will neither pass the legal title nor be upheld by a chancellor; *Burke v. Burke*, 14 Wisconsin, 131.

An agreement among persons having a common interest to unite for the vindication of their right is not within this rule; *Thompson v. Marshall*, 36 Alabama, 501; *Tillman v. Searey*, 7 Humphreys, 347; *Speiglemyer v. Crouford*, 6 Paige, 264; nor does it preclude a conveyance of part of the land in dispute to a son, or relative, in consideration of his services in maintaining the suit; *Thalheimer v. Brinkerhoff*, 20 Johnson, 380; 3 Cowen, 623; *Sayles v. Tibbitts*, 5 Rhode Island, 79. In this instance the Court of Errors and Appeals enforced an agreement to bear half the expense of an ejectment which had been brought by a brother-in-law, in consideration of receiving one-fourth of the premises in dispute.

For like reasons, a husband may lend his aid to a suit for the recovery of land which his wife may by possibility inherit; *Gilleland v. Failing*, 5 Denio, 308; and the principle is the same where one has an interest in the question, though not in the property in dispute; *Dornin v. Smith*, 35 Vermont, 69. And it may be said in general that consanguinity, affinity, or a charitable desire to assist a friend or neighbor in the prosecution of a right which he believes to be just, is a sufficient answer to a charge of maintenance; see *Shirley v. Riggs*, 11 Humphreys, 55; *Perrine v. Doane*, 3 Johnson Ch. 508. The

question is nevertheless one of circumstances, and a contract which tends to promote litigation or prevent the amicable settlement of a controversy, is not less objectionable because the parties to it are connected by blood or marriage; *Barker v. Barker*, 14 Wisconsin, 131.

In *Thalheimer v. Brinkerhoff*, the Chancellor said: "It was a principle of the common law that a right of action could not be transferred by him who had the right to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail, and oppression would follow, if rights of action might be assigned. Nothing, says Coke (Co. Lit. 114, a), in action, entry, or re-entry, can be granted over; for so under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed. Feeble, partial, and corrupt, must have been the administration of justice where such a reason could have force. In early times, this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence the doctrine of maintenance which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. But the rule of the common law, that rights of action

cannot be assigned, has in modern times been reversed; the apprehension that justice would be trodden down if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed; and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession. The general law, both in England and here, now is that rights of action may be transferred; and as the laws concerning maintenance are still in force, the present state of the law is, that while an entire right of action may be transferred to a purchaser, with complete effect, a contract to transfer a part of a right of action is void. The primary rule forbidding the assignment of a right of action has ceased, but the auxiliary sanction concerning the assignment of a part of such a right remains in force. The English judges, feeling that the original reasons for the law of champerty and maintenance had ceased, have gradually mitigated that law, by interpretations and exceptions; and the present state of English opinion on this subject may be seen in 4 D. & E. 340, 341, where Buller, Justice, expresses himself in terms which

do not disguise his contempt for the whole doctrine of maintenance.

"Our statute concerning champerty and maintenance is a compilation of the several English statutes relating to the same subjects; and it declares certain contracts void. This statute throughout makes or supposes a distinction, which before prevailed in the rules of the common law, between maintenance which is innocent and that which is unlawful. To maintain the suit of another is unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the suitor in some social relation. These are the exceptions to a general rule; and they are exceptions which rest upon the strongest ground of reason, as well as the support of authority. Where the person promoting the suit of another has any interest whatever in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor, according to the nature and extent of his interest. To deny to such a person the benefit which he might receive from a suit conducted mainly or partly for the benefit of another, would be to close the temple of justice against all persons not parties to the suit, and yet having interests in the subject of litigation, which may be affected by the determination of the cause. It is, accordingly, a principle that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance. Whether

this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest to participate in the suit of another, who also has or claims some right to the same subject; Bac. Abr. tit. Maintenance, letter B, and the several authorities cited.

"Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance. The relation of landlord and tenant, that of master and servant, acts of charity to the poor, and the exercise of the legal profession, are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice. Upon all such cases, these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretense of right in the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise than as purchasers of the profits of litigation."

In New York, "nothing is left of the old doctrine of maintenance beyond a statutory prohibition against taking a conveyance of lands in suit, buying or selling pretended titles, and conspiracies falsely to move or maintain suits;" 2 R. S. 691, § 5-8; *Mott v. Small*, 20 Wend. 212; 22 Id. 403; *Peck*

v. Briggs, 3 Denio, 109. The statute consequently does not apply unless the suit is "moved" or maintained for a false or corrupt purpose, or the thing in dispute is land held adversely to the grantor. *Mott v. Small*; *Sedgwick v. Stanton*, 14 New York, 281. An agreement by the complainants to prosecute and maintain the defendant's right to the pre-emption of a lot of ground before the Commissioners of the General Land Office, in consideration of receiving one-half of the proceeds, if successful, was accordingly specifically enforced in *Sedgwick v. Stanton*, and held not to be open to the objection which attends on contracts to procure legislation, or bias the administration of a department of the government, by personal or private influence, as distinguished from the public and avowed use of argument and proofs; see 1 Smith's Leading Cases, 692, 7 ed.; *Marshall v. The Baltimore and Ohio Railroad*, 16 Howard, 314; *Coquillard v. Bearss*, 21 Indiana, 479. In the case last cited an agreement to prosecute a claim against the government, pay all expenses, and receive a certain proportion of the amount recovered if successful, was held to be against public policy and invalid, although there was no evidence that undue means were contemplated or employed; it appearing that the nature of the demand was such that it could not be enforced without an act of Congress which had been obtained.

The evils which were so strongly depicted by Coke as incident to maintenance have diminished with

the advance of law, and the disappearance of the social and political inequality which prevailed at an earlier period, and the courts are now disinclined to vacate an agreement on that ground unless the motive is obviously sinister or corrupt; see *Richardson v. Rowland*, 40 Conn. 565; *Thalheimer v. Brinckerhoff*, 3 Cowen, 623, 645; *Sedgwick v. Stanton*, 14 New York, 289, 297; *Roberts v. Cooper*, 20 Howard, 467. But this indulgence may be carried too far; and the case of *Rogers v. Higgins*, 57 Illinois, 245, *ante*, 1231, shows that it sometimes leads to injurious consequences.

A chancellor will not encourage or enforce contracts which savor of maintenance or champerty, whether they are or are not within the strict legal limits of those offences, as defined by statute; see *Barker v. Barker*, 14 Wisconsin, 131; *Hoppies v. Eskridge*, 2 Iredell Eq. 54, 56; and it has been said to follow that a cause of action which has never been recognized or conceded by the opposite party, and cannot be reduced to possession without a suit, is not susceptible of assignment as against him; see *Prosser v. Edmunds*, 1 Young & Collier, Ex. 481; *Kendall v. The United States*, 7 Wallace, 113; *Barker v. Barker*, 14 Wisconsin, 131; *Martin v. Veeder*, 20 Id. 436.

It was accordingly held, in the case first cited, that the right to avoid a grant or transfer, as having been fraudulently procured, belonged exclusively to the injured party, and could not be exercised by an assignee. The point arose under an

assignment of an interest conferred by will, followed by an assignment of the same interest to the complainant, and it was determined that the latter could not file a bill to set aside the first transfer on the ground of fraud, against the wish of the assignor who refused to join in the suit. The cases of *Norton v. Tuttle*, 60 Illinois, 130; and *Marshall v. Mears*, 12 Georgia, 61, cover the same ground.

The weight of authority nevertheless is that as a deed procured by fraud is voidable, the grantee cannot rely on it as invalidating a subsequent conveyance by the grantor. The law was so held in *Livingston v. The Peru Iron Co.*, 9 Wend. 511, with reference to a grant of real estate, and the principle is not less applicable when chattels are in question; *ante*.

Whatever may be thought on this point, it would seem clear that the right to enforce an express, resulting, or constructive trust, or contract to sell and convey, may be transferred to an assignee and enforced by him whether the defendant does or does not admit the existence of the fiduciary obligation alleged in the bill; *Baker v. Whitney*, 3 Sumner, 476; *Allen v. Smith*, 1 Leigh, 248. "The main objection," said Story, J., "taken to the operation of this deed, is, that at the time of the conveyance by Stimson to Baker the defendant was in full possession and seizin of the premises, claiming them in his own right, and, of course, that Stimson was then dis seized and the conveyance to Baker void under the operation of the com-

mon law relative to maintenance and champerty, and the statute of 32 Henry 8, ch. 9, made in aid thereof. This statute prohibits under penalties the buying or selling of any pretended right or title to land, unless the vendor is in actual possession of the land, or of the reversion or remainder. The object of the statute, as well as of the common law, was, doubtless, to prevent the buying up of controverted legal titles, which the owner did not think it worth his while to pursue, upon mere speculation; so that, in fact, it might properly be deemed the mere purchase of a lawsuit.

"The old cases upon this subject have gone a great way, further indeed than would now be sustained in courts of equity, which have broken in upon some of the doctrines established thereby. But, be this as it may, neither common law, nor the statute, applies to a trust estate actually existing, either by the acts of the parties, or by construction of law. Thus, a *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee, for the latter can never disseize the former of the trust estate, but so long as it continues, the possession of the trustee is treated, at least in a court of equity, as the possession of the *cestui que trust*. If a contract is made for the sale of land, the contractee may sell and assign the whole, or a part, or make a binding sub-contract respecting the same, whether there be a controversy respecting the specific performance of the original contract, or not. The case of *Wood v. Griffith* (1

Swanston, 55, 56), is fully in point upon this doctrine, even when the assignment or sale is made during the pendency of a suit for a specific performance. I repeat it, therefore, that the whole question, whether the deed from Stimson to Baker was a valid conveyance or not, depends upon the point whether, at the time, the defendant was actually or constructively a trustee of the premises for Stimson."

It was declared in *Kendall v. The U. S.*, that "The debt or fund as to which such an equitable assignment can be made must be some recognized or definite fund or debt in the hands of a person who admits the obligation to pay the assignor; or at least, it must be some liquidated demand, capable of being enforced in a court of justice. We apprehend that the doctrine has never been held that a claim of no fixed amount, nor time, nor mode of payment; a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them." The explanation of this decision may be found in the peculiar nature of the claim as arising out of a treaty between the Government of the United States and the Cherokee Indians.

It seems to be generally conceded, notwithstanding the dicta in *White v. Skinner*, 23 Vermont, 531, that the mere circumstance that a demand is unliquidated, or the amount

due controverted, will not prevent it from passing to an assignee, or render a compromise or settlement without his assent valid. See *Westcott v. Potter*, 40 Vermont, 271; *Mulhall v. Quinn*, 1 Gray, 107. And the weight of authority is that the purchase of a cause of action, with a view of enforcing it for one's own benefit by a suit in the name of the assignor, is not maintenance, unless the subject-matter is land held adversely, or the right to damages for a personal injury; see *Danforth v. Shuter*, 28 Vt., 395.

CONTRACTS WITH ATTORNEYS.—A contract by an attorney to institute or conduct a suit, in consideration of receiving the whole or a part of the amount or property recovered, contravenes the policy which forbids champerty and maintenance, and cannot be enforced. *Davis v. Sharon*, 15 B. Monroe, 64; *Boardman v. Thompson*, 25 Iowa, 487; *Thurston v. Percival*, 1 Pick. 415; *Low v. Hutchinson*, 37 Maine, 196; *Merritt v. Lambert*, 10 Paige, 352; *In re Bleakley*, 5 Id. 311; *Wills v. Lonbat*, 10 Id. 352; 2 Denio, 607; *Berrien v. M' Lane*, Hoffman Ch. 421, 425; *Birkey v. Vattier*, 1 Ohio, 132; *Wickly v. Hall*, 13 Id. 167; *Elliott v. M' Clelland*, 17 Alabama, 266; *Dumas v. Smith*, Ib. 305; *Lafordy v. Jelly*, 13 Indiana, 117; 22 Id. 471; *Scoby v. Ross*, 15 Indiana, 117; *Martin v. Veeder*, 14 Wisconsin, 126; *Martin v. Clarke*, 8 Rhode Island, 389; *Holloway v. Love*, 7 Porter, 488; *Potts v. Francis*, 8 Iredell Eq. 300; *Brotherson v. Consalus*, 26 Howard Pr.

213; *Grill v. Leary*, 16 C. B. (N. S.), 73; *Earle v. Hopwood*, 9 Id. 566.

This doctrine does not necessarily preclude the attorney from stipulating for a contingent fee depending on the amount recovered, but not charged upon or payable out of it; *M' Donald v. Talbot*, 29 Iowa, 170; and it seems to be generally conceded that the champertous or illegal nature of the express contract will not preclude the recovery of a reasonable compensation, under a *quantum meruit*; *Stearns v. Fellner*, 25 Wisconsin, 594; *Grill v. Leary*, 16 C. B. (N. S.), 73.

It was held in *Grill v. Leary*, that when such a contract was to be carried into effect in England, it was not less illegal there, because made in France and sanctioned by the *lex loci contractus*. And it was declared in like manner in *West v. Raymond*, 21 Indiana, 305, that a contract by which the attorney is to have a part of, or the entire subject-matter of, the litigation is void, not only as between the parties, but as it regards third persons.

In *Stearns v. Fellner*, 25 Wisconsin, 594, an agreement by an attorney to prosecute the suit, pay the expenses and divide the amount recovered with the client, was held to be champertous and invalid. The authorities in Iowa are to the same effect; *Boardman v. Thompson*, 25 Iowa, 487; and it is held on like grounds in Ohio, that a contract which assumes to give the attorney such an interest in the subject-matter in dispute as will preclude the plaintiff from settling

the controversy in a way to promote his interest and put an end to litigation, is against good policy, and may be treated as invalid; *Key v. Vattier*, 1 Ohio, 132; *Lewis v. Lewis*, 15 Ohio, N. S. 715.

The better opinion seems to be that it is immaterial whether the aid given for the maintenance of the cause consists of money or services, and that an agreement by an attorney or agent to conduct or prosecute a suit, in consideration of receiving part of the land or fund in dispute, may be invalid, although the costs and charges are to be defrayed by him, and not by the principal or client; *Lathrop v. The Amherst Bank*, 9 Metcalf, 439; *Boardman v. Thompson*, 25 Iowa, 487; *Backus v. Byron*, 4 Michigan, 535; *Davis v. Sharon*, 15 B. Monroe, 64; *Thompson v. Warren*, 3 Id. 488; *Wilhite v. Roberts*, 4 Dana, 172; *Rust v. Lance*, 4 Littell, 411.

In the case first cited, an agreement between A. and B. that B. should institute legal proceedings against a third person on behalf of A., and receive a certain percentage on the amount recovered, and that, in the event of failure, A. should only pay the sum actually expended, was accordingly held to be so far illegal and void, that B. could not sustain an action on the agreement against A. Dewey, J., said: "It was suggested in the argument that the facts here shown do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his own expense, but was, in the event of a failure to sustain

the action, to be remunerated for his actual expenses. It is true that some of the elementary books, in defining champerty, say that the champertor is to carry on the suit at his own expense; as 4 Bl. Com. 135; Chit. Com. 5 Amer. ed. 675. Other books of equal authority omit this part of the definition of champerty; as 1 Hawk. c. 84, § 1; Co. Lit. 368, b. Maintenance and champerty, if we are to judge from the manner in which they are usually introduced in connection with this subject, are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious intermeddling, and upholding another's litigation by personal services as well as money; more dangerous formerly than now, as more powerful combinations were resorted to with a view of controlling, if not overawing, the judicial tribunals. In the view we have taken of the subject, the result is, that the defence is well maintained."

Such was also the view taken in *Backus v. Byron*, 4 Mich. 535, where the court held the following language in giving judgment: "The case of *Merritt v. Lambert*, 10 Paige's R. 352, was decided by the chancellor in 1843. Wallis, the solicitor of one of the parties, had entered into an agreement with his client, by which he was to have the rents and profits of certain lands in controversy for his services, if he succeeded in the defence of the suit. A large amount of rents had come into his hands, and on an application of the client for an order that he

pay over such rents, this agreement was holden to be void, by the vice chancellor. It was appealed to the chancellor, and in his opinion, he lays down the doctrine that one is not permitted, 'either as an attorney or solicitor, or as counsel, to contract with his client, previous to the termination of the suit, for a part of the demand or subject of litigation, as a compensation for his services;' and he cites, in support of this position, 1 Pick. R. 415; 2 Mart. (Louis) R. 271; 1 Ham. O. R. 132; 3 Littell, R. 411; 6 Mon. R. 389; 5 Paige, 311. The case was removed to the court for the correction of errors, where the order of the chancellor was unanimously affirmed; 2 Denio, R. 607.

"In *Thompson v. Warren*, 8 B. Mon. 488, decided in 1848, a contract to prosecute a suit for one-half that should be recovered, was held void for champerty. The case of *Lathrop v. The Amherst Bank*, 9 Metcalf, R. 489, was decided in 1845 by the Supreme Court of Massachusetts, in which a contract was held to be void for champerty upon similar grounds. It was also held in that case, to constitute champerty, it was not necessary that the attorney should agree to pay the expenses of the suit, when litigation was upheld by personal services. See, also, the case of *Elliott v. McClelland*, 17 Ala. R. 206, decided in 1850, where the common law doctrine in regard to champerty was applied to a contract made by an attorney with his client to collect money by suit, and for his services to retain twenty per cent. of the money collected, or be paid \$200, as he should elect.

"The plaintiff in that case contended that if the contract was void for champerty, as to that part of it relating to the retention of the twenty per cent., yet that it was divisible, and he was entitled to recover \$200 stipulated for his services, but the court held that the contract was entire, and being tainted with champerty, was wholly void. In the case of *Wilhite v. Roberts*, 4 Dana, 172, it was held that where the attorney was to receive a sum equal to a certain portion of the thing recovered, in money, but was to have no interest in the thing itself, the contract was champertous."

Agreeably to the view taken in some of the States, such contracts are not only void, but if it appears during the trial of the cause that the attorney is to be compensated by part of the litigated fund or property, the court will vindicate the rule, and protect the administration of justice by non-suiting the plaintiff; *Dowell v. Dowell*, 3 Head, 502; *Vincent v. Ashley*, 5 Humphreys, 594; *Barker v. Barker*, 14 Wisconsin, 131, 143.

It has been held with less reason in other instances, that so long as the plaintiff conducts the cause at his own expense, it matters not what disposition is to be made of the property when recovered, and that he may consequently agree that a fixed proportion of the proceeds of the suit shall be appropriated to the payment of the counsel or attorney; *Bayard v. McLane*, 3 Harrington, 133; *Allard v. Lanmade*, 29 Wisconsin, 502; see *Wylie v. Coze*, 15 Howard, 415;

Major v. Fields, 1 Patton & Heath, 48. Such contracts are also valid in New York, under the provisions of the code; *Benedict v. Stewart*, 23 Barbour, 420.

In Illinois the offences of champerty and barratry have been abrogated by statute, and that of maintenance defined as consisting in officiously intermeddling in a suit, and furnishing means for its prosecution with a view to promote litigation. Hence contingent fees to attorneys are not there condemned by law or public policy; *Newkirk v. Cone*, 18 Illinois, 449; it was also held in this instance, that "an agreement between parties, one of whom is an attorney, that the latter should investigate the records of titles to real estate, and decide between conflicting titles as to which is best, acquire such titles, and prosecute for the recovery of them, and when successful to divide profits, the attorney furnishing skill, and the other the capital, is not tainted with crime, nor against any statute of the State."

Such is also the rule in Texas, California and Mississippi, and it would seem in Pennsylvania and Connecticut; *Matthewson v. Fitch*, 22 California; *Richardson v. Rowland*, 40 Connecticut, 565; *Cassedy v. Jackson*, 45 Mississippi, 397; *Bentwick v. Franklin*, 38 Texas, 45; *Strohecker v. Hoffner*, 7 Harris, 225; see *Major v. Fields*, 1 Patton & Heath, 48.

All the courts would probably agree that when the cause of action is for an injury which, like an assault and battery, is merely personal, and therefore insusceptible of assign-

ment, it cannot be the subject of a contract that will confer a specific interest on the attorney, or preclude the plaintiff from compromising or withdrawing the suit; *Pulver v. Harris*, 52 New York, 73; *ante*. In *Patton v. Wilson*, 10 Casey, 299, an agreement that the attorney should have \$100 out of the sum, if any, that might be recovered in an action for an assault and battery, was nevertheless held to confer a specific interest on him which was valid against the client, and therefore against an attachment issued after the case had gone to judgment.

WHAT WILL OPERATE AS AN ASSIGNMENT.—Anything which denotes an intention to transfer on the one hand, and a willingness to receive on the other, may operate as an equitable assignment, if the circumstances are such in other respects as to justify the intervention of a chancellor; *Pass v. M. McRea*, 36 Mississippi, 143; *Kimball v. Donald*, 20 Missouri, 577. An oral or written declaration may consequently be as effectual as the most formal instrument; *Kessil v. Albetis*, 56 Barb. 362; *Spiker v. Nydeger*, 30 Maryland, 315; *Mitchell v. Mitchell*, 1 Gill, 66; *Crane v. Gough*, 4 Maryland, 366; *Noyes v. Brown*, 33 Vermont, 431; *Newly v. Hill*, 2 Metcalf (Ky.), 530; and pass the right to an obligation under seal or of record; *Dunn v. Snell*, 15 Mass. 485; *Morange v. Edwards*, 1 E. D. Smith, 414; *Dawson v. Coles*, 18 Johnson, 51; *Ford v. Stuart*, 19 Id. 342; *Thompson v. Emery*, 7 Foster, 269. So rent, though not due, and savoring of the

realty, may be the subject of a parol assignment which will take effect when the obligation matures and becomes a debt; *Morton v. Naylor*, 1 Hill, 583; *Eeling v. Zantzinger*, 1 Harris, 50; or, as the rule is sometimes stated, "any order, writing, or act, which makes an appropriation of a fund, amounts to an equitable assignment of the fund;" see *Clemson v. Davidson*, 5 Binney, 392, 398; *Spain v. Hamilton*, 1 Wallace, 604; *Newley v. Hill*, 2 Metcalf, 530; *Wiggins v. McDonald*, 18 California, 126. Hence, if A. is indebted to B. and B. to C., and it is agreed that A. shall pay B's debt, or that C. shall look exclusively to A., there is not only a contract which may be enforced by suit, but an equitable assignment of the fund; *Wiggins v. McDonald*.

The intention need not be expressed in terms, and may be implied from any act or instrument which admits of such interpretation, and is not inconsistent with any other; *Guernsey v. Gardiner*, 49 Maine, 167. A power of attorney to collect a debt, an order for the amount due; *Wallace v. The Chair Co.*, 16 Gray, 209; *Laimon v. Smith*, 7 Id. 150; *Brooks v. Hatch*, 6 Leigh, 534; *The Bank v. Hastings*, 15 Wisconsin, 75; *McEwen v. Johnson*, 7 California, 258; or the delivery of the instrument by which the debt is secured or evidenced, is an equitable assignment, if so intended; *Jones v. Witter*, 13 Mass. 304; *Grover v. Grover*, 24 Pick. 261; *Dennis v. Turnbull*, 10 Metcalf, 188; *Fetcomb v. Thomas*, 5 Greenleaf, 282.

It is a general principle that a symbolical delivery may suffice

when an actual transfer is impracticable, and hence the delivery of an execution may pass the equitable right to the judgment; see *Jones v. Witter*, 13 Mass. 304; *Dunn v. Snell*, 15 Id. 481; *Prescott v. Hill*, 17 Johnson, 281; or that of a mortgage confer an implied authority to collect the bond for which the mortgage is conditioned; *Runyan v. Merriman*, 11 Johnson, 534; *Crain v. Pain*, 4 Cushing, 483.

A partial assignment of a demand or cause of action will not preclude the debtor from making any payment or settlement that would have been valid if the entire right had remained in the assignor. This results from the obvious injustice of compelling one who has contracted a single obligation, to enter into a new and complex relation with persons who may be at variance with each other and with him; *Gibson v. Cooke*, 20 Pick. 15; *Tiernan v. Jackson*, 5 Peters, 580, 597; *Walker v. Mauro*, 18 Missouri, 564; *Blin v. Pierce*, 20 Vermont, 25. The rule was enunciated in *Mandeville v. Welch*, 5 Wheaton, 277, and is generally followed in the United States; *Harberry v. Smith*, 13 Ohio, N. S. 495, 585; *Gibson v. Finley*, 4 Maryland Ch. 75; *Wilson v. Carson*, 12 Maryland, 54, 74; *Jermyn v. Moffit*, 25 P. F. Smith, 399; *Chapman v. Shattuck*, 3 Gilman, 49; *Palmer v. Merrill*, 6 Cushing, 282; *Hopkins v. Beebe*, 2 Casey, 85, 88; *Robbins v. Bacon*, 3 Greenleaf, 346. A draft on a particular fund will not therefore confer any right as against the drawer unless it is accepted by him or covers the whole amount due; *Eichelberger v. Mur-*

dock, 10 Maryland, 373; *Wilson v. Carson*, 12 Id. 54; *Sands v. Matthews*, 27 Alabama, 399, 402; *Hopkins v. Beebe*, 2 Casey, 85, 88; *Gibson v. Finley*, 4 Maryland Ch. 75. Accordingly, where one who was entitled to certain quarterly payments from a trustee, drew an order on him in favor of a creditor, which did not correspond in amount to one or any number of the installments, and the trustee refused to accept the order, the court held that it did not operate as an assignment, and that the payee could not maintain an action in the drawer's name against the drawee; *Gibson v. Cooke*, 20 Pick. 15.

In *Mandeville v. Welch*, Story, J., said: "Where the order is drawn on the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands. But where an order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation may be fairly implied from custom of trade, or the course of business between the parties, as a part of their contract. The reason of the principle is plain: a creditor shall not be permitted to split up a single cause of action into many actions without the assent of the debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract, and to decline any legal or equitable assignments

by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he should be obliged to pay in fractions to any other persons; so that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The rule is nevertheless intended for the protection of the debtor, and may be waived by him; *The Public Schools v. Heath*, 2 McCarter, 22; and if he acquiesces in or ratifies a partial assignment of the fund, a new obligation will arise, and may be enforced by a chancellor; see *Ex. parte Alderson*, 1 Maddock, 53; *Yeates v. Groves*, 1 Vesey, Jr., 280; *Lett v. Morris*, 4 Simons, 607; *Bourne v. Cabot*, 3 Metcalf, 305; *Pomeroy v. The Manhattan Ins. Co.*, 40 Illinois, 398; *Wallace v. The Chair Co.*, 16 Gray, 209.

The assignment of a demand as collateral security for a debt due by the assignor to the assignee, is not within this rule, because the entire right devolves on the assignee, and may be enforced by a suit in the assignor's name for his use, although he is liable to account to the assignor for what, if anything, remains after his own claim is satisfied; *Wetmore v. San Francisco*, 44 California, 294; *Wheeler v. Wheeler*, 9 Cowen, 34; *Field v. The Mayor of New York*, 2 Selden, 179.

In the case last cited the right to compensation under a prospective contract with the City of New York was assigned as a security

successively to three different persons, of whom the complainant was the last, and the latter filed a bill against the assignor and the corporation, averring that the claims of the prior assignees had been satisfied, and asking for an account and payment. "I am aware," said Willis, J., "that, as a general rule, the assignee of a chose in action may use the name of the assignor in an action at law to recover the amount. But it seems to me that the rule should be confined to cases where the whole of an entire demand is assigned to one person or party. Suppose A. has an entire demand of \$1000 against B., and assign to C. \$100, to D. \$100, and to E. \$100, out of the \$1000. Which of the three assignees shall institute an action against the debtor? Suppose we say C. shall have the right, how much shall he recover? Shall it be the \$1000? Clearly it must be that, or the residue will be gone, because the demand cannot be split and several actions sustained for the several parts assigned. But C. has no right, nor is he bound to litigate in relation to the parts assigned to D. and E., or that part not assigned at all. Here would be four parties, having separate and distinct interests, one having as good right to commence an action, to discontinue it, and to direct in relation to it, as the other; and in case of disagreement, who is to decide? In the case at bar, the plaintiff had no right to sue in Bell's name for what was to be paid under the first two assignments, nor for what would be going to Bell after all

three were paid; and he could not carve out just \$1500 and the interest upon it from the demands due from the city to Bell without splitting entire demands, which cannot be done; *Smith v. Jones*, 15 Jones, 229; *Guernsey v. Carter*, 8 Wend. 492; *Stevens v. Lockwood*, 13 Id. 644; *Story's Equity Jur.* § 1250."

The better opinion would also seem to be that a partial assignment of a debt may be valid as between the parties, and render the assignor liable to account specifically to the assignee for what he receives from the debtor, and it seems that the assignee may file a bill in equity to enforce this obligation; see *Caldwell v. Hartuppes*, 20 P. F. Smith, 74; *Hall v. Buffalo*, 2 Abbott's Appeal, 301; *Field v. The Mayor of New York*, 2 Selden, 179; *The Public Schools v. Heath*, 2 M'Arter, 22; *Moody v. Kyle*, 34 Mississippi, 506; *Stanbury v. Smith*, 13 Ohio, N. S. 495, 501.

To constitute an assignment, there must be an actual or constructive appropriation which confers a present right on the assignee, although the circumstances may not admit of its immediate exercise; *Christmas v. Russell*, 16 Wallace, 69; *Ford v. Gardner*, 15 Indiana, 298; *Christmas v. Griswold*, 8 Ohio, N. S. 563. A covenant to pay a debt with the proceeds of goods when sold, or out of an outstanding demand when collected, will not operate as an assignment, because it implies that the covenantor is to retain a control over the fund, and that more remains to

be done on his part to make the transfer effectual; *Christmas v. Griswold*; *Roger v. Hosack*, 18 Wend. 319; *Hoyt v. Story*, 3 Barb. 262; *Trist v. Child*, 21 Wallace, 441; *Cowperthwaite v. Sheffield*, 3 Comstock, 243; *Pearce v. Roberts*, 27 Missouri, 179; and an assignment contemplated, but not executed, or which is not assented to by both parties, will not confer a right on the assignee; *Foster v. Lowell*, 4 Mass. 308; *The Bank v. Pindall*, 2 Randolph, 465.

It is, notwithstanding, established that what ought to be done may be considered as done for the purpose of relief. An obligation to transfer on one side, attended with a right to a specific performance on the other, is consequently an equitable assignment, although the fund or property in question may not be susceptible of an immediate transfer or reduction to possession; *Dickinson v. Masson*, 14 M. & W., 713; *ante*, vol. 1, 438; *Hart v. The Western Railroad Corporation*, 13 Metcalf, 99, 108; *Perry v. Newbern*, 69 North Carolina, 551. Such is the effect of a contract for the sale of land, or to hypothecate a chattel as a security for a debt, vol. 1; *Langton v. Waring*, 18 C. B., N. S. 315; *Martin v. Reed*, 11 C. B., N. S. 730; *Mitchell v. Winslow*, 2 Story. The agreement may be implied from circumstances, as in the common case, where an insurer, guarantor or surety is subrogated to the remedies of the party whom he has indemnified, or to the obligation which he has discharged.

When an assignment does not pass the legal title, and is not in

tended as a gift, it will not be upheld by a chancellor unless it has the essentials of a valid contract; *ante*, vol. 1, 395, 429. There must consequently be mutual assent, and a consideration; *Nesmith v. Drum*, 8 W. & Serg. 9; *Cox v. Sprigg*, 6 Maryland, 274; *Risly v. Smith*, 39 New York Sup. Ct. 137; *Alger v. Scott*, 54 New York, 14; *Prescott v. Hull*, 17 Johnson, 284; *Perkins v. Parker*, 1 Mass. 117; *Antrobus v. Smith*, 12 Vesey, 39; *Sutton v. Lord Chatwood*, 3 Merivale, 249; *Meek v. Kettlewell*, 1 Hare, 464; 1 Phillips, 342; *Kennedy v. Ware*, 1 Barr, 445; *Mark v. Clark*, 11 B. Monroe, 44; *Duval v. Wilson*, 9 Barb. 202; *Cannaday v. Shepard*, 2 Jones Eq. 224.

It is not essential to such an agreement that the intention of the assignor should be communicated directly to the assignee, and it is enough if the latter gives his assent subsequently, when informed by any one who is duly authorized for that purpose; *Sharpless v. Welsh*, 4 Dallas, 279. If A. deposits goods or money in the hands of B. for the use of C., and B. communicates what has been done to C., who agrees, he may maintain trover or assumpsit against B.

A pre-existing debt is a good consideration for any act on the part of the debtor that will operate as security or payment; *Nesmith v. Drum*, 8 W. & Serg. 9; *Blin v. Pierce*, 20 Vermont, 25; *Wheeler v. Wheeler*, 9 Cowen, 34; *Burn v. Carvalho*, 4 Mylne & Craig, 690; 7 Simons, 109; *Walker v. Rostron*, 9 M. & W. 411; *Alexander v. Ghiselin*, 5 Gill, 138; *Canfield v. Monger*, 12

Johnson, 346. Thus, where the plaintiff directed the defendants to account for a consignment of wheat to one Scarth, to whom he was indebted, and who owed money to them, it was held that the assignment to Scarth became irrevocable on the defendants crediting Scarth with the proceeds of the wheat, although the amount was not actually paid over to him; *Dickinson v. Marrow*, 14 M. & W. 713. But a chancellor will not specifically enforce an appropriation of assets in payment of a debt due by a third person and for which the assignor was not previously answerable, unless there is some new consideration in the nature of an agreement for satisfaction or forbearance; see *Brook v. Spooner*, 9 Leigh, 153; *Alger v. Scott*, 54 New York, 14; *Deronge v. Elliott*, 8 C. E. Green, 486; see 2 American Lead. Cases, 204, 5 ed.

It is nevertheless well settled at the present day, although the question was long involved in doubt, that a chose in action may be the subject of a gift which will pass the right of property, if the intention of the donor is clearly expressed by acts or words. The delivery of a note, bond or certificate of stock to a third person, with an intention to vest the right of property in the donee; *Grover v. Grover*, 24 Pick. 261; *Elam v. Keen*, 4 Leigh, 333; *Dunbar v. Woodcock*, 10 Id. 628; *M'Nulty v. Cooper*, 3 Gill & Johnson, 214; *Hunter v. Hunter*, 19 Barbour, 631; *Henderson v. Henderson*, 21 Missouri, 379; see *Lucey v. Lucey*, 7 Barr, 175; *Norton v. The Piscataqua Insurance Company*,

111 Mass. 532; or the execution of an instrument declaring an intention to make a present gift to him, or a declaration of trust in his favor, is enough to constitute a gift which a court of equity will uphold and enforce; *ante*, 395, 438, 1238. So an order on a particular fund in favor of a volunteer may vest the beneficial interest in him; *Pope v. Hatch*, 14 California, 403, contrary to the earlier decisions, which required a consideration for such a draft; see *Nesmith v. Drum*, 8 W. & S. But the intention to make a present transfer, as distinguished from an agreement to bestow at a future day, must appear with unmistakable distinctness, and a promise will not be effectual as a donation even when put in the form of a note payable on demand; vol. 1, 446, 1221.

DRAFT ON A PARTICULAR FUND.

—It follows, from what has been said, that an order drawn on a particular fund operates as an assignment of the fund, not only as between the drawer and payee, but as it regards the drawee, though not assented to or accepted by him, and will render him equitably answerable to the payee for a failure or refusal to appropriate the fund to the payment of the draft; *Conway v. Cutting*, 51 New Hamp. 407; *McWilliams v. Webb*, 32 Iowa, 517; *Walker v. Mauro*, 18 Missouri, 564; *Peyton v. Hallett*, 1 Caines, 363; *Morton v. Naylor*, 1 Hill, 583; *Clark v. Mauran*, 3 Paige, 373; *M'Menomy v. Ferrers*, 3 Johnson, 72; *Crocker v. Whitney*, 10 Id. 318; *M'Lellan v. Walker*, 26 Maine, 114; *Cutts v. Perkins*, 12 Mass. 206; *Adams v. Robinson*, 1 Pick. 461;

Legro v. Staples, 16 Maine, 252; *Robbins v. Bacon*, 3 Greenleaf, 346; *Nesmith v. Drum*, 8 Watts & Serg. 9; *Blin v. Pierce*, 20 Vermont, 25; *Corser v. Craig*, 1 W. C. C. R. 424; *Spain v. Hamilton*, 1 Wallace, 604; *Caldwell v. Hartuppee*, 20 P. F. Smith, 74; *Parker v. The City of Syracuse*, 31 New York, 376; *Taylor v. Lynch*, 5 Gray, 49; *Lewis v. Berry*, 64 Barb. 593; *Hall v. City of Buffalo*, 2 Abbott App. 301; *Danklessen v. Braynard*, 3 Daly, 183. This results not from the order merely as such, but from the delivery of it to the payee. A letter to an agent or debtor requesting him to pay the amount to a third person will not produce this effect, and may be recalled at pleasure; but an order delivered to the payee, or communicated to him at the express or implied request of the drawer, is *prima facie* evidence of an intention that he shall have the beneficial interest in the fund or property in question; see *Carvalho v. Burn*, 4 B. & Ad. 382; 1 A. & E. 883; *Burn v. Carvalho*, 7 Simons, 109; 4 Mylne & Craig, 690.

In this case, Fortunato, having goods in the hands of Rigo in a foreign port, wrote to Burn that he would direct Rigo to deliver the goods to Burn's agent to cover certain bills which Burn had endorsed, and soon afterward sent a letter to Rigo to that effect. Fortunato committed an act of bankruptcy while the letter was on its way, and the goods were not delivered until after a commission had been issued against him. The assignee brought trover for the goods against Burn in the King's Bench and obtained a judg-

ment, which was affirmed by the Exchequer Chamber on the ground that the latter had not obtained an equitable lien or title before the bankruptcy. The defendants then went into Chancery, where the court arrived at an opposite conclusion, and enjoined the assignee from issuing an execution on the judgment, or proceeding further at law. The chancellor said: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the funds. In *Row v. Dawson*, Lord Hardwicke says, 'It is a credit on the fund, and must amount to an assignment of so much of the debt; and, though the law does not admit an assignment of a chose in action, this court does, and any words will do, no particular words being necessary thereto;' and in *Yeates v. Groves*, Lord Thurlow says, 'This is nothing but a direction by a man to pay part of his money to another for a valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer.' In *Ex parte South*, Lord Eldon says, 'It has been decided in bankruptcy that if a creditor give an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. On the other hand, this doctrine has been brought into doubt by some decisions in the courts of law which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions, but is certainly

not the doctrine of this court.' In *Fitzgerald v. Stewart*, and *Lett v. Morris*, the same rule was acted upon; and in *Watson v. The Duke of Wellington*, Sir J. Leach thus defines an equitable assignment: 'In order to constitute an equitable assignment, there must be an engagement to pay out of a particular fund.' Upon this principle it is that assignments of future freight and of non-existing but expected funds have been enforced in equity; but this case is far within the limits of the principle; for here there is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund, and to give directions for that purpose. I think, therefore, that the letter of the 4th and 9th of April, 1829, amounted to an equitable assignment of the funds in the hands of Rigo."

It results from this decision that an agreement between a debtor and creditor for the appropriation of goods in the hands of a third person to the debt, will pass the equitable title as against a subsequent assignment in bankruptcy or execution, although the levy is made or act of bankruptcy committed before the agreement is communicated to the person who is to carry it into effect. What the parties agree to do and execute, as far as the circumstances will permit, may be treated as done for the purpose of relief. But such an agreement is not valid against a *bona fide* purchaser who obtains possession of the goods before it is carried into effect; see *Clemson v. Davidson*, 5 Binney, 392.

Although it may not be essential to the equitable transfer of a debt that the debtor should be directed to pay the money over to the assignee, still the omission to give such an order may conduce to show that the arrangement is merely prospective, and not designed to confer a present interest; see *Rodick v. Gandell*, 2 De Gex M. & G. 778.

In *Rodick v. Gandell*, Gandell & Brimton were indebted to their banker, and promised him that the amount due to them as contractors by a railway company should be appropriated to the payment of the debt. They then requested Pinniger & Westmacott, who were the solicitors of the company, to carry this arrangement into effect; and it was held not to be an equitable assignment of the fund, although Pinniger & Westmacott had communicated their instructions to the bank and made various partial payments. Lord Truro said: "If an assignment of the debts had been intended, it would have been quite as easy for Gandell & Brimton to have directed the order to the railway companies as to Pinniger & Westmacott. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realized. The latter does not clearly fall within the terms of the principle stated either by Lord Eldon or Lord Cottenham, inasmuch as the order was neither upon a debtor of Gandell & Brimton, nor upon any one holding funds of Gandell & Brimton; nor, as regarded

Pinniger & Westmacott, was there any subject-matter upon which the order could presently attach. It was a mere authority to receive, which might or might not be acted upon; it was not directed to the railway companies, nor to any officer or representative of any of the companies, in any sense to make it available against the companies, who might have paid Gandell & Brimton or any attorney or agent appointed by them, or have arranged for time to pay or have compromised or compounded at their discretion."

The question is, nevertheless, one of intention, as deduced from all the circumstances; and when that appears to be to make a permanent transfer, it will not be allowed to fail because the order is drawn on the agent who is to collect the debt, and not on the debtor.

In *Neemith v. Drum*, 8 W. & S. 9, a principal debtor gave the surety a written order on his attorney to pay over the amount of a note in his hands, when collected, as an indemnity, and it was held that this bound the proceeds of the note in the hands of the attorney, when subsequently received by him.

If the fund exists potentially when the order is given, it need not be actually in being; and a draft on the proceeds of goods which the drawer is about to sell or consign, or on the employer whom he has agreed to serve, will confer a beneficial interest that may be specifically enforced by a court of equity; *ante*; *Taylor v. Lynch*, 5 Gray, 49; *Dickinson v. Morrow*, 14 M. & W. 713; *Garland v. Har-*

ington, 51 New Hamp. 409; *Brooks v. Hatch*, 6 Leigh, 534; *Peyton v. Hallett*, 1 Caines, 363; *St. John v. Charles*, 105 Mass. 262; *Macomber v. Doane*, 2 Allen, 544; *Tripp v. Brownell*, 12 Cushing, 37; *Augur v. The Belting Co.*, 39 Conn. 536; *Hawley v. Bristol*, *Ib.* 26.

In *Tripp v. Brownell*, an order by a seaman who was about to sail in a whale-ship, for the balance that might be due to him at the end of the voyage, made and delivered to the payee before the voyage commenced, as a security for future advances, and addressed to the agent and owner of the vessel, was accordingly held to become irrevocable when such advances were made, and vest a beneficial interest in the assignee, which might be enforced by a suit in the name of the assignor, notwithstanding a subsequent release by him. Metcalf, J., said: "The order is certainly an authority to receive the seaman's pay, whether in money or in oil. Perhaps the seaman, before anything had been advanced on the credit of it by way of outfit or otherwise, might revoke it, and give notice thereof to the owners; and it being still a naked authority, he might defeat it. But if, at the time of giving the order, the holder had advanced him anything for him, or become responsible to pay or do anything for him in his absence; or if, after his departure without revoking the authority, the holder, in pursuance of any previous arrangement with him before leaving, had made any advance to his family or otherwise, it became an authority coupled with an interest, and by law is

not revocable. The holder then, has a right to recover the pay even against the express prohibition on the part of the seaman. It is almost the same legal proposition, stated in a little different aspect, that if, at the time such order is drawn, it be understood and intended as a security for the payment of money, it becomes an assignment of the debt or chose in action, an assignment of the whole debt, the legal effect of which is to give a right to the assignee to collect and receive the whole amount assigned, being accountable over to the assignor for the surplus, if any, which may remain after applying it to the satisfaction of the debt or obligation intended to be secured. It is called an equitable assignment, and it is so far an equitable transfer only of the debt, that if the assignee have occasion to go into a court of law, he must sue in the name of the assignor, that the debtor may have the benefit of any payment, or set-off, or other defence he may have against the assignor.

"But it is, so far, a transfer of the right to the debt, or balance due, that after notice of it the debtor cannot discharge himself by paying the original creditor, the assignor; and it is so far recognized as a right in a court of law, that in a suit brought in fact by the assignee, but in the name of the assignor, the court will take notice of the right of the assignee, and protect it, and will not permit the assignor to discontinue or release the action, or in any way to control it."

BILL OF EXCHANGE.—A bill or draft payable generally, and not

specifying or referring to any particular fund, does not operate as an equitable assignment, whether it is or is not accepted by the drawee, and it is immaterial that assets have been placed in his hands as a means of payment, because they may be diverted to another use without asking the consent of the payee; *Watson v. The Duke of Wellington*, 1 Russell and Mylne, 602; *Phillips v. Stagg*, 2 Edwards, 108; *Mandeville v. Welch*, 5 Wheaton, 277; *Kimball v. Donald*, 20 Missouri, 577; *Sands v. Matthews*, 27 Alabama, 399; *The Marine Insurance Bank v. Janney*, 3 Sandford, 257; *Luff v. Pope*, 5 Hill, 413; 7 Id. 577; *Cowperthwaite v. Sheffield*, 1 Sandford, Sup. C. R. 416; 3 Comstock, 243; *Harris v. Clark*, Ib. 93; *Greenfield's Estate*, 12 Harris, 232, 240; *Hopkins v. Beebe*, 2 Casey, 86.

In *Hopkins v. Beebe*, 2 Casey, 86, A., B. and C. were bankers or dealers in bullion and exchange. A. was established at San Francisco, B. at Philadelphia, and C. at New York. On the 10th of February, 1851, B. gave a letter of credit to A., which authorized A. to draw on B. for any amount of money required in his business. A. made this letter as public as he could, by advertisement in the California newspapers, and drew largely on B., who for a time regularly accepted and paid the bills. To make B.'s acceptances safe, and to reimburse his payments, A. from time to time remitted gold dust, and bills of exchange on the Atlantic cities, to B. These, as they were received, were credited by B. to A.'s account, where A. was also charged with the

amount of his bills paid. C. was not concerned in these transactions, except that the packages containing the gold and other effects were consigned to him at New York, and by him forwarded to Philadelphia. In August, 1851, B. suddenly stopped payment, and soon after A. also failed. When this happened, A. was indebted to B. upward of twenty thousand dollars; that is to say, B. had then paid bills of A. to an amount much greater than the remittances sent by A. to meet them; and there were a large number of bills not presented in the hands of holders who had paid value for them. It appears also that B. was at the time indebted to C., but in what precise amount the record does not show. At the date of B.'s failure, a remittance to him of gold and some other effects was on its way from A., but had not then reached New York. This, like the previous remittances, was shipped at San Francisco under a bill of lading to C., and was covered by a policy of insurance in C.'s name. Very soon afterward B. made a writing authorizing and directing C. to take the expected gold and bills, and apply them to the credit of B.'s indebtedness to C. When the vessel which had them on board arrived at New York, they were accordingly converted by C. into money, which he appropriated to his own use. The plaintiff, who was the holder of a bill drawn by A., and protested for non-acceptance, then brought assumpsit for money had and received against B., on the ground that the assets which had been remitted by A. to meet the bills were specifically

appropriated to that purpose, and could not be diverted to any other purpose without a constructive fraud on the bill-holders, for which redress might be had in Pennsylvania under the form of the common law.

"We are quite clear," said Black, J., "that the plaintiff had not any title to, or property in, or lien upon the effects in question. He had an interest that they should reach their destination and remain there until he could secure them, and appropriate them to his claim. This is the interest which every creditor has in the property of his debtor when the latter is in failing circumstances. But further than that the plaintiff had no concern with the remittance. His bill was payable at all events, and his remedy for non-payment was an action on the bill itself against the parties to it. He had no claim on any particular fund, which he could follow into the hands of other parties. This has been so long and so universally regarded as true, that an order to pay money out of a particular fund is not anywhere considered as a bill of exchange. (Chitty, 55, 252; Byles, 8.)

"If the drawee in this case had been directed by the bill to pay the amount of it out of the proceeds of the gold dust, while the instrument would have lost its negotiable character, it would still not have been an assignment of the fund; for, according to *Mandeville v. Welch* (5 Wheaton, 227), and *Tiernan v. Jackson* (5 Peters, 580), a part only of a fund will not be legally assigned even by an order to pay such part. It is not pretended that

the bill in the plaintiff's hands amounts to more than a small part of what the gold dust was worth.

"The proposition that a bill of exchange does, *propria vigore*, vest in the payee a title to the effects sent to meet it, or give the payee a lien upon such effects, so that he can demand them or their proceeds from a person to whom the drawee has transferred or passed them away, is altogether unsupported by any authority or custom that we know of. Such a rule would certainly not promote the convenience or the safety of commercial business. The contrary doctrine, that the bill has no such operation, but that the holder must look to the parties whose names are on it, and not to any particular fund, has cases in its favor quite numerous enough to sustain a principle so simple and just, more indeed than could have been expected on a point so little likely to be raised. 3 Comstock, 251.

"The rule is clearly established, that when goods are shipped and the bill of lading sent to the consignee, with the understanding, express or implied, that the proceeds are to be credited to the consignor's general account, the property vests by that act in the consignee. The carrier becomes the agent of the consignee, and is responsible to him for the non-delivery of the goods. The consignee may sell them before they arrive or afterward. He has the exclusive and unlimited dominion over them which a man ought to have over what belongs to him; 1 Binney, 106; 4 M. & W.

775; 1 Bing. 150; 2 Id. 20; *Schumaker v. Eby*, 12 Harris, 521."

A material point in this instance seems to have been that the drawer was indebted to the drawee to a larger amount than the value of the gold dust. If goods are consigned to B. as a means of paying a bill drawn on him by A., and B. becomes insolvent after accepting the bill, he cannot appropriate the fund to any debt which he does not owe without a fraud on his creditors, and good faith requires that it should not be appropriated to the payment of any debt which is not due by A. Hence, if the fund comes into the hands of an assignee in bankruptcy for distribution, it will be appropriated to the payment of the bill, unless the state of the account between A. and B. is such that he might justly have refused to accept the bill, and appropriated the money to his own use; vol. 1, 177; and it would seem that the holder of the draft has an equity which a chancellor may enforce.

An agreement between the drawer of a bill and the payee, that a remittance to the drawee shall be appropriated to the payment of the bill, may be specifically enforced by a court of equity; see *Ex parte Prescott*, 3 Deacon & Chitty, 218; *The Marine Ins. Bank v. Janney*, 1 Barb. 486; *Lowery v. Steward*, 25 New York, 239; *Harwood v. Tucker*, 18 Illinois, 544. In the case last cited A. sold a draft on C. to B., and at the same time sent C. the exact amount in bank bills, with a request to honor the draft,

and it was held that this was an equitable appropriation of the fund, and that C. held it in trust for the benefit of B.

Agreeably to the weight of authority, a check is essentially a bill of exchange, and will not, therefore, operate as an equitable transfer or appropriation; *Tyler v. Gould*, 48 New York, 682; *Chapman v. White*, 2 Selden, 412; *The Aetna National Bank*, 46 New York, 82; *The Marine Bank v. The Fulton Bank*, 2 Wallace, 252; *The Bank of the Republic v. Millard*, 10 Id. 152; *Dykens v. The Leather M. Bank*, 11 Paige, 612; *Harris v. Clark*, 2 Barb. 94; 3 Comstock, 93; *Winter v. Drury*, 1 Id. 525. It has been held in other instances, that as a check on a bank is ordinarily drawn against an actual deposit, and will not be paid unless the amount is standing to the credit of the drawer on the books, it is virtually an order on a particular fund, and confers a specific interest on the drawee; see vol. 1, 395; *Bromley v. Branton*, 6 L. R. Eq. 275; *Munn v. Burch*, 25 Illinois, 35; *The Chicago M. Ins. Co. v. Stanford*, 28 Id. 168; *Fogerties v. The Bank*, 12 Richardson, 502; *Gourley v. Leisenbigler*, 1 P. F. Smith, 345; *Rhodes v. Childs*, 14 Id. 18; *In re Brown*, 2 Story, 502, 517; *ante*, vol. 1, 1249; and such will clearly be the effect when the check is so worded as to leave no doubt of the drawer's intention to transfer the entire deposit specifically to the payee; *Kingman v. Perkins*, 105 Mass. 116.

In *The Aetna National Bank v. The Fourth National Bank*, 46 New York, 87, Allen, J., said: "The

cases all agree, that notwithstanding the agreement which bankers make with their customers, to pay their checks to the amount standing to their credit, a check-holder can take no benefit from this agreement, and that a check does not operate as a transfer or assignment of any part of the debt, or create a lien at law or in equity upon the deposit; *Harris v. Clark*, 3 Comstock, 93; *Winter v. Drury*, 1 Selden, 525; *Dykens v. Leather Man. Bank*, 11 Paige, 612; *Thornhill v. Hall*, 2 Cl. & Fin. 28. The principle was applied by this court, in *Cowperthwaite v. Sheffield*, 3 Coms. 243, to a bill of exchange, drawn against a consignment of goods, of which the consignees and drawees were advised by letter, accompanying a notice of the shipment of the goods. The court held, that the bills and letter of advice did not operate as an appropriation of the proceeds of the cotton to the payment of the bills. The Judge, delivering the opinion, says: 'But if it could, by any equitable intendment, be held to amount to a specific direction to apply the proceeds of shipment to the payment of these bills, it could only be in favor of a party who had notice of the arrangement and who had purchased the bills, or become liable upon them on the faith of it.'"

LETTER OF ATTORNEY.—The effect of a power of attorney as an assignment depends on the person to whom and the purpose for which it is given, and the nature of the property over which it is to be exercised; see *Raymond v. Squire*, 17 Johnson, 47; *Knapp v. Alvord*, 10

Paige, 205; *Rogers v. Lindsey*, 15 Howard, 441; *M'Graff v. Porter*, 5 Florida, 343; *Clayton v. Fawcett*, 2 Leigh, 19. A power from a debtor to a creditor to collect an amount due by a third person, and apply it to the payment of the debt, is *prima facie* an assignment, because a chose in action is not susceptible of actual transfer, and an authority to reduce it to possession is as near an approach to delivery as the nature of the case admits. Or, to state the point somewhat differently, as an assignment of a debt cannot be made effectual save through a power to proceed in the name of the assignor, so the execution of such power may operate as an equitable appropriation of the fund; *Brooks v. Hatch*, 6 Leigh, 534; *Gerrish v. Sweetzer*, 4 Pick. 374; *Bromly v. Holland*, 7 Vesey, 28; *Bergen v. Bennett*, 1 Caines' Cases, 1; *Raymond v. Squire*, 11 Johnson, 47; *The People v. Tioga*, 19 Wend. 73; *Stimson v. Frees*, 2 Jones' Eq. 156; *Weed v. Jewett*, 2 Metcalf, 168.

In *Weed v. Jewett*, Putnam, J., said: "A letter of attorney to receive all the money due from A. to the constituent, and to give a discharge therefor in the constituent's name, with a clause stating that it is an assignment of the same, constitutes an assignment of the debt to the attorney, though the letter is not in terms irrevocable and does not expressly authorize the attorney to receive the money to his own use. It is not said in so many words that the attorney might receive the money for his own use, but that is necessarily to be inferred from the words which were used,

viz.: that the instrument was an assignment; and if so, the assignee was, of course, to have the property for his own use."

POWER OF SALE.—A power to sell land or chattels and apply the purchase money to the payment of a debt due from the giver of the power to the donee, negatives rather than implies an intention to assign, because the appropriate mode of passing the title to land is by deed, and in the case of chattels by delivery. Moreover, if the right of property vested in the grantee, he might dispose of it without any authority to that effect. Such a power consequently does not operate as an equitable assignment; see *Hunt v. Rousmanier*, 242; 3 Id. 294; 8 Wheaton, 174; 1 Peters, 1; *ante*, 983; *Webb v. Walker*, 7 Cushing, 46; *Fuller v. Emerson*, Ib. 203.

In *Webb v. Walker*, Pierce, the purchaser of the brig, gave Webb, the seller, his notes for the purchase money, and also a bond, reciting that said amount was to run on bottomry, and conditioned to pay the notes at maturity, and stipulating that Pierce should keep the brig insured, and that on his failure to pay the notes Webb might sell the vessel at public auction for the payment of the notes and expenses; and Pierce, by the same instrument, appointed Webb his attorney to convey the vessel to the person who should become the purchaser at such sale. Pierce immediately sold to Walker, and when the first note became due, Webb desired to sell, but Walker refused his assent, and denied the existence of any vendable interest in Webb. It was held

that the instrument did not create an equitable lien upon the brig, nor declare a trust which could be enforced as against a subsequent purchaser from Pierce, with or without notice.

Shaw, C. J., said, "The instrument was simply an agreement that the vendor of certain personal property might resell it upon non-payment of the purchase money, and pay himself from the proceeds. Can the main intention of the parties be carried into effect notwithstanding this failure? And did the instrument create such a lien, or declare such a trust, as can be enforced by a bill in equity? We think not. The stipulation to insure has no effect on the construction of the instrument. As the plaintiff was not to have the benefit of it, it was a clause entirely aside from the main body of the agreement. There are no words of grant, conveyance, pledge or hypothecation. There is simply a stipulation that if one party failed to pay at the time fixed, the other might enter and sell, or might act as his attorney for the sale of the property. The instrument cannot be upheld as a mortgage, for there was no possession, and no record before the sale. It only gives a power to sell and apply the proceeds to the payment of the notes. This is not a power coupled with an interest, and amounting to an assignment. The vessel must be sold before any proceeds could arise, and it was only in the proceeds when realized that the plaintiff had any interest. Such an interest could not affect Pierce's power to sell and pass the property.

When a party has conveyed an interest in the thing itself, with a power to sell and appropriate the proceeds, the grantee takes something more than a naked, revocable power; but when only a power to sell is given, without any interest in the subject-matter, except in the proceeds arising from the sale, which interest can only be obtained by execution of the authority, it is otherwise. This case most resembles that of *Hunt v. Rousmanier*, 2 Mason, 432; 8 Wheaton, 174; and 3 Mason, 294. Rousmanier had borrowed money of Hunt, and by way of security gave him power to sell two vessels, then at sea, and reimburse himself from the proceeds. Rousmanier died before the return of the vessels. Hunt brought his bill in equity, in the Circuit Court, to have a lien on the vessels declared in his favor, and to have the vessels sold, and his debt first paid out of the proceeds. The estate of Rousmanier was insolvent, and the question was between the complainant, relying upon such trust, and the general creditors. Upon a demurrer, judgment was given for the defendant, on the ground that the power was a naked power, not coupled with an interest in the vessels, and that it terminated with the death of the party who gave it. On error to the Supreme Court of the United States, the cause was argued at great length; and, in an opinion given by Marshall, C. J., the court affirmed both the above propositions, namely: first, that a power to sell a vessel and take payment from the proceeds, was a naked power not coupled with an interest, and so

created no assignment; and second, that, as a naked power, it ceased with the death of the party who gave it; that it created no trust and no assignment, and of course no lien on the vessels.

"But as that case came up on a demurrer, and it appeared to be stated by the bill that the agreement was intended to operate as an effectual security for the loans on those vessels; that both parties so intended; and that the powers were therefore given and taken under a mistake; and as that court had jurisdiction in equity to correct a mistake, they reversed the decree of the Circuit Court, sustaining the demurrer, and remanding the case to the Circuit Court, with leave to the defendants to withdraw the demurrer, and file an answer. The case came again before the Circuit Court on the answer and proofs; and it was decided by Story, J., that no such mistake was established, and judgment was given for the defendants. To the only points applicable to this case, the foregoing is an authority for the defendants; and besides, that such a power of attorney, given by an owner, though intended as a security for money, constitutes no assignment, no contract for specific performance, and no trust; and, therefore, will not sustain a bill in equity in this court."

POWER COUPLED WITH INTEREST.—It is, nevertheless, well settled that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing a benefit to the donee of the authority, it is coupled

with an interest, and cannot be revoked; see *Gausson v. Morton*, 10 B. & C. 731; *Smart v. Sanders*, 3 B. & C. 380; 5 Id. 895; or, in the language of Chief Justice Marshall, in *Hunt v. Rousmanier*, Wheaton, 174, "although a letter of attorney depends, from its nature, on the will of the person making it, and may in general be recalled at his will, yet if he binds himself for a consideration in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it."

Accordingly, where the owner of certain lands gave one Foster, to whom he was indebted, the power to sell the lands and receive the purchase money as a means of discharging the debt, it was held that Foster had an interest in the execution of the power, and that it could not be revoked; *Gausson v. Morton*.

The judgment in *Hunt v. Rousmanier* turned on the single point that the power, though irrevocable during the life of the donor, ceased at his death. So an irrevocable power of attorney may be defeated by a conveyance of the subject-matter to a third person, because the power must necessarily be executed in the name of the grantor, and cannot be effectual after the interest on which it was intended to operate has passed from him. Such, at least, is the rule at law; but as such a sale is a manifest breach of faith on the part of the donor of the power, a court of equity should give relief against a purchaser with notice of the fraud. And it would seem that the executors of one who has agreed to give an irrevocable

power of disposition as a means of security or payment, may be enjoined from making his decease a ground for disputing the execution of the power; *Ish v. Crane*, 8 Ohio, N. S. 350; 13 Id. 574; 2 American Lead. Cases, 553, 5 ed.

Under these circumstances, the intention of the parties is frustrated by one of those accidents which constitute a distinct ground for the interposition of a chancellor; see *The United States v. Vaughan*, 3 Binney, 391, 401; *Tyson v. Passmore*, 2 Barr, 122, 125.

An authority or direction to a third person to collect or dispose of goods or assets belonging to the donor of the power, and pay them over to one to whom he is indebted, is *prima facie* an authority or agency which may be recalled at pleasure; *Scott v. Porcher*, 3 Merivale, 658; *Rodick v. Gandell*, 1 De Gex, M. & G. 763; *Lindsay v. Price*, 33 Texas, 280; *Fuller v. Emerson*, 7 Cushing, 203; and it does not necessarily vary the case that the assets are in the keeping or possession of the person on whom the power is conferred; *Beans v. Bullitt*, 7 P. F. Smith, 221; *Walter v. Ross*, 2 Washington C. C. R. 283, 289; *Eschelberger v. Erskine*, 10 Maryland, 373; *Brind v. Hampshire*, 1 M. & W. 363; *The M. F. Bank v. Janney*, 1 Barb. 486; *Winkley v. Foye*, 2 Fogg, 174.

"Where," said Fowler, J., in *Winkley v. Foye*, "a consignment or remittance is made, with instructions to pay over the proceeds to a third person, the appropriation is not absolute, for it amounts to no

more than a mandate from a principal to his agent. It may be revoked at any time before it is executed; or at least before any engagement is entered into by the mandatory with the third person to execute it for his benefit; and it will be revoked by any prior disposition of the property inconsistent with such execution; 2 Story's Eq. Jurisp. sec. 972, 1036 a, 1036 b, 1045, 1046; *Scott v. Porcher*, 3 Merivale, 662, 664; *Acton v. Woodgate*, 2 Mylne & Keen, 492."

In *Scott v. Porcher*, H. & Co., of Madras, made a consignment of pearls to B., with directions to sell and pay the proceeds to P. (to whom H. & Co. were at the time indebted) on account. B. acknowledged the receipt of the consignment, and undertook to perform these directions, but no notice was given by either party to P. H. & Co. subsequently wrote to B. requesting the pearls to be sent to America, and there disposed of; and afterward, being insolvent, made an assignment of all their effects in trust for the benefit of their creditors; and it was held that the directions accompanying the consignment did not constitute an appropriation, but amounted to no more than a mere mandate revocable at the pleasure of the consignor, and which was actually revoked by the subsequent disposition of the property; and that P., who had no express notice of the consignment, but, on receiving information of it after he knew of the failure of H. & Co., had laid an attachment on the pearls in the hands of B., on which he had proceeded to judgment and

sold the pearls, and who, having executed the trust deed as creditor, was bound to account with the trustees for the proceeds.

The Master of the Rolls said: "This case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation. Harrington & Co., who made the consignment, never informed Porcher & Co. that any remittance was made, or intended to be made, on account of the debt due to the latter. The consignees, who were mere factors for the consignors, had no directions to apply the produce of the consignment in payment of any specific debt, or in taking up any particular bill of exchange. The only order they received was that when the sale should be effected they should pay over the proceeds to Porcher & Co. They informed their principals that they would act in conformity to the directions received, but they had no communication whatever with Porcher & Co. on the subject. This amounts to no more than a mandate from the principal to his agent, which can give no right or interest to the third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it. The assignment of it in December, 1811, was such a disposition. Under that assignment the general creditors of Harrington & Co. became entitled to the benefit of every

description of property over which they had a disposing power. There was no third person who had then acquired any interest, legal or equitable, in the goods in question, and, therefore, Harrington & Co. could dispose of them, and they have disposed of them to the present plaintiffs, who are consequently entitled to a decree."

The court may, nevertheless, go outside of the instrument for the purpose of discovering the intention of the donor of the power, and if that appears to have been to confer an irrevocable authority on the donee, or that he should hold the fund as the agent of the party to whom it is to be paid, and not of the donor, it will not be allowed to fail through a defect of form. See *Sharpless v. Welch*, 4 Dallas, 279; *Watson v. Bagaley*, 2 Jones, 164.

In the case last cited, a letter of attorney from an insolvent debtor, authorizing the collection of his assets and the distribution of them among his creditors, in a prescribed order of preference, was accordingly held to be a declaration of trust in their favor, which could not be recalled after the assets had been collected by the attorney and were in his hands for distribution. And all the authorities agree that when a direction or authority to an agent or debtor to pay over the money in his hands to a third person is communicated to the latter, and receives his assent, there is an appropriation which cannot be recalled; *Hodgson v. Anderson*, 3 B. & C. 842; *Lowery v. Steward*, 25 New York, 239.

It results from these decisions that the effect of a letter of attor-

ney, as an assignment, depends on the agreement which it is a means of carrying into effect, and which must be deduced from all the evidence, and not merely from the language of the instrument. See *Rodgers v. Lindsey*, 13 Howard, 441. An irrevocable power to a creditor to collect the amount due by a third person, may consequently be shown to have been given as collateral security for a demand which has since been paid; *Gerrish v. Sweetzer*, 4 Pick. 374. But the letter may be so worded as to be itself a contract, and will then be insusceptible of contradiction; *Langdon v. Lacy*, 4 Gray, 186.

It has also been held, and would seem clear on principle, that the delivery of assets for the use of a third person, or in trust for him, may confer a right of property which cannot be defeated by any subsequent act of the bailor or those claiming under him as creditors, although done before the transfer is communicated to the *cestui que trust* or beneficiary and ratified or accepted by him; vol. 1, 431; Story on Bailments, § 103; Story's Eq. Jurisprudence, § 1041. "If a man gives goods or chattels to another upon trust to deliver them to a stranger, chancery will compel him to do it;" Cumming's Digest, Ch. 4 W. 5; *Howard v. The Bank*, 40 Vermont, 547; *Blanchard v. Selden*, 43 Id. 512; vol. 1, 1239. It is in this light that conveyances in trust for the benefit of creditors are viewed in the United States, though held revocable in England. See *Acton v. Woodgate*, 2 Mylne &

Keen, 495; *Wilt v. Franklin*, 1 Binney, 502; *Alexander v. Adams*, 1 Strobhart, 47; *Atkins v. Barwick*, 1 Strange, 165.

The uncertainty which still pervades this branch of the law appears from the following extracts from the works of Mr. Justice Story on Eq. Jurisprudence and on Bailments: "The distinction between the operation of assignments at law and the operation of them in equity, may be very familiarly shown by a few illustrations, derived from cases of bailments and consignments. In the common case, where money or other property is delivered by a bailor to B. for the use of C., or to be delivered to C., the acceptance of the bailment amounts to an express promise from the bailee to the bailor to deliver or pay over the property accordingly. In such a case, it has been said that the person for whose use the money or property is so delivered, may maintain an action at law therefor against the bailee, without any further act or assent.

"In regard to the other class of cases above suggested, namely, those where the question may arise of an absolute appropriation of the proceeds of an assignment or remittance, directed to be paid to particular creditors, courts of equity, like courts of law, will not deem the appropriation to the creditors absolute until the creditors have notice thereof, and have assented thereto. For until that time the mandate or direction may be revoked or withdrawn, and any other appropriation made by the consignor or remitter of the pro-

ceeds. The true test whether an absolute appropriation is made out or not depends upon the point at whose risk the property is, and until the creditor has consented, the property will clearly be at the risk of the assignor or remitter. But if upon notice the creditors should assent thereto, and no intermediate revocation should have been made by the assignor, or remitter there in equity, the assignee or mandatory will be held a trustee for the creditors, and they may maintain the bill to enforce a due performance of the trust;" Story's Eq. Jurisprudence, §§ 1041, 1045.

"But if A. delivers goods to B., to be delivered over to C., there C. hath the property and may demand the goods, if B. undertakes to make the delivery to C., and hath no interest or claim but for that purpose. But in all such cases there must be a clear assent on the part of B. to such undertaking, otherwise no action will lie by C., and the mere receipt of the goods will not be sufficient to establish such assent. It has been settled by several modern decisions, that in case of a remittance of a bill to an agent or banker, with directions to apply a part of it to the payment of a debt due to a third person, the mere fact of a receipt of the remittance does not, unless the remittee assents to such a disposition of the proceeds, and agrees to pay over the same to the creditor, amount to such an appropriation of the proceeds as will enable such creditor to recover the same against the remittee. The same principle

has been applied to a consignment of goods for sale, with directions to make payment of a debt out of the proceeds to a creditor;" Story on Bailments, § 103.

DILIGENCE TO PERFECT TITLE.—An assignee must be diligent to perfect his title, and will be postponed to a subsequent purchaser who has been prejudiced by his laches; *ante*, 51; *Spain v. Hamilton*, 1 Wallace, 624; *Welsh v. Bekey*, 1 Penrose & Watts, 58, 61. A failure to have the assignment of a judgment marked on the docket is negligence within this rule in Pennsylvania; *Fisher v. Knox*, 1 Harris, 622; *Fraley's Appeal*, 26 P. F. Smith, 42; *ante*, 54. So an assignee who lies by until a subsequent assignee has proceeded to judgment, loses the priority which he had gained by being first in point of time; *Judson v. Corcoran*, 17 Howard, 612; *The Mercantile Ins. Co. v. Corcoran*, 1 Gray, 75; and the principle is the same when the assignee does not give notice to the debtor, until judgment has been rendered against him in an attachment issued by a creditor of the assignor; *Richards v. Griggs*, 16 Missouri, 416.

It results from the same principle that one who claims under an equitable transfer or appropriation of goods or chattels, should take immediate possession of the property if it is within his reach; and if he does not, he is chargeable with laches, and will have no equity against a subsequent purchaser who gives value in ignorance of his right, and on the faith of the seem-

ing ownership of the vendor; *Clemson v. Davidson*, 5 Binney, 392, 398.

It has been said that this rule does not apply to choses in action, nor to any fund which is not susceptible of manual transfer and possession; *The United States v. Vaughan*, 3 Binney, 394; see *The Commonwealth v. Watmough*, 6 Wharton, 117, 139; *Williams v. Downing*, 6 Harris, 60, 65; *Conant v. The Seneca City Bank*, 1 Ohio, N. S. 298; 1 Smith's Lead. Cases, 81, 7 Am. ed.; but in these cases the question arose under a levy by a creditor, and might have been determined differently as between purchasers. A purchaser may rely on the negligence of a prior assignee as a reason for setting aside a transfer which is good against the assignor, but no such right can be exercised by a volunteer, nor, agreeably to the generally received doctrine, by one to whom the fund is transferred as collateral security for an antecedent debt; *Pratt's Appeal*, 27 P. F. Smith, 378; and the same rule applies to creditors unless the case is controlled by a statute, or the transfer is actually or constructively fraudulent as it regards them; *ante*, 83.

A creditor is not a purchaser, and cannot assert any right that could not have been enforced by the debtor; *ante*, 90. Hence an assignment which is valid as between the parties will also be good against creditors; *Westoby v. Day*, 2 Ellis & Blackburn, 605; and it has been held to follow that the delivery of a certificate of stock to a purchaser, attended with a power of attorney to transfer, will confer a right that

cannot be impeached or set aside by a subsequent execution or attachment against the vendor; *The United States v. Vaughan*, 3 Binney, 394; *The Commonwealth v. Watmough*, 6 Wharton, 117; *The People v. Elmore*, 35 California, 653; *Buffalo v. Kortright*, 20 Wend. 91; 22 Id. 348; *McNeil v. The Tenth National Bank*, 46 New York, 328; *Grymes v. Howe*, 49 Id. 17, 22; *The Mount Holly Co. v. Ferree*, 2 C. E. Green, 117.

In *The Commonwealth v. Watmough*, it was contended that the principle which makes transmutation of possession essential to the validity of a sale as against creditors, is the same whether the property in question is goods or stock, and that, as stock is not susceptible of manual occupancy, it should be transferred on the books of the corporation in order that the vendor may not obtain a false credit from a seeming ownership, contrary to the policy of the law as declared in the 13 Eliz. c. 5; see *Welsh v. Bekey*, 1 Penrose & Watts, 58, 61. But Gibson, C. J., said: "Though this reasoning may be ingenious, and not without plausibility, yet it is believed that it would be contrary to the universal understanding, as also the practice of mankind on the subject, to adopt it. Besides, although the legislature has made such stock the subject of execution, yet it cannot be said that the nature of it has thereby changed, so as to have become in every respect the same as, or even similar to, goods and chattels. For the debts of the real owner it is made liable to be taken in execution; but as to what con-

stitutes the ownership of it, or the nature of the evidence by which it may be established, they are in no wise changed. The law in that respect remains the same as it was before the passage of the act subjecting it to execution. The actual possession and use of goods is a matter which is open and visible to all the world, and being also considered *prima facie* evidence of ownership, it has, therefore, not only in law, but likewise in the common estimation of mankind, been supposed to be sufficient to give such possessor a credit in his dealings and intercourse with the world equal to the value of the goods so held and used; and for this reason it has been held that a private purchaser of goods, even for a valuable consideration, who leaves them in the possession of the vendor, no matter from what motive, whether innocent or fraudulent, shall not be permitted afterward to withdraw them from the execution creditor of the vendor. But as to stock, it, from its very nature, is incapable of such possession so as to make it known or notorious who has the use or benefit of it, and thus raise a general belief in regard to the ownership thereof; even its existence may be unknown, excepting to comparatively but few persons. The only evidence of it that can be safely trusted as to this, is the books of the bank or the corporation; but they, being of a private nature, are not open to public inspection. Hence it is, that the ownership of such stock, though held by the owner in his own name on the books of the corporation, is not sup-

posed to have given him a general credit with the world."

On the other hand, it was held in *Pinkerton v. The Manchester and Lawrence Railroad Co.*, 42 New Hampshire, 424, that the delivery of stock is not complete until it is transferred on the stock record, or a notice sent to the office for that purpose; and that a failure to adopt this course is *prima facie* and, if unexplained, conclusive evidence of a fraudulent purpose, which invalidates the transaction as it regards the vendor's creditors. Bellows, J., said: "In deciding this question, it is not material to determine the precise character of this property, whether stock is to be regarded as choses in action or not; because we are satisfied that it comes within the provisions of the statute of 13 Eliz. Ch. 5, even if regarded as a chose in action. The terms used in that statute, in respect to personal property, are 'goods and chattels,' but they are construed to embrace things in action as well as in possession; 2 Bl. Com. 384, note 1; *Ford and Sheldon's Case*, 12 Co. 1, applying to an act of Parliament; *Ryall v. Rowles*, 1 Atk. 164, 182, and same case in 1 Ves. 348, 363, 366, 367, 369, 371.

"This case involved the construction of the terms 'goods and chattels' in the statute of 21 James 1, relating to conveyances by persons afterward becoming bankrupt, and it was held that they included a conveyance of a share in a trading concern by one of the partners, and it was expressly held that these terms in an act of Parliament

would include choses in action. And such, we think, has been the doctrine of the courts in this State, as shown in cases of foreign attachment and otherwise; *Hutchins v. Sprague*, 4 New Hamp. 469; *Giddings v. Coleman*, 12 Id. 153; *Langley v. Berry*, 14 Id. 82; *Newman v. Bagley*, 16 Pick. 570; *Richmondville Company v. Pratt*, 9 Cowen, 487.

"The claim of the Granite Bank arises from what must be regarded as a pledge, and to be valid, a delivery is essential, at least as against creditors. To constitute such delivery, the assignee should be clothed with the usual marks and indications of ownership. In the case of things in possession, there should be a manual delivery and change of possession, or its equivalent. In the case of things in action, the usual muniments of title should be conferred upon the assignee. As to the former, it is held that if the articles are bulky, the delivery of the key of the warehouse in which they are deposited will suffice; *Ryall v. Rowles*, 1 Ves. 362; see *Patten v. Smith*, 5 Conn. 200. So in case of the sale of goods at sea, a transfer of the bill of lading, by indorsement, is, by the commercial law, valid as to creditors; *Caldwell v. Ball*, 1 T. R. 205, 211; *Conrad v. Atlantic Insurance Company*, 1 Peters, 444, and cases cited; *Lanfear v. Sumner*, 17 Mass. 112. A bill of lading is an acknowledgment, under the hand of the master, that he has received the goods, and will deliver them to the person named therein, and, by the well-settled principles of

the commercial law, is assignable by indorsement; and this is equivalent to the actual delivery of the goods.

"Such transfer is the ordinary and appropriate mode of selling goods at sea; and it was held in *Caldwell v. Ball*, 1 T. R. 205, 215, that when two bills of lading were signed by the same master, the person to whom one was first transferred would hold the goods. So where the goods sold are in the custody of another, and an order is given to the depositary to deliver them to the buyer, which is presented to him, there the sale is complete; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 459; *Tuzworth v. Moore*, 9 Pick. 348. In the case of real estate mortgaged, where the title deeds are left with the mortgagor, who makes a second mortgage and delivers the title deeds, the first will, in equity, be postponed to the second; *Ryall v. Rowles*, 1 Ves. 360.

"In regard to the assignment of choses in action, as a bond or promissory note, a delivery is essential as against a subsequent assignee, or probably a creditor; see *Ryall v. Rowles*, 1 Ves. 348, 362; as to goods and chattels in possession, a substantial change of possession is by our law essential when it can be had. The want of it unexplained is conclusive evidence of a secret trust, and shows the sale to be fraudulent as to creditors. In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record. This is indicated by the ordinary course of dealing in such

property, and has been assumed in our legislation for many years."

It is held, in like manner, in Connecticut that the failure to complete the title to stock by a formal transfer is a badge of fraud, which renders the sale invalid as against the creditors of the vendor; *Shipman v. The Aetna Ins. Co.*, 29 Connecticut, 245; *Oulb v. Ives*, 31 Id. 251; although the presumption may be rebutted by proof that the purchaser did all in his power to perfect the title, and failed in consequence of the unjustifiable refusal of the corporation, and his right will then be superior to that of a subsequent attaching creditor.

Agreeably to the authorities in Massachusetts, where the charter of a bank provides that the shares shall "be transferable only at its banking house and on its books," they cannot be effectually transferred as against a subsequent attachment, without notice, by a delivery of the certificate with an assignment and blank power of attorney, unless notice of the transfer is given to the bank before the levy; see *Fisher v. The Essex Bank*, 5 Gray, 373; *Blanchard v. The Dedham Gas Light Co.*, 12 Id. 213. But these decisions were based on the language of the statutes as prescribing a particular mode of transfer, and not on general principles.

In the *Mount Holly Co. v. Ferree*, 1 C. E. Greene, 117, the Chancellor said: "The certificate of stock, accompanied by the power of attorney authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and renders the stock

transferable by the delivery of the certificate. And when the party in whose hands the certificate is found, is shown to be a holder for value, and without notice of any intervening equity, his title as such owner cannot be impeached. The holder of the certificate may insert his own name in the power of attorney, and execute the power, and thus obtain the legal title to the stock, whenever the loan for which it was hypothecated becomes due, or whenever, by the terms of his contract, he becomes entitled to the stock; and such a power is not limited to the person to whom it was first delivered, but inures to the benefit of each *bona fide* holder into whose hands the certificate and power may pass, and the title of the holder is in nowise affected by a provision in the charter or by-laws of the corporation, that the stock is transferable only on the books of the corporation. Such provision is intended merely for the protection and benefit of the corporation. These principles have been repeatedly recognized by the courts of other States, and in commercial cities constitute the basis of daily business transactions; *Fatman v. Lobach*, 1 Duer, 353; *Leavitt v. Fisher*, 4 Id. 1; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *Bank of Utica v. Smalley*, 2 Cowen, 770; *Angell & Ames on Corporations*, §§ 454, 564. The same principles have been adopted and sanctioned by the courts of this State; *Rogers v. The New Jersey Ins. Co.*, 4 Halst. Ch. R., 167; *Broadway Bank v. McElrath*, 2 Beasley, 26."

It might be inferred from the

language held in this instance that such a transfer will not only pass the title as against the assignor, and those claiming under him as creditors and volunteers, but against a subsequent purchaser for value and without notice. But the point was not actually before the court, and the better opinion would seem to be that a purchaser of stock, who perfects his right by obtaining a transfer on the books of a corporation, will be preferred to a prior purchaser who has been less diligent or fortunate; see *The New Haven & New York R. R. Co. v. Schuyler*, 34 New York, 30; *The People v. Ellison*, 35 California, 653. Until such a transfer has been made the assignment is merely an equitable one, and will not stand against one who has obtained the legal title for value and without notice; see *The Bank of Commerce's Appeal*, 23 P. F. Smith, 59, 64; *Bayard v. The Farmers' & Mechanics' Bank*, 2 Id. 232, 235.

The true rule seems to have been laid down in *Sabin v. The Bank of Woodstock*, 21 Vermont, 353, where Redfield, C. J., said, "The mode pointed out in the charter is the only mode which the public are bound to regard as conveying the title; and all persons unaffected with notice are at liberty to act upon the faith of the title being as it appears on the books of the corporation; but this view is not inconsistent with the idea that any other mode of conveyance may, like an unrecorded deed, or an equity to real estate, be good as between the parties, and every one having notice."

NOTICE TO DEBTOR.—To complete the assignment of a demand or chose in action as against the debtor, he must be informed that the obligation has been transferred; and if this precaution is not observed, a payment to the assignor, or release by him, will be valid as against the assignee; *Bishop v. Garcia*, 14 Abbott Pr., N. S. 69. In *Ryall v. Rowles* it was held to follow, that when such notice is not given, the debt remains within the control and disposition of the assignor, and will consequently pass to his assignee in bankruptcy by virtue of Statute 21, Jac. c. 19, s. 11.

It was a natural if not logical deduction from these premises, that a failure to notify the debtor will invalidate the assignment as against a subsequent *bonâ fide* purchaser from the assignor, and that the question which of successive assignees of the same obligation should be preferred, depends not on the date of the respective transfers, but upon when they were communicated to the obligor.

The practical wisdom of this course of decision is obvious, because it affords a ready means of tracing the title to choses in action, and gives purchasers a security which they would otherwise want. It has accordingly been adopted in Vermont, New Hampshire, Connecticut, Tennessee, and some of the other States; *Spain v. Hamilton*, 1 Wallace, 624; *Campbell v. Day*, 16 Vermont, 358; *Barney v. Douglass*, 19 Id. 98; *Ward v. Morrison*, 25 Id. 593; *Loomis v. Loomis*, 26 Id. 201;

Hobson v. Stevenson, 1 Tennessee, Ch. 203; *Cladfetter v. Cox*, 1 Sneed, 330; *McWilliams v. Webb*, 32 Iowa, 507; *Murdoch v. Finney*, 2 Missouri, 138; *Woodbridge v. Perkins*, 3 Day, 364; *Judah v. Judd*, 5 Id. 534; *Bishop v. Halcomb*, 10 Conn. 444; *Foster v. Mix*, 20 Id. 395; *Adams v. Leavens*, Ib. 73. In *The Hartford Insurance Co. v. Van Buskirk*, 14 Conn. 145, it was said to be the settled rule in Connecticut, in accordance with the law of England, that to perfect the assignment of a chose in action against creditors and subsequent *bond fide* purchasers, notice must be given to the debtor without any unreasonable delay.

The notice need not, however, be formal or express, and it is enough that the debtor has such knowledge or information as will put him on his guard and enable him to warn subsequent purchasers; *Dale v. Kempton*, 46 Vermont, 76; *Pickering v. The Ilfracombe Railway Co.*, 3 L. R., C. P. 235; see *Baron v. Porter*, 44 Vermont, 587, where it was said that the notice must proceed from the assignee or some one authorized by him.

In *Cladfetter v. Cox*, McKinney, J., said: "The assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this not only as regards the debtor, but likewise as to third persons. Hence, as between successive purchasers or assignees of a chose in action, he is entitled to preference

who first gives notice to the debtor, although his assignment be subsequent to that of the other. * * * In like manner, an attachment by a creditor, in the period intervening between the assignment and the notice, will have preference. This doctrine furnishes a definite rule for determining between opposing equities, and places the right of the assignee of a chose in action upon a footing of security altogether unattainable under the opposite rule."

It was nevertheless held in *The Gayos Saving Institute v. Fellows*, 60 Caldwell, 467, that when a bond, bill, note, or like evidence of debt, is transferred by actual delivery, the assignment is *ipso facto* complete without notice to the debtor.

The general course of decision in this country is the other way, and in favor of the doctrine that he who is first in point of time is first in right; *The United States v. Vaughan*, 3 Binney, 394; *Stevens v. Stevens*, 1 Ashmead, 590; *Bohlen v. Cleveland*, 1 Mason, 174; *Warren v. Copeland*, 4 Metcalf, 594; *Dix v. Cobb*, 4 Mass. 508; *Wood v. Partridge*, 11 Id. 488; *Littlefield v. Smith*, 17 Maine, 327; *Beckwith v. The Union Bank*, 5 Selden, 211.

In *Muir v. Schenck*, 3 Hill, 228, a subsequent assignee obtained a promise from the debtor, before the latter was informed that the debt had been already transferred, and it was held that this did not vary the case, or entitle him to a preference. For a still stronger reason, a failure to notify the debtor

will not postpone the assignee to a subsequent attachment against the assignor; *Pellman v. Hart*, 1 Carr, 263.

It is now established in England, contrary to the earlier decisions, that the failure to give notice of an assignment is immaterial as regards one claiming under the assignor as a creditor or volunteer; *Bispham's Eq.* § 168; *Beavan v. Lord Oxford*, 6 De Gex M. & G. 492; *Kendrick v. Jervis*, 22 Beavan, 1; *Pickering v. The Ilfracombe Railway Co.*, 3 L. R. C. P. 235, 248; it being a general, if not invariable, rule, that one cannot give what he could not justly hold, and that the right of a creditor does not rise higher than that of the debtor, and is subject to all equities that could have been enforced against him; *ante*, 90.

REMEDIES OF ASSIGNEE.—The assignment of a demand entitles the assignee to every remedy, lien or security that could have been used or made available by the assignor as a means of indemnity or payment; *Mehaffey v. Share*, 2 Penrose & Watts, 296; *Donley v. Hayes*, 17 S. & R. 400; *Custis v. Taylor*, 6 Paige, 431; *Crow v. Vance*, 4 Clarke, 434; *Wilson v. Bowden*, 26 Arkansas, 451; *Norwood v. Dehoney*, 5 Bush, 174; *Coffing v. Taylor*, 16 Illinois, 457, 472; *Beldin v. Meeker*, 2 Lansing, 470; *Perry v. Roberts*, 30 Indiana, 244; *Parmalee v. Dunn*, 23 Barb. 461; *Rose v. Baker*, 13 Id. 230; *The Farmers' Bank v. Fordy*, 1 Barr, 454; *Craig v. Parkes*, 40 New York, 181; 9 Id. 275; and if a mortgage or other collateral be excepted or reserved in a transfer

of the debt which it was intended to secure, it will be extinguished or revert to the mortgagor; see *Coffing v. Taylor*.

It follows that a mortgage will pass in equity with an assignment of the bond, although merely by parol, or through any act or dealing which authorizes a third person to stand in the place of the obligee; see *Runyan v. Mercereau*, 11 Johnson, 520; *Perry v. Levasseur*, 21 Louisiana Ann. 529; *Southerin v. Mendum*, 5 N. Hampshire, 420; *Lindsay v. Bates*, 42 Missouri, 397; *Gillett v. Campbell*, 1 Denio, 520; *Stone v. Locke*, 45 Id. 445; *Ryan v. Dunlap*, 17 Illinois, 40; *Whittemore v. Gibbs*, 4 Foster, 484; *Thorn-dike v. Norris*, Ib. 454; *Martin v. Mowlin*, 2 Burrows, 969; *Sheldon v. Sill*, 8 Howard, 444; *Anderson v. Baumgartner*, 28 Missouri, 89; *Green v. Hart*, 1 Johnson, 580; *Jackson v. Bloodget*, 5 Cowen, 202; *Pattison v. Hull*, 9 Id. 747; *Blair v. Bass*, 4 Blackford, 539; *Slaughter v. Foust*, Ib. 379; *Dick v. Mawry*, 9 Smedes & Marshall, 448; *Lewis v. Starke*, 10 Id. 120; *Henderson v. Herrod*, Id. 631; *Burdett v. Clay*, 8 B. Monroe, 287; *Crane v. March*, 4 Pick. 131; *Duval v. M'Loskey*, 1 Alabama, 708; *Emmanuel v. Hunt*, 2 Id. 190; *Rigney v. Lovejoy*, 13 New Hampshire, 247.

The parties may, nevertheless, agree that the assignee of one of several demands, secured by a mortgage, shall rely exclusively on the personal responsibility of the mortgagor; and that the mortgage shall stand as a security for the others; *Rolston v. Brockway*, 23 Wisconsin, 407.

Agreeably to some authorities, a purchase of one of several notes or demands, secured by a mortgage which is not sufficient to cover all of them, entitles the assignee to be paid before the assignor, and consequently to a preference over those deriving title from him subsequently by assignment; *Gwathmeyer v. Ragland*, 1 Randolph, 466; *Cullum v. Erwin*, 4 Alabama, 452; *The Bank of Mobile v. The Planters' Bank*, 9 Id. 645. These decisions are the converse of those which establish that successive purchasers of parcels of land by the same incumbrance are liable in the inverse order of alienation; *ante*, 291, 305. But the analogy has been denied in other cases, and all the parties having an equal claim on the fund held entitled to come in *pari passu*; *Henderson v. Herrod*, 10 Smedes & Marshall, 631; *Donley v. Hays*, 17 S. & R. 400; *Mohler's Appeal*, 5 Barr, 418.

The right conferred by the assignment of a chose in action is now recognized by the courts of law, and will be upheld as far as the means at their command permit; *Westoby v. Day*, 2 Ellis & Blackburn, 605; *Chapman v. Shattuck*, 3 Gilman, 49; *Carr v. Waugh*, 28 Illinois, 418; *Morris v. Chaney*, 51 Id. 454. Upon the completion of the transfer by notice, the assignee becomes the owner of the demand and entitled to protection against the original parties, who must act with a due regard to his equity. A payment by the debtor after he has been informed of the transfer is consequently invalid, and will not be a defence to

an action brought in the name of the assignor for the assignee's use; *Morton v. Naylor*, 1 Hill, 583; *Lovely v. Caldwell*, 4 Alabama, 684; *Blin v. Pierce*, 20 Vermont, 25; *Bryant v. Dana*, 3 Gilman, 343; *Dunklee v. The Greenfield Mill Co.*, 3 Foster, 245. For a like reason, the declarations or admissions of the assignor subsequently to the assignment, and after notice to the debtor, are not admissible against the assignee; *Halloran v. Whitcomb*, 43 Vermont, 306; *Work's Appeal*, 9 P. F. Smith, 444; 1 Smith's Lead. Cases, 7 Am. ed. So it has been held, where a creditor, who has two demands against the same person, assigns one of them, the debtor must apply any counter-demand which he may have against the creditor to the debt which still belongs to him; *Berry v. The Church*, 7 Maryland, 564.

"Courts of law," said Story, J., in *Welch v. Mandeville*, 1 Wheaton, 233, "take cognizance of the assignment of choses in action, and afford the assignee every protection not inconsistent with the established principles and modes of procedure which govern tribunals proceeding according to the course of the common law. They will not, therefore, give effect to a release procured by a covenous combination with the assignor, in fraud of the assignment, nor permit the assignor to interfere injuriously with the conduct of any suit brought to enforce the rights passed under it."

It is established, in accordance with these principles, that a release

given subsequently to an assignment of the cause of action is fraudulent on the part of the assignor, and will not avail the debtor if accepted after he had been made acquainted with the right of the assignee; *Johnson v. Holdsworth*, 4 Dowl., P. C., 63; *Payne v. Rogers*, 1 Douglass, 407; *Legh v. Legh*, 1 Bos. & Pull., 447; *Hickey v. Burt*, 7 Taunton, 48; *Mountstephen v. Brooke*, 1 Chitty, 390; *Innel v. Newman*, 4 B. & Ald., 419; *Manning v. Cox*, 7 Moore, 618; *Barker v. Richardson*, 1 Y. & J., 362; *Phillips v. Claggett*, 11 M. & W., 84; *The Reservoir Co. v. Chase*, 14 Conn., 123; *Bulkley v. Landon*, 3 Id. 76; *Strong v. Strong*, 2 Aiken, 373; *Bartlett v. Pearson*, 29 Maine, 9; *Parker v. Kelly*, 10 Smedes & Marshall, 184; *Webb v. Steele*, 13 New Hampshire, 230; *Anderson v. Miller*, 7 Smedes & Marshall, 586; *Andrews v. Beeker*, 1 Johnson's Cases, 411; *Blake v. Buchanan*, 22 Vermont, 548; and this is equally true where the circumstances are such as to render it the duty of the creditor to assign, although he may not have made an actual transfer; *Hart v. The Western Railroad*, 13 Metcalf, 99.

The English courts administer this equity by striking such a plea from the record; *Phillips v. Claggett*, 11 M. & W., 814; and this course was followed in *Green v. Beatty*, 1 Cox, 142, where it was said to be anomalous to set up the plaintiff's fraud in support of his action. But the usual practice in this country is to reply averring the assignment as an equitable avoidance of the release.

In *Soy v. Dascomb*, 1 Hill, 442, the defendant pleaded set-off and payment, which the plaintiff traversed, and sought to give the assignment in evidence, but the court held it should have been specially replied and was not admissible under the general issue. "The plaintiff," said Bronson, J., "instead of taking issue on the plea of payment, should have replied the assignment and notice; and there should have been a like replication to the plea of set-off, instead of a general denial of the matters alleged in the plea. I am not aware that this point has been directly adjudged, but in all the cases I have noticed, when a defence as against the nominal plaintiff has been pleaded, the replication has been special, setting up the assignment and notice. In *Littlefield v. Story*, 3 Johnson, 425, one of the pleas was payment. In *Raymond v. Squire*, 11 Id. 47, a release was pleaded, also an accord and satisfaction. In *Dawson v. Coles*, 15 Id. 51, there were pleas of payment, release, and a former suit and recovery by the plaintiff. In *Briggs v. Dorr*, 10 Id. 95, a release was pleaded, and there was a like plea in *Wheeler v. Wheeler*, 9 Cowen, 34, and in *Wheeler v. Raymond*, 5 Id. 231, satisfaction was pleaded. In each of these cases the replication was special, stating an assignment and notice before the defence set up by the plea arose, and averring that the action was brought in the name of the nominal plaintiff for the benefit of the assignee."

It was held in like manner, in *Eastman v. Wright*, 6 Pick. 316, that the court will not interfere on

motion, and that, whatever the nature of the fraud relied on in avoidance of a release, the question is one of fact for the jury, and which the court should not summarily determine.

The assignee of a chose in action cannot ordinarily maintain a bill in equity, because he may have an adequate legal remedy by a suit in the name of the assignor; *Motteux v. The London Assurance Company*, 1 Atkyns, 545; *The Ontario Bank v. Mumford*, 2 Barb. Ch. 296; *Adair v. Winchester*, 7 Gill & Johnson, 114; *Gover v. Christie*, 2 Har. & Johnson, 67; *Carter v. The United States Insurance Company*, 1 Johnson, Ch. 461; *Smiley v. Bell, Martin & Yerger*, 378; *Doggett v. Hart*, 5 Florida, 215. When, however, the demand assigned is equitable in its own nature, the assignee must necessarily come into chancery, and he may be entitled to adopt the same course when he has been deprived of the power of redress at law by collusion between the assignor and the debtor; *Lennox v. Roberts*, 2 Wheaton, 373; *Boush v. Mosely*, 4 Randolph, 392; *Upton v. Wallace*, 44 Vermont, 522. The assignee may also obtain equitable relief when the assignment is partial, or when the debt has been assigned to different persons, and a court of law is incompetent to adjust the equities of the various claimants; *Field v. The Mayor of New York*, 2 Selden, 179.

In general, the assignee of a chose in action cannot proceed at law in his own name, unless the transfer has been ratified by an express promise on the part of the debtor,

sustained by an adequate consideration, which, agreeably to the English authorities, must arise from some act done or engagement made on the part of the assignee; *Brow-scale v. Bosworth*, 99 Mass. 378; *Thurman v. Wells*, 18 Barb. 500; *Jessill v. The Williamsburgh Insurance Company*, 3 Hill, 88.

A pre-existing debt is not a consideration for a new promise, or for any engagement but that which the law implies, to make payment on demand, and to the person to whom the allegation was contracted; *Hopkins v. Logan*, 5 M. & W. 241; *Craft v. Beale*, 11 C. B. 172; *Vadakin v. Soper*, 1 Aikens, 287, 2 American Lead. Cases, 204, 219, 5 ed. An agreement between A., B. & C. that a debt from B. to A. shall be paid to C. on account of a debt due to him by A., cannot be enforced by C. consistently with those decisions; *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, 4 Id. 163; *Fairlee v. Duntton*, 8 Id. 395; *Cochran v. Green*, 9 C. B. (N. S.) 448, unless C. agrees to forego his claim on A., and look exclusively to B., when the case will come within the principle that the relinquishment of an existing right is a sufficient basis for a new obligation; see *Wilson v. Coupland*, 5 B. & Ald. 228; *Hodgson v. Anderson*, 3 B. & C. 842; *Lucey v. M'Neil*, 4 D. & R. 7; *Grover v. Sims*, 5 Blackford, 49; *Esling v. Zantlinger*, 1 Harris, 501; 2 American Lead. Cases, 208, 216, 5 ed.

It is now established in the United States that the obligation arising from the assignment to account to the assignee is a sufficient

consideration for an undertaking on the part of the debtor to perform that to which he is equitably bound; 2 American Lead. Cases, 209; *Crocker v. Whitney*, 10 Mass. 206; *Cromelien v. Manger*, 5 Harris, 169; *Allis v. Jewell*, 36 Vermont, 547; *Steward v. Eden*, 2 Caines, 150; *Compton v. Jones*, 4 Cowen, 13; *Ford v. Adams*, 2 Barbour, S. C. 349; *Greer v. Archer*, Ib. 420; *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Id. 218; *Wilson v. Hill*, 3 Metcalf, 66; *Bournan v. Cabot*, Id. 305; *Jackman v. Bowker*, 4 Id.; *Tiernan v. Jackson*, 5 Peters, 580; *Moore v. Wright*, 1 Vermont, 97; *Hodges v. Eastman*, 12 Id. 358; *Hills v. Pierce*, 18 Id. 444; *Smith v. Berry*, 6 Shepley, 322; *Gordon v. Downey*, 1 Gill, 41; *Thompson v. Emory*, 7 Foster, 269; *Clark v. Thompson*, 2 Rhode Island, 246. The acceptance of an order on a particular fund is consequently a good cause of action on which a recovery may be had in *assumpsit* against the drawee. *Prentiss v. Foster*, 2 Williams, 742; *Williams v. Fullerton*, 20 Vermont, 346. But this reasoning does not apply unless there is a valid assignment on which to found the new agreement; *Quinn v. Hanford*, 1 Id. 82; *Ford v. Adams*, 2 Barbour, S. C. 349; *Blunt v. Boyd*, 3 Id. 209; *Ramsdale v. Horton*, 3 Barr, 330; and hence, when a promise to pay a bill of exchange failed as an acceptance in consequence of not being reduced to writing as prescribed by statute, the court held that it could not be sustained as a contract.

EQUITIES OF DEBTOR.—The assignee of a chose in action takes subject to every defence that would be valid between the original parties; *ante*, 56; *Martin v. Richardson*, 68 North Carolina, 225; *Boardman v. Payne*, 29 Iowa, 339; *Kleman v. Frisbie*, 63 Illinois, 482; *Johnston v. The Phoenix Ins. Co.*, 39 Indiana, 233. It may consequently be shown as against the purchaser of a bond and mortgage that they were given as a collateral security, or that the obligor did not receive the amount named in the bond, or that the consideration was illegal or usurious; see *Weaver v. McConkle*, 14 S. & R. 304; *Rudy v. Wenner*, 16 Id. 18; *Ellis v. Missouri*, 11 Paige, 462. Until the obligor is informed of the assignment, he is entitled to regard the obligee as the owner, and may accept a release from him or purchase a debt which he owes and use it as a set-off; see *Campbell v. Day*, 16 Vermont, 358; *Loomis v. Loomis*, 26 Id. 201; *Loudon v. Tiffany*, 5 W. & S. 367; *Rider v. Johnson*, 8 Harris, 190. But this right ceases when the transfer is brought to his knowledge, and he can thenceforth do no act to prejudice the title of the assignee; *Brashear v. West*, 7 Peters, 608; *Bean v. Simpson*, 4 Shepley, 49; *Laughlin v. Fairbanks*, 8 Missouri, 367; *Cummings v. Fullam*, 13 Vermont, 434; *The Northampton Bank v. Balliet*, 8 W. & S. 311; *Phillips v. The Bank of Lewistown*, 6 Harris, 394; *Stewart v. Kirkland*, 19 Alabama, 162. So a surety may file a bill to have the obligation which he has incurred on behalf of the

principal set off against a demand which the principal has against him; and it is considered a sufficient answer that the demand was transferred before the filing of the bill to a third person, who gave value for it in ignorance of the equity; *ante*, 1345; *Frantz v. Brown*, 1 Penrose & Watts, 257, 261; *The Tuscumbia R. R. Co. v. Rhoads*, 8 Alabama, 206; *Walter v. Chamberlain*, 8 Dana, 164; *Williams v. Holmes*, 1 Dev. Eq. 151; see *Fallett v. Burger*, 4 Ohio, N. S. 506.

The assignment of a chose in action simply transfers the title of the assignor, and is subject to every equity that could be enforced against him; *ante*, 56; *Davies v. Austen*, 1 Vesey, Jr., 247; *Norton v. Rose*, 2 Wash. R. 233; *Beebe v. The Bank of New York*, 1 Johnson, 529; *Brashear v. West*, 7 Peters, 608; *Livingston v. Stubbs*, 4 Johnson, Ch. R. 693; *Livingston v. Dean*, 2 Id. 479; *Jordan v. Black*, 2 Murphy, 30; *M' Cennie v. Rutherford*, 1 Dev. & Bat. 14; *Oliver v. Lowry*, 2 Harrington, 46; *Webster v. Wise*, 1 Paige, 319; *Gay v. Gay*, 10 Id. 369; *Jeffries v. Evans*, 6 B. Monroe, 119; *Wood v. Perry*, 1 Barbour, S. C. 114; *Ainstie v. Boynton*, 2 Barbour, Ch., 291; *Frantz v. Brown*, 17 S. & R. 287; *Andrews v. M' Coy*, 8 Alabama, 920; *Ragsdale v. Hagy*, 9 Gratian, 409; *Barney v. Grover*, 2 Williams, 391. *Nemo potest plus juris ad aliam transfere quam ipse habet*; Broom's Legal Maxims, 317, and it is not less well settled that he who is first in point of time is

presumably first in right; *Pratt's Appeal*, 27 P. F. Smith, 378. Hence, when a fund is appropriated or assigned to A., and the same fund is subsequently transferred to B., A. will have the better right, although B. is a purchaser for value and without notice; *Van Rennselaer v. Stafford*, Hopkins' Ch. 569; 9 Cowen, 316; *Bush v. Lathrop*, 22 New York, 585; *Moore v. Metropolitan Bank*, 5 New York, 4; *Taylor v. Bates*, 5 Cowan, 376; *Muir v. Schenck*, 3 Hill, 228; *Willis v. Twambly*, 13 Mass. 204; *Covel v. The Tradesman's Bank*, 1 Paige, 131; *Everston v. Everston*, 5 Id. 644; *Bradley v. Root*, Id. 362; *Lindsey v. Wilson*, 2 Dev. & Bat. Eq. 85.

It has indeed been said in some instances that an assignee should not be subject to the latent equities of third persons; see *Livingston v. Dean*, 2 Johnson Ch. 479; *Murray v. Lylburn*, Id. 441; *Mott v. Clark*, 9 Barr, 399; *Metzger v. Metzger*, 1 Rawle, 227; *Moore v. Holcomb*, 3 Leigh, 597; but these dicta are not applicable unless the equity is conceded by the prior assignee, or does not appear in consequence of his negligence; see *Bush v. Lathrop*, 22 New York, 585. An assignee who means to rely on this principle should, nevertheless, take every usual and proper means that can serve to perfect his title and warn subsequent purchasers, and if they are prejudiced by his want of diligence in this regard, he may lose the priority which he gained by being first in point of time; *Redfearn v. Herrick*, 1 Dow, 50; *Welsh v. Bekey*, 1 Penrose &

Watts, 57, 61; *Garland v. Harrison*, 17 Missouri, 282; *Anderson v. Baumgardner*, 27 Id. 80; *Campbell's Appeal*, 5 Casey, 402; *Fraley's Appeal*, 27 P. F. Smith, 42; *Hendrickson's Appeal*, 12 Harris, 363; *ante*, 51, 54. But negligence is not material unless it results in injury; and one who relies upon it as a ground for postponing a prior assignment must show that he is a purchaser for value, and without notice; *De Witt's Appeal*, 26 P. F. Smith, 283; *Pratt's Appeal*, 27 Id. 378. Such, at least, is the rule where the omission does not give rise to a presumption of a resulting trust, or that the transfer was intended as a fraud on creditors; see *Welsh v. Bekey*.

It has been held that a written transfer or assignment of a chose in action cannot be set aside on the ground of fraud as against a *bond fide* purchaser from the assignee; *ante*, 43; *The Bank v. Hastings*, 15 Wisconsin, 75; *Moore v. The Metropolitan Bank*, 55 New York, 41; and the principle is the same where one buys from an agent who has been entrusted with a documentary evidence of title on the faith of his apparent ownership. It follows that the delivery of a certificate of stock with a power to transfer will preclude the owner from reclaiming from a third person to whom it is subsequently assigned for a valuable consideration, however fraudulent may have been the conduct of the first taker. See *The Mount Holly Co. v. Verree*, 6 C. E. Greene, 117; *McNeil v. The Tenth National Bank*, 46 New York, 328; *Buffalo v. Kort-*

wright, 20 Wend. 92; 22 Id. 348. So, the right to impeach the assignment of a mortgage or bond as having been fraudulently obtained must be exercised before the instrument has passed into the hands of a *bond fide* purchaser. *Taylor v. Gritt*, 10 Barr, 428; *McConnell v. Wenrick*, 4 Harris, 366. The point is, nevertheless, one as to which there has been much difference of opinion, and it has been held in some instances that, as the assignee of a chose in action acquires a mere equity, so his title may be impeached on any ground that would have been valid as against the assignor, and consequently by proof that the latter practiced a fraud upon the original owner; *ante*, 56; *Poillon v. Martin*, 1 Sanford, Ch. 569.

One who is asked to become the purchaser of a demand, or to accept it as a security, may apply to the debtor for information, and if the latter states in response to such an inquiry that he has no defence, or that the amount is due, he cannot retract the admission after it has been acted on by the assignee; *Buckner v. Smith*, 1 Washington, 296; *McMutlin v. Warner*, 16 S. & R. 18; *Elliott v. Callace*, 1 Penrose & Watts, 24; *Jones v. Hardesty*, 10 Gill & Johnson, 404; *Sand v. Lacoste*, 5 Howard, 471; *Decker v. Eisenhauer*, 1 Penna. R. 476; *Sargeant v. Sargeant*, 18 Vermont, 371; *Foot v. Ketchum*, 15 Id. 258; *The Middleton Bank v. Jerome*, 18 Conn. 443; *Watson v. McLaren*, 19 Wend. 557; *Petrie v. Feeter*, 21 Id. 172. Where such a declaration is made in writing by a mort-

gagor it becomes a muniment of title, and may be conclusive in favor of third persons who give value on the faith of it, or whom it contributes to mislead; *Ashton's Appeal*, 23 P. F. Smith, 153, 161; *Scott v. Sadler*, 2 Id. 211; *Kellogg v. Ames*, 41 New York, 259; *Twitchell v. McMurtrie*, 27 P. F. Smith, 383. But the estoppel will not arise unless the assignee changes his position for the worse in reliance on the declaration; *Weaver v. Lynch*, 1 Casey, 449; *Hill v. Purnell*, 2 Maryland, Ch. 137; and consequently not in favor of one who takes an assignment of mortgage as security for an antecedent debt; *Ashton's Appeal*, 23 P. F. Smith, 162.

Agreeably to the authorities in Pennsylvania, the burden is on the assignee to show that he gave a consideration, and what it was; *Weaver v. Lynch*, 1 Casey, 449, 451. In *Twitchell v. McMurtrie*, the mortgagor executed an acknowledgment under seal, and duly acknowledged before a magistrate that the debt was due, and that the assignment was made with his assent; and it was held not to

be conclusive in favor of the assignee, without proof that he was a purchaser for value.

It would, nevertheless, appear that one who makes a formal admission of the validity of a mortgage as a means of inducing a third person to accept it as a collateral security, enters into a direct engagement with the assignee; see *Elliott v. Callan*, 1 Penrose & Watts, 25, 30; and should be as much bound as if he were the maker of the accommodation note, and such should certainly be the effect when the acknowledgment takes the form of a covenant, or is under seal.

A promise to the assignee subsequently to the transfer fails as a new contract for want of a consideration; *Weaver v. Lynch*, 1 Casey, 449; but may operate as a ratification of the implied agreement of the assignor, and preclude the debtor from making a set-off, although not, as it would seem, from showing that the debt is not due; *King v. Fowler*, 16 Mass. 397; *Thompson v. Emery*, 7 Foster, 269.

* STAPILTON v. STAPILTON. [*824]

AUGUST 2d, 1739.

REPORTED 1 ATK. 2.

COMPROMISE—FAMILY ARRANGEMENT.]—*An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement.*

Where agreements are entered into to save the honor of a family, and are reasonable ones, a Court of equity will, if possible, decree a performance of them.

By a deed, dated on the 21st of August, 1661, Philip Stapilton was tenant of the premises in question, for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they, by deeds of lease and release, the 9th and 10th of September, 1724, reciting, that, for settling and perpetuating all manors, &c., in the name and blood of the Stapiltons, and for making provision for his two sons, &c., for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s., release and confirm to Thomson and Fairfax all those manors, &c.: To have and to hold to them, their *heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns forever, and as [*825] to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the remaining part, to the use of Philip the father for life, with like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months, and likewise for further assurances. N. B. To this

deed, the heir of the surviving trustee in the deed in 1661 was not a party.

But, by deeds of lease and release, dated the 28th and 29th of September, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make Thomson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September, 1724.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterward, by lease and release, the 12th and 13th of April, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip the father and Philip the son covenant to suffer a recovery, in which Thomson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity Term, 1725, a recovery was suffered, in which were the same tenant to the præcipe, the same demandant, and the [826] same vouchees (except Henry, who **was* dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

The father, Philip Stapilton, being dead, the plaintiff, as son and heir of Henry, brought this bill to establish his title to the premises in question, and for the whole estate as tenant in tail under the old settlement, and to be let into possession, and for an account of rents received by Philip Stapilton the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant, Philip the son, by his answer confesses the several deeds before mentioned, but says, Henry was a bastard, and that, by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

Upon an issue directed, Henry was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points:—

1st. That the recovery suffered in Trinity Term, 1725, should inure to the use of the deeds of the 9th and 10th of September, 1724, and not to the uses of the deed in 1725.

2dly. Supposing it did not, yet that the deed of 1724 was such an agreement as this Court will carry into execution.

As to the first point, it was said that the uses, when once declared, cannot be altered, unless all the parties entitled to the uses join in the new declaration; and Henry did not join in the deed of 1725. Tenant in tail may part with his estate, and it shall be good against him, though not against his issue. For tenant in tail is not aided by the Statute of Westminster the 2d,

but only his issue; therefore, by the deed of 1724, the uses being executed by the statute of Hen. 8, Henry gained a base fee, which is not avoidable by Philip during his life; *and, as his issue are barred by the subsequent recovery, they will not [*827] be able to avoid it, and consequently Henry's estate, which was before defeasible, is made indefeasible by the recovery.

If tenant in tail confesses a judgment, or mortgages the lands, and afterward suffers a recovery to a collateral purpose, that recovery shall inure to make good all his precedent acts and incumbrances: 1 Ch. Cas. 119.¹ [Lord Chancellor mentioned a case in Lord King's time, where father, tenant in tail, remainder to himself in fee, contracting debts on specialty, his son after his death levying a fine, let in his father's creditors.] And if a recovery suffered for another purpose will substantiate any prior act of the tenant in tail, much more in this case, this recovery will substantiate the first deed, where there are all the parties who covenanted by that deed.

As to the second point: this cannot be considered as a voluntary agreement, for Henry's legitimacy was then doubtful, and, if he had proved legitimate, Philip would have come into this Court to have the agreement executed, and Henry would have been bound by it. This Court has decreed the performance of agreements like this, founded upon mistakes; as in the cases of *Frank v. Frank*, 1 Ch. Cas. 84, and *Cann v. Cann*, 1 P. Wms. 723.

For the defendant it was argued, as to the first point, that Henry being dead before the recovery was suffered, the intent of the parties in the first deed could not be pursued; for the plaintiff (supposing him legitimate) claims paramount his father, and the deed 1661; therefore, as the recovery could not substantiate the first deed, supposing him legitimate, it shall not substantiate it, now he is found illegitimate.

The plaintiff, upon the death of his father, had not any use vested in him; for the intent of the parties was, that the uses should arise out of the recovery: the ends recited could not be come at without a recovery; and where the intent of the parties is, that the uses should pass by fine or recovery, nothing will pass by the deed that is intended *only to declare the uses. The fine and recovery all make but one conveyance: [*828] Cro. Jac. 643, 2 Ro. Rep. 68, 2 Lev. 306, 1 Vent. 279, 2 Lev. 54; *Cromwell's case*, 2 Co. 69; Cro. Jac. 320.

As to the second point: take it as an agreement, this Court will not decree a performance of it; for, supposing Henry had been found legitimate, this Court would not have decreed a performance of it against the plaintiff; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration; and the covenant for further assurance will be void, as the deed itself

¹ *Goddard v. Complin*.

to which it is annexed is void: and so it was determined in the case of *Fursaker v. Robinson*, Prec. Ch. 475.

LORD CHANCELLOR HARDWICKE.—The plaintiff in this case is entitled to have a decree. There was a sufficient foundation for Philip the father, and Henry and Philip, his two sons, to execute the lease and release of the 9th and 10th of September, 1724. *It was to save the honor of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done.*

It would be very hard for the defendant, on his side, to endeavor to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement; Philip had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so; there was a foresight in the father and mother, that such a dispute between their two sons might hereafter arise, to their dishonor, and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son Henry, has now been determined by a trial, and it is found that Henry was a bastard; yet both the sons are of the same blood of the father equally, though not so in the notion of the law.

[*829] *If the elder son should be found illegitimate (as he now is), the father knew he would be left without any provision, if no such agreement was made; and, on the other hand, if his legitimacy should be established, then Philip, the younger son, would have nothing. To prevent these disputes and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee in the settlement of 1661, at the time of the lease and release of the 9th and 10th of September, 1724; because they covenant a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterward found, and made a party to the deeds of the 27th and 29th of September, 1724.

The bill is brought by the eldest son and heir of Henry, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing, an issue was directed to try whether Henry the father was legitimate, and it was found he was not; and now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part; this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by

his bill; but it might be otherwise in the case of an adult person.

Upon this case there arise two general questions:—

First, Whether the plaintiff has any estate at law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is entitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches:—

First, Whether the lease and release of the 9th and 10th of September, 1724, will amount to a good *declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725? [*830]

Secondly, If not, whether the recovery of Trinity Term, 1725, having barred the estate tail, will make good any estate which passed by the lease and release of the 9th and 10th of September, 1724?

As to the first: whether the lease and release is a good declaration of the uses of the recovery, I am strongly inclined to think it will amount to a good declaration: this question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will inure to the uses so declared.

And, before the Statute of Frauds, if the deed declaring the uses had not been pursued, a parol declaration of uses would have been let in; but if there is a deed declaring the uses, and the common recovery is suffered accordingly, that would, before the statute, exclude a parol declaration of new uses.

But, even now, there may be a subsequent declaration of uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it is said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law, for such subsequent declaration must be by all the parties concerned in interest; and in the case of the *Countess of Rutland* (5 Co. 25), it is not laid down there that the tenant in tail might declare new uses, but it is said, whilst it is directory only, new uses may be declared; and the meaning of that is, that, as the uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of all the parties concerned in interest; and in that case it was a mutual agreement of all parties.

*And in the case of *Jones v. Morley* (2 Salk. 677), there was a variance as to the time of suffering the recovery [*831] from the deed declaring the uses, and it was there held, that a declaration of uses was equally good, whether by deed or not, if in writing.

But, in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration, and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

The consideration for suffering the recovery was good, both in law and equity; and there is no case to warrant me to say the first agreement is not good and binding, or that the tenant in tail could, by his own agreement, afterward change the uses.

But if it was doubtful whether the recovery suffered in 1725 should inure to the uses declared by the deed of 1724, I am of opinion the recovery will operate to make good those estates which passed by the deed of 1724.

But to this two objections have been made:—

First, That the uses must be governed by and operate according to the intention of the parties; therefore, the subsequent recovery being suffered to other uses, those uses will take place.

Secondly, If any uses did pass by the deed in 1724, yet this recovery will not make those uses good; because the subsequent recovery was suffered to particular uses declared by the deed of 1725.

As to the first objection, I am of opinion that a use did pass by the deed of 1724, and according to the intention of the parties. It is certainly true, that, according to the Statute of Uses,¹ the general doctrine is, that the uses shall be executed according to the intention of the parties; but both the Courts of law and equity consider what was the general and final intent of the parties. In this case, their intention was, that the estate should pass; and wherever a Court of law or equity find that the general and substantial intent of the parties was that the estate [*832] should pass, they will construe deeds in support of that intention different from the formal nature of those deeds themselves; as a feoffment to serve the intention of the parties, shall operate as a covenant to stand seized. The intent here was, that the estate in point of law should pass by the deed of 1724, and that the uses declared by that deed should vest in the mean time till the recovery suffered. This is an answer to the objection arising from the Statute of Uses; but there is another question, What estate passed by the deed of 1724?

It was a defeasible estate to serve the uses of that deed, and so is the resolution in *Machill v. Clarke*, in Farrel. 18,² 2 Salk. 619, that tenant in tail may convey a base fee and estate defeasible by the entry of the issue.

The next question is, whether the recovery suffered in 1725 did enure to make good and render indefeasible those base estates created by the deed of 1724? And I am of opinion they are made good.

The objection to this is, that the recovery was suffered in pur-

¹ 27 Hen. 8, c. 10.

² 4 Mod. 1.

suance of the deed of 1725, wherein there were new uses limited; but the only uses which make any difference in that deed, are to Philip the son and his heirs; so there is nobody concerned in the question but Philip and his heirs.

It has been argued by defendant's counsel, that, if the first declaration of uses is in general to prevail, purchasers of estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe; for the vendor may defeat such declaration by a precedent one to different uses; but in such cases I think a recovery would not inure to make good such former declaration of uses, but only the uses of the purchase.

It is admitted, that if tenant in tail confesses a judgment or a statute, or enters into a bond and afterward suffers a recovery to bar the estate tail, it lets in the precedent judgment, etc. And it is as clear, if a tenant in tail makes a lease not warranted by the statute of the 32 Hen. 8, if he suffers a recovery, that lets in the lease *and makes it good. There are so many cases of this kind, that it is not necessary for me to mention [*833] them.

This case is different from those that turn only upon the point of the effect of a mere declaration of uses; for a mere declaration of uses subsists only upon the agreement of the parties; and in such cases, where the agreement has been changed by mutual assent of all parties, there a recovery shall inure to make good such last agreement or declaration.

But if the estate was vested, notwithstanding such declaration of uses, yet the recovery has always been held to make good such defeasible estate; for the prior lease, charge, or estate made by tenant in tail, is only defeasible by the issue, by virtue of the statute de donis, which was made to protect the issue against the alienation of the tenant in tail; therefore, the issue would avoid such lease, &c., but not the tenant in tail himself; but when by the recovery he has gained to himself a fee, all the reasoning for avoiding an estate made by tenant in tail is gone, for the issue is barred by the recovery. The reason why the issue may avoid a charge made by tenant in tail is, upon account of the protection of the issue and his estate, under the statute de donis, and of the privity of the estate tail; but when the privity is gone, the reason ceases; and to this purpose is the case of *Croker v. Kelsey*, Sir W. Jones, 60.

In the case of *Lord Derwentwater* (9 Mod. 172), the question was, whether a Papist, tenant in tail, suffering a recovery and declaring the uses to himself in fee, gained a new estate within the 11th and 12th of Will. 3, or was in of the old use? And it was held, the 5th of Geo. 1, by four Judges out of five, appointed delegates to determine appeals from the Commissioners of Forfeited Estates, that he was in of the old use; and I take it for law, that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the statute de donis; and

therefore, I am of opinion that the recovery has made good this defeasible estate, created by the deed of 1724.

[*834] *It has been objected, that, if the plaintiff has any title, his remedy is at law; but I think it is more properly here. He is an infant, and has come recently into this Court. Nor do I think this case depends entirely upon the point of law; for I am of opinion that the plaintiff is entitled to have an execution of the agreement, as a good and binding agreement in this Court.

The question is, whether there was *any valuable consideration* on all sides for entering into this agreement? If so, then there is a sufficient ground for coming here; but a mere volunteer is not entitled to come here for an execution of an agreement. But here is a proper consideration, as appears in the recital of the deed of 1724. Neither is it the common case of a bastard; for the law of England does allow of some privileges to a bastard eigné, and their parents are not punishable by the canon law for ante-nuptial fornication.

In the case of *Cann v. Cann*,¹ it was laid down by Lord Macclesfield, that an agreement, entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

Another objection has been made to this agreement, that the benefit on Henry's and Philip's side was not mutual and equal. During both their lives, the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a recovery with Philip. But it is said, that an alteration as to their mutual benefit has happened by the death of Henry; and it is said, that if Henry had been legitimate, the plaintiff would not have been compelled to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor, the tenant in tail. But here, the chance was at first equal; and it is hard to say, that the act of God should hinder the agreement from being carried into *execution; the chance was equal, [*835] who died first, Henry or Philip. If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement; and, therefore, the chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over Philip, to force him into this agreement; and it is said equity does not favor agreements made by compulsion. But *this Court always considers the reasonableness of the agree-*

¹ P. Wms. 723, 727.

ment; besides, there is no proof of compulsion by the father: if there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son; and, considering the consequence of setting aside this agreement, *a Court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.*

His Lordship, therefore, declared, that the plaintiff is entitled to the lands and premises limited in remainder to the first son of Henry Stapilton, his father, by the deeds of the 9th and 10th of September, 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the said premises; and declared that Philip was entitled to hold the lands, limited by the deeds of the 9th and 10th of September, 1724, to Philip the elder for life, with remainder to the defendant for life, against the plaintiff and his heirs; and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side.

"From the case of *Stapilton v. Stapilton*," observes Lord Chancellor Sugden, "down to the present day, the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family *(and especially, I [*836] may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honor of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers. . . . Generally, if there be a legitimate and an illegitimate son, it cannot admit of any doubt, that, under the state of circumstances involving the honor and credit of a family, there may be a compromise binding upon the legitimate son, by which he agrees to give up a particular part of the property to his illegitimate brother; and that, not, of course, upon any title in the illegitimate son, but simply upon the ground that such an arrangement was for the honor of the family, and the settlement of family differences, and to avoid any question of legitimacy:" *Westby v. Westby*, 2 D. & War. 503. In that case, which proceeded on precisely the same principles as *Stapilton v. Stapilton*, A. was entitled to an estate in remainder, in Blackacre, expectant upon the decease of his uncle B. without male issue, and had also a remote interest in Whiteacre, expectant upon the same event. B. was twice married; by his first wife he had issue only two daughters; by his second, *who was sister of his first wife*, he had issue both sons and daughters. Un-

der these circumstances, in 1817 A. threatened and attempted to institute proceedings of a civil character in the Ecclesiastical Court against B. and his second wife, for the purpose of annulling their marriage, and rendering their issue illegitimate. A compromise was proposed, and after much deliberation carried into effect by articles of agreement. By these articles, B. agreed to secure certain provisions for the female issue of A.; and in consideration thereof, A. covenanted not to impeach B.'s second marriage. The articles also contained a proviso, that, in the event of the successful impeachment of B.'s marriage by any person, all the agreements of the article should be void. In 1838 B. died, and his marriage was never disturbed. On a bill filed by his executor and his eldest son, to set aside the compromise of 1817, it was held, by Lord Chancellor Sugden, that the transaction was a fair family arrangement, neither inconsistent with public policy nor the principles of the Court, and the bill was dismissed with costs. And see *Stockley v. Stockley* (1 V. & B. 30), where Lord Eldon, after noticing *Pullen v. Ready* (2 Atk. 587), and *Cory v. Cory* (1 Ves. 19), said, that those cases and *Stapilton v. Stapilton*, which, [*837] with all the able reasoning *in it, was also an extremely strong case, led him to the opinion, that, in family arrangements, the Court did not quite go the length of denying relief upon the principle that prevailed between strangers. And see *Cood v. Cood*, 33 Beav. 314; *Williams v. Williams*, 2 Dr. & Sm. 378; 2 L. R. Ch. App. 294.

It is proposed in this note to examine the cases in which Courts of equity will give effect to transactions based upon the compromise of conflicting claims, and to point out how much more readily, and to how much greater an extent, such transactions will be supported, when they either are, or partake of the nature of, family arrangements.

The compromises of doubtful claims, whatever may be the actual rights of the parties, have, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence. For the authorities of the civil law upon the subject, see 3 Burge's Comm. 742. So, in the law of Scotland, compromises, under the name of *transactions*, are equally favored. Thus, Lord Stair, in treating on Restitution, lays it down, "that positive law, for utility and quietness' sake, excepteth *transactions* which are properly such, and which are of two sorts, the one extra-judicial, when, in any matter doubtful and debatable, either party, to shun the hazard and trouble of a legal decision, is willing to *transact* and agree, so as thereby they quit or abate part of what they claim as their right, and so they tacitly renounce all future question upon any appearing of right, either judicially or extra-judicially; and therefore, what either quitteth to other of their rights is done for the same cause, and hath in it, either expressly or implicitly, that such *transaction* shall not be *retracted* upon anything that shall accidentally appear thereafter, fraud and force only (as the common exception in all human actions) being excepted:" Stair's Inst. tit. 7, s. 9; *Hotchkin v. Dickson*, 2 Bligh.

348; *Stewart v. Stewart*, 6 C. & F. 911; and see *Trigge v. Lavallee*, 11 W. R. (P. C.) 404, as to the old French law.

With regard to our law, it is clear that if a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bonâ fide*, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of equity, without inquiring whether he was in truth liable to the claim, will compel a specific performance: *Attwood v. —*, 1 Russ. 353; *Pickering v. Pickering*, 2 Beav. 56; *Partridge v. Smith*, 11 W. R. (V. C. K.) 714. And see *Callisher v. Bischoffsheim*, 5 L. R. Q. B. 449, where it was decided at law, that a compromise *of a disputed claim made *bonâ fide*, is a good consideration for a promise, even although it [838] ultimately turn out that the claim was wholly unfounded.

Nor can the Court inquire into the supposed adequacy or inadequacy of the consideration. "Where," asks Sir John Leach, V. C., "is it to find a scale for determining the true measure of adequacy? If a Court is in such a case to be governed by its judicial opinion upon the rights of the parties, then to him who by that opinion is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim to the perpetual annuity. It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration; and the actual rights of the parties, whatever they might be, cannot affect the question." Per Sir J. Leach, V. C., in *Naylor v. Winch*, 1 S. & S. 585; see also *Lucy's case*, 4 De G. Mac. & G. 356, and *Cook v. Wright*, 1 B. & S. 559, 570.

A family arrangement may be implied without any express written contract, from a long course of dealings between the parties, and the Court will enforce it, in the same mode as it does ordinary family arrangements. See *Williams v. Williams*, 2 Dr. & Sm. 378; 2 L. R. Ch. App. 294.

A distinction has been taken between an error of law and an error of fact. "It is a maxim of equity," says an eminent Judge, "that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law, they cannot afterward be heard to say, that the contract shall on that account be set aside:" *Marshall v. Collett*, 1 Y. & C. Ex. 238; and see *Broughton v. Hutt*, 3 De G. & Jo. 501; *The Midland Great Western Railway of Ireland Company v. Kinder*, 6 W. R. (Ho. L.) 511; *The Directors, &c., of the Midland Great Western Railway of Ireland v. Johnson*, 6 Ho. Lo. 798, 811.

It is not intended here to examine with any minuteness the nice distinctions which undoubtedly exist as to the effect of a mistake of law or fact in ordinary dealings or agreements (see *Cooper v. Phibbs*, 2 L. R. Ho. Lo. 149). It seems, however, that ignorance, whether of fact or law, if the fact or law be doubtful, and the ignorance of it is common to all parties, especially in cases of family arrangements, *will not vitiate a compromise. For instance, the question, whether a person is heir or not, is a *fact*, or, at any rate, often depends upon a doubtful fact, whether a marriage has or has not been celebrated; nevertheless, it is clear, that if, as in the principal case, that fact be doubtful, two claimants, although one of them is afterward clearly proved to be heir, may settle all disputes, especially to save the honor of the family, by dividing the property. Another case may be mentioned, in which the parties entering into a compromise appear to have been ignorant of a fact, namely, of the existence of a deed; nevertheless, the compromise was sustained. In *Neale v. Neale* (1 Keen, 672), James Neale and Joseph Neale, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, James, the elder brother, taking somewhat the larger share, a doubt being then entertained, whether their father had a right to devise the lands. James was, in fact, at the time of this agreement, tenant in tail under the limitation of a surrender made by his grandfather; and, after James' death, without issue, Joseph having discovered his own title as tenant in tail, repudiated the agreement, and brought an action to recover the whole estate. On a bill being filed by the devisee of James, it was argued for Joseph, that he had never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party with whom the agreement was made; and that, in most of the cases which were cited, the parties had a full knowledge of all the circumstances enabling them to enter into a compromise. However, Lord Langdale, M. R., decreed Joseph to do all necessary acts to bar the entail, and vest the parts of the lands allotted under the agreement to James, upon the trusts of James' will. "It does not," said his Lordship, "appear to me that the agreement merely related to the mode of enjoying the estate, or had reference only to a partition. Joseph did not so consider it; he knew that James thought himself entitled to the whole estate, and he himself influenced, as he says, by the assertions of James, and desirous to avoid litigation, consented to accept less than half. This, then, is not a simple agreement for equality of partition; it is an agreement for partition, with compensation for abandoning a supposed right and a claim. Upon what that supposed right depended does not appear; but that there was a supposed right of James, to some extent yielded to by Joseph, is clear; and, if it be considered that the right, which to the parties themselves at that time was only supposed, had a real foundation, which might have been verified

*either by production of the document then in the possession of Joseph, or by searching the Court rolls of the manor, that, if [*840] Joseph had not made the concession which he did, James, instead of consenting to the agreement, might have investigated the title, and proved that the whole estate was his own, it will appear that the concession, however trifling in itself, placed the parties in a situation very different from that in which they might otherwise have stood; and looking at this case with reference to those principles, deducible from the several cases cited at the bar, I am of opinion that the agreement, though *parol*, yet being in the nature of a family arrangement, and followed by the uninterrupted several enjoyment of the portions allotted to the two brothers respectively, is an agreement which this Court will enforce." This decision was, on appeal, affirmed by Lord Cottenham. See also *Heap v. Tonge*, 9 Hare, 90; *Manby v. Bewicke*, 3 K. & J. 342; *Fowler v. Fowler*, 4 De G. & Jo. 250.

That a mistake of *law* which is common to all the parties, will not vitiate an arrangement is clear. Thus, in *Pullen v. Ready*, 2 Atk. 587, legacies were given, to be forfeited upon marriage without consent; one of the legatees did marry without consent, and a family arrangement, without the advice of counsel, took place, and articles were executed, giving that legatee the benefit of the legacy. It was insisted afterward, that the arrangement was made under a mistake of law that the condition was only in *terrorem*, which, under the circumstances, it was not; but Lord Hardwicke decreed specific performance of the articles, saying, that, at the time of the execution of the articles, the marriage without consent could not but be known, and that the parties to it could not possibly be supposed to be ignorant of that *fact* which happened some years before. That it was said, they might know the *fact*, and yet not know the *consequence in law*: but if parties were entering into an agreement, and the very will out of which the forfeiture arose was lying before them and their counsel while the drafts were preparing, the parties should be supposed to be acquainted with the consequences of law as to that point, and should not be relieved under a pretence of being surprised, with such strong circumstances attending it; so that, with the knowledge of the will, and all the clauses in it, the condition annexed, and the forfeiture, the parties, with their eyes open, executed the deed; that it had been insisted by counsel, that they had executed the articles under a *mistake*. But his Lordship said, that there was nothing more mischievous than for the Court to decree a forfeiture after an agreement, in which, *if there was any mistake it was the mistake of all the parties to the articles, and no *one of them was more under an imposition than the other.* The Court was so far [*841] from assisting to set up the forfeiture again, that it would rather rejoice at the agreement, because it had absolutely tied up the hands of the Court from meddling in the question; and if it were to decree the forfeiture then, it would be making all agreements vain and nugatory: the case

that came nearest to the present was *Cann v. Cann*, (1 P. Wms. 723), before Lord Macclesfield.

Where, therefore, a doubtful question arises, such as a question of construction upon a will, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportion which may be agreed upon. Per Sir J. Leach, V. C., in *Naylor v. Winch*, 1 S. & S. 564.

So where payments were made under a mistaken construction of a doubtful clause in a settlement, the Court refused to direct them to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially as subsequent family arrangements had proceeded on the footing of that construction: *Clifton v. Cockburn*, 3 My. & K. 76; and see *Great Western Railway Co. v. Cripps*, 5 Hare, 91.

And where a deed of family arrangement has been acted upon for many years, and no fraud is imputed, the Court will not set aside or alter such deed upon the mere allegation by some of the parties to it, that its provisions did not carry out their intentions: *Bentley v. Mackay*, 31 Beav. 143, 10 W. R. (L. J.) 873.

The principle of these cases seems to have been departed from in *Lansdown v. Lansdown*, Mos. 364. In that case there were four brothers; the second died, and the eldest brother entered upon his lands; the youngest brother claimed a title; upon which they applied to Hughes, a school-master, their neighbor, in the country, (who often acted as an attorney), for his opinion, who, upon consulting a book called "The Clerk's Remembrancer," gave it in favor of the youngest brother, because land could not ascend; upon which the eldest brother agreed to divide the estate with the youngest, and declared he would rather do so than go to law, though he had the right; upon which Mr. Hughes prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds in the penalty of 300*l.*, which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares. The youngest brother died, and the moiety descended on the infant defendant, his son and heir. And Lord Chancellor King decreed, that the bond and deeds of lease and release should be delivered up to the *plaintiff, the [*842] eldest brother, being obtained by mistake and *misrepresentation*, and that the defendant, the infant, when he came of age should convey *nisi*, &c.; and his Lordship said, that the maxim of law, *Ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.

An extract of this case, from the Registrar's Book, is given, 2 J. & W. 205, where the ground for the decision is stated to be "mistake and misrepresentation of the law." A mere mistake, however, or misrepresentation of the law by the person the brothers consulted, would not be sufficient reason for refusing to carry into effect such an agreement; and it is clear

that the observation of Lord King, that the maxim, *Ignorantia juris non excusat*, did not hold in civil cases, has not been recognized in modern times. See *Stewart v. Stewart*, 6 C. & F. 966.

Moreover, where parties come to the Court of Chancery to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told in what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice they have received be well or ill founded) they will give up the question in favor of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child. Per Sir G. Turner, V. C.; *Stone v. Godfrey*, 5 De G. Mac. & G. 90.

Any transaction between father, tenant for life, and son, tenant in tail of property, entered into upon barring the entail, is looked upon in the nature of a family arrangement; and in such a case, apparent inadequacy of consideration, and the circumstance that the property is reversionary, will have but little weight. In *Cory v. Cory*, 1 Ves. 19, on the fact appearing, that one of the parties was drunk at the time an agreement was entered into to settle disputes in a family, Lord Hardwicke thought that it was not sufficient to set the agreement aside, as it was reasonable, and it did not appear that any unfair advantage was taken. And he observed, that, "if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterward the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside." And see *Wycherley v. Wycherley*, 2 Eden, 175; *Perse v. Perse*, 7 C. & F. 318.

In *Bellamy v. Sabine*, 2 Ph. *425. where upon an agreement between father and son, for disentailing an estate, and for a conveyance to the son in fee, the main consideration moving from the son was an undertaking to pay the father's debts, even the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside as against the father, though the son was only just come of age, as a family arrangement of such a description could not be supposed to have depended upon a very exact calculation of the amount of debts. See also *Hoghton v. Hoghton*, 15 Beav. 305, where the law upon the subject is very elaborately laid down by Sir John Romilly, M. R.; *Dimsdale v. Dimsdale*, 3 Drew, 556; *Baker v. Bradley*, 7 De G. Mac. & G. 597; *Hartopp v. Hartopp*, 21 Beav. 259; *Head v. Godlee*, Johns. 536; *Jenner v. Jenner*, 2 Giff. 232; 2 De G., F. & Jo. 359.

As to undue influence on the part of a parent, see ante, p. *583.

A *bonâ fide* family arrangement (previous to the abolition of the usury laws) would not have been deemed usurious merely because it secured a

loan with legal interest, and the borrower, by way of settlement, made other provisions for the lender: *Arkwright v. Lord Huntley*, Printed Cases, D. P., 1825, cited Sugd. Prop. 86.

If an arrangement between two parties is, on moral principles, fair, or is such as is sustainable, as between them, on the ground of its being a family transaction, it will not be rendered invalid because it may have been concocted and brought about by a third party, with a fraudulent intention of benefiting himself. Thus, in *Bellamy v. Sabine*, 2 Ph. 425, an agreement between a father, tenant for life, and an eldest son, tenant in tail, for certain considerations, to bar the entail and convey the estate to the son, was followed, within a fortnight, by the sale of the estate by the son to the solicitor who had acted for both parties in the agreement. In a suit, after the death of the son without issue, by the next remainderman in tail, who was also heir-at-law of the son, to set aside both transactions, and to have the estates resettled to the former uses, Lord Cottenham was of opinion, upon the evidence, that both transactions were but parts of one scheme, contrived by the solicitor for his own benefit; but, being also of opinion, that, on the principle of family arrangements, the agreement between the father and son was not necessarily an unfair one in itself, the second transaction only was set aside, the bill being dismissed as to the first, and the solicitor was decreed to convey the estate to the plaintiff in fee.

Although it is clear that when parties enter into a compromise or family arrangement, in order to avoid litigating the question as to whether one of the parties is *entitled to certain property or not, such com- [*844] promise will not be set aside although it should eventually turn out that the party taking something under the compromise was in reality legally entitled to nothing; nevertheless, the rather refined distinction has been taken that if the parties assuming something to be due, by the compromise merely settle the amount, without reference to the question whether anything be due or not, if it turns out that nothing really was due, the compromise will not be binding, and a deed for carrying it into effect will be set aside. This distinction was taken in the case of *Lawton v. Campion*, 18 Beav. 87; there the children of John Lawton, a deceased remainderman, insisted as against their uncle Charles (a prior tenant for life in possession) that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, and a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of the arrears of interest, and settled the amount of the future interest, which Charles thereby engaged to pay. It having been afterward determined in another suit, that on the true construction of the settlement the claim of the children was unfounded, Charles instituted a suit to set aside the deed, and Sir John Romilly, M. R., made a decree in his favor. "In my opinion," said his Honor, "the

thing compromised was not the right to have the portions immediately raised, but something collateral to it, and arising and flowing out of it. The liability of the plaintiff to pay was not, in fact, compromised; but the amount which he would have to pay, under a liability, assumed and admitted on both sides, was the thing compromised, and the only subject of the compromise. That is the view which I take of the case from the correspondence, and which the deed appears to me to confirm. It appears to me to have been entered into for the purpose of settling the question of the amount which the plaintiff was liable to pay to these ladies, and not to settle any question as to his liability to pay anything at all." And after referring to *Harvey v. Cooke*, 4 Russ. 57, as being exactly in point, his Honor added, "Undoubtedly a family arrangement was entered into in this case; but the question is, what it included. In my opinion, the liability of the plaintiff to pay anything, or in other words, the fact that the money was raisable on the death of John Lawton, was not an ingredient in that arrangement, and did not form a term of it. That question was not present to the mind of either party at the time when they entered into this arrangement, as one which could *be contested; the arrangement was limited to matters in difference, flowing out of and [*845] proceeding from that which was considered to be an undoubted liability." Upon a principle somewhat similar it has been determined that a compromise under the Court, will not exclude a point of construction not then under consideration: *Bennett v. Merriman*, 6 Beav. 360.

But an agreement cannot be sustained, even as a family arrangement, if by design, or even by accident, there has not been a full disclosure of all material circumstances in the knowledge of one of the parties, and it is immaterial whether information be asked for by the other parties or not. See *Gordon v. Gordon*, 3 Swanst. 400; there an agreement was entered into between two brothers, the younger of whom disputed the legitimacy of the elder, for the division of the family estates. At the time of the agreement the younger brother was apprised of a private ceremony of marriage which had passed between their parents, but did not communicate that fact to the elder. The legitimacy of the elder brother being established on the trial of an issue directed, Lord Eldon, after the lapse of nineteen years, rescinded the agreement. "I apprehend," observed his Lordship, "that if, on the death of an individual seized in fee of an estate, a dispute arises who is his heir, and there is room for a rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and all the information which he has received on the question, and at length adopt a resolution to distribute the property under the notion that the eldest claimant is illegitimate, although it afterward appears that he is legitimate, the Court will not disturb a family arrangement of that kind, merely because the fact is eventually found different from the supposition on which it

was founded. I put the case of *full and free disclosure*, and where the transaction proceeds on a compromise with reference to which no want of good faith on either side can be suggested.

“On the question of legitimacy the verdict is decisive, and I am bound to consider the plaintiff as the legitimate son; and the question now is, whether, attending to the *allegata et probata* in this case, these agreements are to be impeached, and to what extent, and on what terms? I lay out of the case the question of consideration, and I think myself justified by the authority of *Cann v. Cann* (1 P. Wms. 723), and other decisions, in holding, that if a dispute arises relative to the legitimacy of children, [*846] and the members of the family, to *maintain their character in the world, arrange their rights among themselves, if the matter is fully before them their agreement will not be disturbed because it is founded on a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate; but then, *there must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient.*

“My view of this case (and I have not arrived at it without reluctance), is, that the younger son knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that at the time when the plaintiff entered into the agreement of 1790, he was apprised of that ceremony; and I say, that if the youngest son, knowing that fact, of which the plaintiff was ignorant, dealt with him without disclosing it, *whether the omission of disclosure originated in design, or in an honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication*, the agreement cannot be sanctioned by the Court.

“If the younger son had informed the plaintiff of the fact of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the plaintiff had consented to impute to himself the character of illegitimacy, when, by the verdict, it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement.”

So, in *Harvey v. Cooke*, 4 Russ. 58, Sir J. Leach, M. R., observed, that “if the case could have been treated as a family compromise of doubtful rights, it would have been extremely difficult to have maintained it—not because it would have proceeded on a mistaken notion of the rights of the parties (for this, in a family arrangement, was of no importance), but because there was not that full disclosure of the legal opinions which one of the parties had received, and of the state of the accounts, which the rules of a Court of equity would require.”

In *Groves v. Perkins*, 6 Sim. 576, a wife, who had been deserted by her husband, became entitled to a share of an intestate's property,

amounting to 3609*l*. The husband, whilst he was ignorant of the amount of the share, assigned it in trust for the wife and children, subject to the payment of 10*l*. a-week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet, as the administrators, who were the wife's *brothers, and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside by Sir L. Shadwell, V. C. "The consideration," said his Honor, "for which the plaintiff executed the deed is very small; and the question is, whether, advertent to the nature of the transaction, there was that disclosure made to the plaintiff which he was entitled to have. The administrators do not allege in their answer, that they stated to the plaintiff what was the amount of the intestate's property, or of his wife's share of it; nor is there any evidence to that effect. The deed, it is true, recites that the intestate was at his death possessed of very considerable personal estate; but I do not think that that was a sufficient disclosure. And, though there was not that fraud in the transaction which the plaintiff has charged, yet, as the administrators withheld from him the knowledge of the amount of his wife's share, there was that non-disclosure of a material fact which compels me to say that the deed cannot stand. As, however, the plaintiff has charged the defendants with a fraud which they never practiced, I shall set aside the deed without costs." And see *Pusey v. Desbouverie*, 3 P. Wms. 315, 321; *M'Carthy v. Decaix*, 2 Russ. & My. 614; *Leonard v. Leonard*, 2 Ball. & B. 171; *Smith v. Pincombe*, 3 Mac. & G. 653; *Cooke v. Greves*, 30 Beav. 378; *Greenwood v. Greenwood*, 2 De G. Jo. & Sm. 28; *Tennent v. Tennents*, 2 L. R. Ho. Lo. Sc., 6, 9, 10. [*847]

And especially if parties are not on equal terms, and one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties: *Pickering v. Pickering*, 2 Beav. 31, 56; *Pusey v. Desbouverie*, 3 P. Wms. 315, 320, 321; *Sturge v. Sturge*, 12 Beav. 229.

In *Stockley v. Stockley*, 1 V. & B. 31, Lord Eldon said, he had a doubt whether what is in *Stapilton v. Stapilton*, represented as falling from Lord Macclesfield, in *Cann v. Cann*, could have been his language. "If," added his Lordship, "a doubt is raised between parties as to their rights, and, advertent to that doubt, they come to an agreement, and that is a reasonable agreement in family matters, the Court goes a long way to carry it into execution. But my difficulty was, that there might be supposition of right without a doubt upon it; that it would be too much to execute an agreement entered into upon such supposition, if unfounded; and the words of Lord Macclesfield, instead of 'a supposition of right,' might have been 'a doubtful right;' but I observe, in a manuscript note that I have, the same words are represented as those of Lord Macclesfield." [*848]

In *Dunnage v. White*, 1 Swanst. 137, a deed was executed by the members of a family, to determine their interests under the will and partial intestacy of an ancestor; but it appeared on the face of the deed, that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration; and evidence was given of his gross ignorance and habitual intoxication, liability to imposition, and want of professional advice. After an acquiescence of five years, and in the absence of direct proof of fraud or undue influence, Sir Thomas Plumer, M. R., considering the state of mind of the heir, his circumstances, and the nature of the transaction, was of opinion it was not such a deed as the Court ought to execute, and that it could not be supported as a family arrangement, upon the doctrine of *Stapilton v. Stapilton*, and *Cann v. Cann*; but he said, that, undoubtedly, parties entitled in different events, might, while the uncertainty existed, each taking his chance, effect a valid compromise; that, in *Stapilton v. Stapilton*, the legitimacy of the eldest son was doubtful: that was a question proper to be so settled, and the settlement was a consideration which gave effect to the deed.

Where a person under the influence of threats, and under apprehension of arrest, and without adequate consideration or advice, has given securities as a compromise of doubtful rights, they will be set aside in equity: *Scott v. Scott*, 11 Ir. Eq. Rep. 74.

Upon the same principle where a deed in the nature of a family arrangement has been executed by a *cestui que* trust, under pressure from the trustees in violation of their duties, it will be set aside in equity: *Ellis v. Barker*, 7 L. R. Ch. App. 104.

Where a deed was made for the purpose of carrying into effect a family arrangement, and it contained a declaration of trust inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered, it was held by Sir James Wigram, V. C., that the declaration ought to be varied: *Ashurst v. Mill*, 7 Hare, 502.

It has been decided by the highest authority that a compromise of a family dispute is not rendered invalid in consequence of one of the parties not distinctly understanding his rights, if they were understood by his agents, by whose acts and knowledge, in the absence of fraud, the principal is bound. *Stewart v. Stewart*, 6 C. & F. 911, where Lord Cottenham, after an elaborate *examination of the authorities, shows [*849] that the principle is the same in the law of Scotland as in the law of England and in the civil law.

Where a family arrangement is entered into upon the assumption that all the parties named in a deed will execute it, and one of them does not do so, it will not be binding upon the others although they execute it: *Peto v. Peto*, 16 Sim. 590.

The result is the same where one of the parties, from any incapacity, as for instance, coverture, cannot execute the deed in a valid or binding form: *Bolitho v. Hillyar*, 13 W. R. (M. R.) 600; 34 Beav. 180; and see *Taylor v. Cartwright*, 14 L. R. Eq. 167, 20 W. R. (V. C. W.) 603.

Where a bill alleges a judgment obtained by fraud and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or to have the compromise carried out, and in the opinion of the Court the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed: *Cawley v. Poole*, 1 Hem. & Mill. 50.

A compromise made after a bill is filed may be relied on by the answer, if it completely disposes of the rights in question; but if its validity be doubtful, or it requires something further to carry it into effect, a bill must be filed either to execute or set it aside. Therefore, when a bill claimed a share of property, and an agreement was made to dispose of it and divide the proceeds in a certain manner, which was never carried out, and the agreement was impeached by amendments in the bill, the cause was allowed to stand over: *Bristow v. Bristow*, 12 Ir. Eq. Rep. 329.

Letters written, after a dispute has arisen, with a view to a compromise and "without prejudice," cannot be used in evidence against the party by or on behalf of whom they were written. See *Hoghton v. Hoghton*, 15 Beav. 321, where Sir J. Romilly, M. R., said, "that such communications made with a view to an amicable arrangement ought to be held very sacred; for if parties were to be afterward prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences." And see *Jones v. Foxall*, 15 Beav. 388, 396.

In a recent case in Ireland, a correspondence had been carried on with a view to a compromise, and without prejudice to the rights of the parties. It was held by the Court of Appeal in Chancery that it could not be given in evidence to take a claim out of the operation of the Statute of Limitations, even though there had never been any controversy as to the existence and the validity of the claim. "There are grounds of public policy," said Lord Justice of Appeal, "which apply with *great force to this case, for when a party makes concessions in order to effect a [*850] compromise, and guards himself against their use for any other purpose, it would be unconscientious and unjust to deprive him of the protection for which he has expressly stipulated." *In re Monsell*, 6 Ir. Ch. Rep. 245, 254. [But while nothing is better settled than that an unaccepted or executory offer of compromise is neither admissible in evidence; *Miller v. Halsey*, 14 New Jersey Law, 48; *Spence v. Spence*, 4 Watts, 155; *Pike v. Doyle*, 19 La. An. 362; *Brown v. Shields*, 6 Leigh, 440; *Kelly v. Brooks*, 25 Alab. 523; *Molyneaux v. Collier*, 13 Georgia, 406; nor binding upon either party; *Williams v. Price*, 5 Munford, 507; *Edwards v. Turner*, 9 Iowa, 443; *Reed v. McLemore*, 34 Mississippi, 110; yet it is equally well settled that admissions of independent facts, pertinent to the issue and unconnected with the subject of the settlement, are admissible,

although made in the course of a treaty of compromise; *Murray v. Casper*, 4 Cowen, 635; *Gibbs v. Wright*, 14 Alab. 465; *Sailor v. Hertzogg* 2 Barr, 182; *Witt v. Baird*, 7 Blackford, 258; *Donner v. Button*, 26 New Hamp. 338; *Marsh v. Gold*, 2 Pickering 285; *Genish v. Sweetzer*, 4 Id. 374; *Dickinson v. Dickinson*, 9 Metcalf, 471; *Emmerson v. Boynton*, 11 Gray, 395; *Durgin v. Somers*, 117 Mass. 55.]

Neither counsel (*Swinfen v. Swinfen*, 18 C. B. 485; 1 C. B. (N. S.) 364; 27 L. J. (Ch.) 35, 491) nor an attorney (*Fray v. Vowles*, 1 Ell. & Ell. 839, 846, 847, 848) can compromise a case against the express wishes of their client. An action for so doing will lie against the attorney (*Fray v. Vowles*, 1 Ell. & Ell. 839), but not against counsel: *Swinfen v. Lord Chelmsford*, 5 Hurlst. & Norm. 890. But it seems that both counsel (*Strauss v. Francis*, 1 L. R. Q. B. 379) and attorneys in ordinary cases entrusted with the general management of a cause have power to compromise it, unless expressly forbidden so to do (*Prestwich v. Poley*, 18 C. B. (N. S.) 806; *Berry v. Mullen*, 5 Ir. Eq. 368); and an attorney is not guilty of actual negligence, provided he acts *bonâ fide* and with reasonable care and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition: *Chown v. Parrott*, 14 C. B. (N. S.) 74; and it seems that a compromise being within the apparent authority of counsel or an attorney is binding on the client, notwithstanding he dissented, unless this dissent was brought to the knowledge of the opposite party at the time: *Strauss v. Francis*, 1 L. R. Q. B. 379; *Brady v. Curran*, 2 Ir. Rep. C. L. 314; *Berry v. Mullen*, 5 Ir. R. Eq. 368.

If the Court, having all the necessary facts before it, sanctions a compromise on behalf of infants, and it afterward turns out that the Court was mistaken, the infants have no redress, it being an error of judgment for which there is no remedy. But if by suppression or misstatement of facts, the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice, and the Court will, if possible, set aside the transaction as against the innocent party: *Brooke v. Lord Mostyn*, 33 Beav. 457; 2 De G. Jo. & S. 373, reversed Dom. Proc. nom. *Mostyn v. Brooke*, 4 L. R. Ho. Lo. 304; but the reversal did not affect the law as laid down in the Courts below, but proceeded upon the opinion of the House that, in fact, there had not been any concealment of documents or any misrepresentations when the arrangements, which the suit sought to set aside, had been agreed upon. See also *Stainton v. The Carron Company*, 6 Jur. N. S. 360.

The Court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit, to make a trustee liable for a breach *of [*851] trust in relation to a fund in which the married woman has a reversionary interest: *Wall v. Rogers*, 9 L. R. Eq. 58.

Contracts upon the Separation of Husband and Wife.—In this place a class of contracts, viewed now with more favor than heretofore by Courts

of equity, may be noticed, viz., contracts upon the separation of husband and wife, which partake somewhat of the nature of family arrangements.

It may be admitted, indeed, that a mere agreement for husband and wife to live separate and apart from each other is against the policy of the law, and will not be executed by the Court: *Westmeath v. Westmeath*, Jac. 126; [*McKenna v. Phillips*, 6 Wharton, 571; *Smith v. Knowles*, 2 Grant's Cases (Pa.) 413; *McCrocklin v. McCrocklin*, 2 B. Munroe, 370;] nevertheless, it will be seen that a contract founded on that motive will clearly be enforced; [*Calkins v. Long*, 22 Barbour, 97; *Wells v. Stout*, 9 California, 479; *Carson v. Murray*, 3 Paige Ch. 483; *Robertson v. Robertson*, 25 Iowa 350; *Dutton v. Dutton*, 30 Indiana, 453.]

"It is in vain," observed Lord Langdale, M. R., "to regret the perplexities in which Courts have found themselves involved, by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it. It does, as Sir W. Grant expresses it (*Worrall v. Jacob*, 3 Mer. 268), seem rather strange, but it has been settled, that, in certain cases, they must do so:" *Frampton v. Frampton*, 4 Beav. 293.

It is necessary to distinguish between a deed of separation actually executed and a mere agreement for a separation.

Where a deed of separation between husband and wife has been actually executed, although it is not founded upon valuable consideration, the trusts thereof will, if complete, be carried into effect by the Court. See *Frampton v. Frampton*, 4 Beav. 287. There, on a separation between a husband and wife, the former by deed made between himself, his wife, and trustees, assigned the dividends of some funds standing in the names of trustees to other trustees for the benefit of the wife, and he covenanted that she might live apart from him, and the wife agreed to accept the provision in lieu of dower, and to exonerate her husband from all her debts and to forfeit her right under the deed if she violated the agreement. The deed contained no covenant on the part of the trustees, and was supported by no further consideration. It was held by Lord Langdale, M. R., that although the assignment was purely voluntary, it was binding upon the husband. "It would," said his Lordship, "scarcely be just to say, that although a voluntary trust may be binding in other cases, it shall not be so in the case where a husband has, by creating such a trust, prevailed upon his wife to live apart from him, and waive the enforcement of her conjugal rights." [And to the same effect are *Calkins v. Long*, 22 Barbour, 97; *Loud v. Loud*, 4 Bush, 453; *Reed v. Beazley*, 1 Blackford, 97; *Wallace v. Bassett*, 41 Barbour, 92; *Goddard v. Beebe*, 4 Greene (Iowa), 126; *Andrews v. Randon*, 34 Texas, 536.]

Courts of equity will moreover *decree specific performance of agreements to execute a deed of separation where the stipulations [*852] are not contrary to law or in contravention of public policy: *Vansittart v. Vansittart*, 2 De G. & Jo. 255.

But the agreement must be founded on sufficient consideration (see cases collected, vol. 1, p. *129, 130), for if it be merely voluntary it will not be enforced in equity: *Walrond v. Walrond*, Johns. 18.

An agreement by a wife (who has property settled to her separate use without power of anticipation) on a separation, to indemnify her husband against debts, will not amount to valuable consideration, as a married woman has no power to contract so as to bind property of that description: *Walrond v. Walrond*, Johns. 18.

Where there are any stipulations in an agreement for separation contrary to law or public policy a Court of equity will not, even if it be made on sufficient consideration, separate one portion of it from the other, and decree specific performance of part, but will refuse to decree specific performance altogether. Thus, in *Vansittart v. Vansittart*, 2 De G. & Jo. 249, by a memorandum of agreement made between a husband and his wife who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, and that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education. It was held by the full Court of Appeal (affirming the decision of Sir W. Page Wood, V. C., 4 K. & J. 62) that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the father's duties with respect to them; and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made. "It has been said," observed Turner, L. J., "that there are cases of this Court's enforcing the execution of separation deeds, and I believe that there are such cases, although the point was not perhaps entirely set at rest until the decision of the House of Lords in *Wilson v. Wilson* (1 Ho. Lo. Ca. 538); since that case, however, I agree that we must take it to be the settled rule that the Court will enforce specific performance of agreements for separation, and of course the deed to be executed must contain covenants for that [*853] separation which are necessary incidents. * Then it is said, why not decree the execution of a deed which shall contain not only those provisions but other provisions which the Courts will not enforce? The answer is, we are bound by the authority to the extent of the case of *Wilson v. Wilson*: the House of Lords has so determined; but we are now called upon to carry that authority further, and to enforce an agreement which contains other provisions repugnant to the policy of the law in other respects. I am not prepared to go that length; I am of opinion that it would be inexpedient so to do." See also *Walrond v. Walrond*, Johns. 18; *Hope v. Hope*, 8 De G. Mac. & G. 731; *Gibbs v. Harding*, 8 L. R. Eq. 490; 5 L. Rep. Ch. App. 336.

So an agreement by a husband petitioner in a suit for the dissolution of marriage on account of the adultery of his wife, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, has been held to be a fraud upon the statute 20 & 21 Vict. c. 85 (The Divorce Act), and void as against public policy: *Gipps v. Hume*, 2 J. & H. 517.

Where, however, a separation deed is actually executed, the Court of Chancery will enforce any of its stipulations which are in accordance with the law, although it may also contain others which are contrary to the law or public policy: *Vansittart v. Vansittart*, 2 De G. & Jo. 255; *Walrond v. Walrond*, 1 Johns. 18; *Re Matthews*, 26 Beav. 463; *Swift v. Swift*, 13 W. R. (M. R.) 378; *S. C. Ib.* (L. J.) 731; 34 L. J. N. S. (Ch.) 209; and see ante, vol. 1, p. *111, 112.

But where a wife induces her husband to execute a deed of separation, in contemplation by her of her renewal of an illicit intercourse, the deed is void: *Evans v. Carrington*, 2 De G. F. & Jo. 481, reversing the decision of Sir W. Page Wood, V. C., reported 1 J. & H. 598.

A deed of separation is a good answer to a husband seeking by habeas corpus to obtain the person of his wife: *King v. Meade*, 1 Burr, 542; *King v. Winton*, 5 T. R. 91.

The Ecclesiastical Courts considered a separation by private arrangement as an illegal contract, implying a dereliction of stipulated duties, which the parties were not at liberty to desert, and, consequently, would entirely disregard it as a bar to a suit for the restitution of conjugal rights (*Mortimer v. Mortimer*, 2 Hagg. Con. Rep. 318; *Westmeath v. Westmeath*, 2 Hagg. Eccles. Rep. App. 115; *King v. Samson*, 3 Adams, 277).

But a Court of equity will, it appears, where a valid contract for separation has been entered into between husband and wife, *stay proceedings of either party for such purpose in the Ecclesiastical [*854] Court (*Wilson v. Wilson*, 1 H. L. Ca. 538, 556, 575; *Hunt v. Hunt*, 10 W. R. (L. C.) 215, reversing the decision of Sir John Romilly, M. R., 31 Beav. 89), and will restrain a husband from molesting his wife (*Sanders v. Rodway*, 16 Beav. 207), and a wife from molesting her husband (*Flower v. Flower*, 20 W. R. (V. C. W.) 231), contrary to covenants contained in deeds of separation. See also *Williams v. Baily*, 2 L. R. Eq. 734; *Kitchin v. Kitchin*, 19 L. T. (N. S.) 674.

But although the trustees of a separation deed may be immediately upon its execution answerable for any breach of contract on the part of the wife, it seems that she will not be placed in the same position until she has compromised herself by some acceptance of the deed. Thus, in *Williams v. Baily*, 2 L. R. Eq. 731, in a separation deed the husband covenanted with trustees to allow his wife 50*l.* a year for her support, he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavor to compel the husband again to live with her or to allow her "any further



or greater or other support, maintenance, or alimony" than the annuity of 50*l*. It was held by Sir W. Page Wood, V. C., that in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon an interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the Court put her under an undertaking to deal with alimony as the Court should direct.

Although, after a separation by private arrangement of the parties, a husband and wife may be relieved from the necessity of cohabitation, they still retain their relative position, which formerly could only be dissolved by Parliament (*Marshall v. Rutter*, 8 T. R. 545), and now by proceedings under the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85); the husband will, consequently, be liable to his wife's debts, unless he provides for her maintenance by an adequate allowance, and it is regularly paid; in which case, he will have a good defence to an action brought against him for goods supplied to his wife: *Hodkinson v. Fletcher*, 4 Camp. 70; *Hindley v. Westmeath*, 6 B. & C. 200; *Mizen v. Pick*, 3 M. & W. 481; *Reeve v. Marquis of Conyngham*, 2 C. & K. 444.

Upon the same principle a *deed of separation is no bar to an [*855] action for damages by the husband for the seduction of his wife (*Chambers v. Caulfield*, 6 East, 244); nor will it, in the absence of express stipulation to that effect [*Dillinger's Appeal*, 35 Pa. St. 357], prevent a wife from claiming her share of her husband's personal estate under the Statute of Distribution (*Slatter v. Slatter*, 1 Y. & C. Exch. Cr. 28).

A mere voluntary separation between husband and wife, not founded on valuable consideration, will not, however, although binding upon the husband, be valid against his creditors (*Fitzer v. Fitzer*, 2 Atk. 511; *Clough v. Lambert*, 10 Sim. 174); [*Reed v. Beasley*, 1 Blackford, 97;] or against subsequent purchasers or mortgagees (*Coux v. Foster*, 1 J. & H. 30); but an indemnity against the wife's debts (*Stephens v. Olive*, 2 Bro. C. C. 90; *Worrall v. Jacob*, 3 Mer. 256), or a relinquishment of her claim to alimony (*Hobbs v. Hull*, 1 Cox, 445), and, perhaps, the compromise of a suit (*Jodrell v. Jodrell*, 9 Beav. 45; *Wilson v. Wilson*, 1 H. L. Ca. 538), would constitute a valuable consideration as against the husband's creditors.

There is an important distinction, however, between contracts for immediate separation, which have just been discussed, and contracts as to future separation; for although the latter do not appear at one time to have been disapproved of (*Moore v. Moore*, 1 Atk. 727; *Hoare v. Hoare*, 2 Ridg. P. C. 268; *Rodney v. Chambers*, 2 East, 297), it has since been determined by the highest authority—the House of Lords—that a deed providing for a future separation is void, as contrary to public policy:

Westmeath v. Westmeath, 1 Dow & C. 519; and see *Durant v. Tilley*, 7 Price, 577; *Vandergucht v. De Blaquiere*, 5 My. & Cr. 229; and see and consider *Cocksedge v. Cocksedge*, 5 Hare, 397; 14 Sim. 244; *Cartwright v. Cartwright*, 10 Hare, 630; 3 De G. Mac. & G. 982; *Byrne v. Lord Carew*, 13 Ir. Eq. Rep. 1; *H. v. W.*, 3 K. & J. 382; *Merryweather v. Jones*, 4 Giff. 499; *Proctor v. Robinson*, 14 W. R. (M. R.) 381; [*Florentine v. Wilson*, Hill & Denio Sup. Ct. (N. Y.), 303; *Hutton v. Hutton*, 3 Barr, 100; *Gaines v. Poor*, 3 Metcalfe, 503]. However, in *Rodney v. Chambers*, 2 East, 297, a covenant to allow maintenance in case the separation took place with the approbation of trustees, was held valid; and see *Gawden v. Draper*, 2 Vent. 217; *Chambers v. Culfeld*, 6 East, 244; *Soilleux v. Herbst*, 2 Bos. & P. 444; *Bateman v. Ross*, 1 Dow, 235.

Where a separation deed points to the separation as the consideration upon which it is based, and no separation ever takes place, the consideration having failed, the deed is wholly void, and the Court of Chancery will direct it to be canceled: *Bindley v. Moloney*, 7 L. R. Eq. 343; see also *Westmeath v. Salisbury*, 5 Bli. N. S. 339.

So, likewise, a reconciliation by renewal of cohabitation, although *there be no stipulation to that effect, will of itself avoid a deed of separation: *Westmeath v. Westmeath*, 1 Dow & C. 519; *Jee v.* [*856] *Thurlow*, 2 B. & C. 547; *Webster v. Webster*, 1 Sm. & Giff. 489; 4 De G. Mac. & G. 437. But mere reconciliation, such as communication by letters, without cohabitation (*Slatter v. Slatter*, 1 Y. & C. Exch. Ca. 28; *Frampton v. Frampton*, 4 Beav. 287), or merely living together under the same roof, without reconciliation [*Heyer v. Burger*, 1 Hoffman (N. Y.), 1; *Carson v. Murray*, 3 Paige Ch. 483; *Hüter's Appeal*, 4 P. F. Smith, 110; *Wells v. Stout*, 9 California, 479], as where it is shown that the parties conducted themselves with the greatest animosity toward each other, will not have that effect (*Bateman v. Ross*, 1 Dow, 245).

But there is nothing illegal in continuing trusts for payment of money to the wife in the event of reconciliation: *Nicholls v. Danvers*, 2 Vern. 671; *Wilson v. Muschell*, 3 B. & Ad. 743; *Bateman v. Ross*, 1 Dow, 245; *Byrne v. Lord Carew*, 13 Ir. Eq. Rep. 1; *Crouch v. Waller*, 4 De G. & Jo. 302; *Randle v. Gould*, 8 Ell. & Bl. 457.

And if a husband after a separation contracts to continue the payment of an annuity to his wife to which she was entitled under a separation deed, in case she would return to and cohabit with him, he will be bound to pay it, even where the contract was merely by parol, when the wife by part performance on her side takes the contract out of the statute: *Webster v. Webster*, 3 Jur. N. S. 655; 1 Sm. & Giff. 489.

The adultery of the wife will not prevent her taking proceedings under the deed or contract for separation: *Seagrave v. Seagrave*, 13 Ves. 443; [*Dixon v. Dixon*, 23 New Jersey Eq. 316; S. C. 24 Id. 133].

In *Jodrell v. Jodrell*, 9 Beav. 45, a singular deed between husband and wife was upheld as a family arrangement. In that case, a wife having

instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, upon trust, to permit the wife to enjoy it and accommodate herself and children; and an income of 4000*l.* a year was also provided for her separate use, to keep up the establishment for herself and children, "upon such a scale, and regulated in such a manner, as she should think fit;" and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house, "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment. Lord Langdale, M. R., held, that the deed was not void on any ground of public policy; and that, being a family arrangement, and a compromise of disputed rights, *there [857] was a sufficient consideration; that it was not void for uncertainty; and that the Court would enforce its due performance both by the wife and the husband. "It has been said," observed his Lordship, "that an arrangement of this sort greatly alters the ordinary relation between husband and wife. No doubt it does; but if it is said that it entirely destroys the ordinary duties, as they before existed, between husband and wife, I think that proposition cannot be maintained. What personal relation is directly affected by this? If, indeed, the parties do not endeavor to accommodate themselves to this state of things—if they seek every occasion, from time to time, of jarring, and are determined not to agree together—then it furnishes, no doubt, foundation enough of difference, and, unfortunately, of great misery to both; but it is equally true that they might, notwithstanding a provision in the deed, go on harmoniously, without any dispute, and in perfect conformity with all the ordinary duties between husband and wife. If, however, they are determined to quarrel about these things—if, instead of maintaining a good temper and showing a mutual forbearance, they seek every occasion for irritation and quarrel—then, no doubt, the means of disagreement will be found in this arrangement, as, unfortunately, they are but too frequently found in the ordinary relation of man and wife. I feel, therefore, very considerable difficulty in coming to the conclusion that this arrangement is illegal, or contrary to the policy of the law, or that it places the husband altogether in the power of the wife, against the law. . . . With regard to the other points—want of consideration and the want of mutuality—I do not think that they ought to influence the mind of the Court at all. This is not a matter of pecuniary consideration, but a family arrangement—a compromise of litigated rights between the parties." See also *Joddrell v. Joddrell*, 14 Beav. 397.

As to the construction of deeds of separation, see *Hulme v. Chitty*, 9 Beav. 437; *In re Andrews*, 1 Ir. Ch. Rep. 410.

The judicial separation of husband and wife is now regulated by the

Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85; 21 & 22 Vict. c. 61; 23 & 24 Vict. c. 144; and 29 & 30 Vict. c. 32).

The existence of a separation deed, none of the provisions of which had been acted upon, was held to be no ground for refusing relief to the wife on account of the desertion of the husband some time after the execution of the deed: *Cock v. Cock*, 13 W. R. (Div.) 188.

COMPROMISE OF DOUBTFUL RIGHT.—It is a doctrine of general application that compromises are to be favored as tending to prevent litigation and quiet titles; *Fisher v. May*, 2 Bibb, 448; *Reynolds v. Brandor*, 3 Heiskell, 593; *Doyle v. Donnelly*, 56 Maine, 26; *Easton v. Easton*, 112 Mass. 438; and, if the parties to such an agreement have acted in good faith, it will not be set aside because the subsequent course of events shows that the gain was all on one side, and the sacrifice on the other. Hence, when a compromise has been fairly effected, the question which it was intended to put at rest will not be reopened. "If compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of right contrary thereto;" *McClellan v. Kennedy*, 8 Maryland, 248.

The rule and the qualification of it are accurately stated in the following passage: "The surrender or discharge of a claim which is utterly without foundation, and known to be so, is not a good con-

sideration for a promise; but it is otherwise if the claims are doubtful, and so understood by the parties, and in such a case the consideration will not be defeated by showing that in fact no valid claim really existed;" *Pitkin v. Noyes*, 48 New Hamp. 294, 304.

It is accordingly well settled that "a *bona fide* claim with a color of right, although there be in fact no right, so long as the party asserting it does not know he has no right and acts in good faith, is sufficient to sustain a compromise; for a party may buy his peace in a case in which he knows there is no right against him. There would be no such thing as a compromise or settlement of a dispute by the parties if the original controversy was not thereby closed;" *Gates v. Shutes*, 7 Mich. 127; *Hull v. Swarthout*, 29 Id. 249; *Mitchell v. Long*, 5 Littell, 71; *Zane v. Zane*, 6 Munford, 406; *Taylor v. Patrick*, 1 Bibb, 68; *Kennedy v. Davis*, 2 Id. 343; *Fisher v. May*, Id. 448; *Sargent v. Larned*, 2 Curtis, 340; *Cavode v. McKelvey*, Addison, 56; *Payne v. Bennett*, 2 Watts, 427; S. C. 5 Id. 259; *Brown v. Sloan*, 6 Id. 421; *Rice v. Bizler*, 1 Watts & Serg. 445; *Chamberlain v. McClurg*, 8 Id. 31; *Kelly v. Associa-*

tion, 3 Wright, 148; *Fleming v. Ramsey*, 10 Id. 252; *Steele v. White*, 2 Paige Ch. 478; *Walker v. Tipton*, 3 Id. 5; *Butler v. Triplett*, 1 Dana, 152; *McKinley v. Watkins*, 13 Ill. 140; *Bach v. Slidell*, 1 La. An. 375; *Jamison v. Pothaus*, 26 Id. 63; *Mahle v. Elder*, Id. 681; *Holcomb v. Stimson*, 8 Vt. 141; *Paris v. Dexter*, 15 Id. 379; *Sowle v. Holdridge*, 17 Indiana, 236; *McClellan v. Kennedy*, 8 Maryland, 230; *Dra-per v. Owsley*, 15 Missouri, 613; *Allis v. Billings*, 2 Cushing, 19; *Riggs v. Hamley*, 116 Mass. 596. "The compromise of a doubtful right is a sufficient consideration," said Turnbull, J., in *McKinley v. Watkins*, "and it is immaterial on whose side the right turns out to be, as it must always be on one side or the other, because there can be but one good title to the same thing." A similar view was taken in *The Union Bank v. Geary*, 5 Peters (U. S.), 99; and in delivering the opinion it was said: "It is unnecessary to inquire whether the defence which was abandoned could have been made available. The validity of the contract does not depend upon this question. It is enough that the bank considered it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and that the complainant, by precluding herself from setting up the defence, waived what she supposed might be of material benefit to her." So in *Moore v. Fitzwater*, 2 Randolph, 442, the court, in upholding a compromise, declined to enter into the question of the validity or existence of the

right relinquished by the appellants. "Whether the title at the time of the contract," said Cabell, J., "was in the appellants or appellees we do not deem it material to inquire. It is sufficient that the parties themselves have settled the question; and as there was no fraud or undue advantage, we would not now disturb it, even if assured that the appellees had no title."

Agreeably to these principles, a deliberate settlement of a controverted right will not be set aside except for those causes which, like fraud, mistake, or undue influence, invalidate all contracts (*Good v. Herr*, 7 Watts & Serg. 253), and it is not therefore sufficient ground for opening or rescinding such an agreement that it is unequal or harsh in its operation; *Bates v. Todd*, 4 Littell, 177; *Varet v. The New York Ins. Co.*, 7 Paige Ch. 560; *Breckenridge v. Waters*, 4 Dana, 620; *Morton v. Ostron*, 33 Barbour, 256; *French v. Shoemaker*, 14 Wallace (U. S.), 314; or that a valid right was conferred or relinquished in consideration of the withdrawal of a claim which could not have been sustained; *Steele v. White*, 2 Paige Ch. 478.

It is equally well settled that a compromise will not be set at large to let in after-discovered evidence, however clearly it may show that the title was in the party who seeks to set aside the agreement, or that he relinquished a right that might have been maintained; *Bennet v. Paine*, 5 Watts, 251; *Wor-rall's Accounts*, 5 Watts & Serg. 112; *Barlow v. Ocean Ins. Co.*, 4 Metcalf, 270; *Allis v. Billings*, 2 Cushing, 19.

The point was determined, and the general principles which lie at the foundation of such agreements stated, in *Barlow v. The Ocean Ins. Co.*, where Hubbard, J., said "If the facts which were offered to be proved in this case had been of an entirely different character from those which gave rise to the compromise, and would have constituted a substantial and independent defence to the claim; or if the facts now newly discovered by the defendants had been known to the plaintiffs at the time of the compromise, and had been designedly concealed by them, or if they had been personally implicated in relation to them, a case might have been presented by the defendants requiring very careful consideration [*infra*, p. 1731]. But in the present instance, the evidence which is offered consists of facts of the same nature with those the alleged existence of which led to the compromise. They do not constitute an independent ground of defence. They alike go to prove that the vessel was designedly cast away by the master; and no suggestion was made, on the trial of this case, against the integrity and good faith of the plaintiffs, or of their agents in Boston, or that they had any knowledge of the manner in which the vessel was believed by the defendants to have been destroyed. Nor was any attempt made to prove that they were guilty of any misrepresentation or fraudulent or designed concealment of material facts, at the time of making the compromise; nor is it pretended that they were not interested

in the subject of the insurance, to the amount insured. So far as appears, both plaintiffs and defendants were alike ignorant at the time of effecting the settlement.

"The case, therefore, is simply this: A party effects a policy of insurance, and upon the happening of a loss, the underwriters refuse to pay, on the ground that the master, who was interested in the vessel, and had a separate insurance upon such interest, made a fraudulent loss of the vessel by casting her away; and in consequence of such alleged defence, the plaintiffs, in good faith on their part, submit to compromise their claim, and take three-fourths for the whole. Shall such compromise be set aside, by reason of the subsequent discovery, by the defendants, of other and distinct facts, going still more clearly to prove that the master bored and scuttled the vessel, and so occasioned the loss? And to the question thus stated, and which presents the defendants' case, we have no hesitation in answering that the compromise ought not to be disturbed. No adequate cause exist for disturbing it. No fraud is imputed to the party making it, and there is no such mistake of facts as led the defendants to an improvident settlement, and which good faith might require should be revised. The parties stood in the same position as to information. One believed a fraud had been committed, which, if proved, would establish his defence. The other feared that it might be so. Under these circumstances, they came together, and without misrepresenta-

tion or fraud on either part, they entered into a compromise by which one party received less than the amount of his contract, which, if free from the taint of fraud, would be wholly due, and the other saved a part of what he was bound to pay, unless he should succeed in establishing the existence of such fraud. Each party understood the law of his case; each understood the bearing of the facts; and with such knowledge the agreement was made. An agreement so made is upon a substantial consideration; and why should it not be enforced? No new fraud is discovered; no new ground of defence to the original contract has arisen; nothing to show that it was originally void. But the defendants, on further investigation and search, have now put themselves in possession of facts by which they ascertain more accurately the manner, as they believe, of the commission of the fraud which was the subject of the negotiation and compromise; and they are now satisfied that if no compromise had been made, and more time had been taken by them, the fraud could have been distinctly proved, and the plaintiffs' right of an action defeated. But the apprehension of the plaintiffs that such might be the case, and the fear of the defendants that it could not be established, led to the settlement; and each party sat down and agreed to pay the loss, though in different proportions. To disturb a settlement made under such circumstances, instead of promoting the ends of justice, would enlarge the field of discord, and would raise

new obstacles to compromises between parties, and thus create a just cause of regret, as such agreements are usually founded upon mutual concessions, and generally with advantage to each party."

No cases are better suited to the beneficial application of this doctrine than those depending on pedigree or title, which not unfrequently involve doubtful and controverted facts and perplexed and intricate questions of law.

In *Bennet v. Paine*, 5 Watts, 261, the court said: "It often happens that the evidence of title is in some respects vague or defective, and the parties, with no more evidence than they then have, prefer to compromise, and they do compromise, and this is reduced to writing and evidenced by solemn instruments; afterward the witnesses of the one party die, the trees of every survey decay and disappear naturally or artificially, or the other party discovers some evidence of which he was not informed when he compromised, and he wishes to annul the contract, to open the controversy and try the title. Nothing is better settled than that this cannot be done; nothing is more clear than that the peace and welfare of the country require that it should not be done. If it were permitted, the settlement of a suit would be only the certain preparation for another, and the party whose witnesses survived the witnesses of the other party, would be sure to renew the contest as soon as he discovered that he had an advantage. A case may occur in which it may be apparent that a

party has lost by a compromise, but it will not do on this account to change a rule of law founded in the best sense and most conducive to the peace of society and security of titles."

It should, nevertheless, be remembered that failure of consideration is *prima facie* a defence, and that the burden of proof is on him who seeks to excuse a want of title to the property which he agreed to convey, on the ground that the contract was one of compromise, and he trusted to quiet a doubtful right and not to press an assured or valid title; see *Haynes v. Thorn*, 8 Foster, 386; *Kidder v. Blake*, 45 New Hamp. 530; *Kaye v. Dutton*, 7 M. & G. 807. It was accordingly held in the case last cited that the execution of a release at the request of the defendant was not a good consideration for a promise on his part unless the plaintiff had some interest which passed by the release.

When an agreement of compromise is executory and does not transfer the legal title or constitute a plea in bar, it may be enforced specifically by a court of equity, as a recovery in damages would not answer the end in view, which is to give repose and terminate litigation; *Woolfolk v. Woolfolk*, 4 Dana, 535; *Cruger v. Douglass*, 4 Edwards' Ch. 433; *Zane v. Zane*, 6 Munford, 406; *Bailey v. Wilson*, 1 Dev. & Bat. Ch. 182; *Williams v. Alexander*, 4 Ired. Eq. 207; *Union Bank v. Geary*, 5 Peters, 99; *Bosley v. McKim*, 7 Har. & Johns. 469; *Jourdan v. Jourdan*, 9 Serg. & Rawle, 269; *Lies v. Stub*, 6 Watts,

48; *May v. LeClaire*, 11 Wallace, 217; *French v. Shoemaker*, 14 Id. 314; and in *Mitchell v. Long*, 5 Littell, 71, the court accordingly decreed the execution of a compromise of conflicting claims to land without entering into the merits of the original controversy. So in *Long v. Shackleford*, 25 Mississippi, 559, an injunction was granted to restrain the issuing of an execution upon a disputed judgment.

In like manner, when an oral agreement for the compromise or adjustment of doubtful or controverted claims to land, or for the settlement of a disputed boundary, has been so far executed by possession as to avoid the prohibition of the Statute of Frauds, it will be specifically enforced in equity without considering on which side the right lay before the agreement had been settled by the payment of a less amount; *Perkins v. Gay*, 3 Serg. & Rawle, 327; *Weed v. Terry*, 2 Douglass, 344. Conversely, an injunction will not issue (*Barron v. Sollibellos*, 26 La. An. 289) against a judgment confessed by a married woman in settlement of a claim against her husband.

NON-EXISTENCE OF THE RISK.—An aleatory contract has two requisites, uncertainty and good faith; but the uncertainty need not be as to the event, and may consist in the want of full or definite information. Past events are unalterable, and that which is to come is an inevitable consequence of the past, subject to such deductions as may be made for the freedom of the will. But human knowledge is essentially limited, and man is entitled to pro-

tect himself against the consequences of his ignorance. Hence an event which has already happened, may, not less than a future event, be the subject of an aleatory contract. This principle lies at the foundation of the doctrine of insurance, and is the basis of the doctrine of compromise. A wager on the life of one who is deceased, or an insurance of a ship which was lost yesterday, may, therefore, be valid if both parties are ignorant of the fact; *The Earl of March v. Pigot*, 5 Burrow. 2802; *Sutherland v. Pratt*, 11 M. & W. 296; *The Philadelphia Life Ins. Co. v. The American Life Ins. Co.*, 11 Harris, 65; *Coggs v. The American Ins. Co.*, 4 Wend. 283; 2 American Lead. Cases, 848, 5 ed. So, when A.'s title to land depends on his legitimacy, he may not know that his parents were married, or he may be acquainted with the fact, and doubtful whether it can be established by evidence. In either case, there is a ground for a compromise which will define the right on either side. It follows that if the parties to a controversy depending on a material fact agree to put an end to their uncertainty by a contract made irrespectively of the existence of the fact, the contract will be valid whether the fact does or does not exist; *Moore v. Fitzwater*, 2 Randolph, 442; *Carvode v. McKelvey*, Addison, 56; *Bellas v. Hays*, 5 Serg. & Rawle, 427; *Paine v. Bennett*, 2 Watts, 427; S. C. 5 Id. 259; *Long v. Shakelford*, 25 Mississippi, 559. In *ex parte Lucy*, 4 De Gex Mac. & Gov. 356, an agreement to pay a sum certain in settlement of a dis-

puted claim for a larger amount, was held not to be less binding in equity because the claim could not have been enforced; and it was said that all that is necessary to give validity to the question of a compromise is that the parties should deem the controverted question doubtful, whether in reality it be so or not. The principle was clearly stated in *Perkins v. Gay*, 3 Serg. & Rawle, 327, where the question was as to the validity of a parol compromise of a disputed boundary, as an equitable defence to an action of ejectment. "It is a principle of equity," said Gibson, J., "that the parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event; *Turner v. Turner*, 2 Chancery Rep. 81; *Bingham v. Bingham*, 1 Vesey, 127; *Gee v. Spencer*, 1 Vern. 32; *Pusey v. Desbouvrie*, 3 P. Wms. 316; *Lansdown v. Lansdown*, Mosely, 364; *Cocking v. Pratt*, 1 Ves. 400. But where the parties treat upon the basis that the fact which is the subject of an agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party, that would affect any

other contract; *Can v. Can*, 1 P. Wms. 726; *Pullen v. Ready*, 1 Atk. 573; *Jones v. Randall*, Cowp. 37. Every wager, as well as every policy of insurance, and every compromise of a doubtful right, depends on this principle. The establishment of this kind of boundary is always a matter of compromise, in which each party supposes he gives up for the sake of peace something to which, in strict justice, he is entitled. There is an express mutual abandonment of their former rights, upon an agreement that, whether they be good or whether they be bad, neither is to recur to them on any pretence whatever, or claim anything that he does not derive from the terms of the agreement. Each takes his chance of obtaining an equivalent for everything he relinquishes, and if the event turn out contrary to his expectations, so much the worse for him. If there be no intention of fraud, no unfair dealing, and neither party has more knowledge of the fact misconceived than the other had, the contract will bind."

In these cases, the question was considered and decided in courts of equity or upon equitable principles; but the inquiry, when and how far agreements of compromise shall be upheld on merely legal grounds, is one of more difficulty, as it involves the question of consideration, and gives room for the argument that a promise to pay money, or make any other sacrifice for the cession or extinguishment of a right which has no real existence, is a *nudum pactum*. The better opinion is that the change of forum does not affect the principle, and

that whatever would sustain a compromise before a chancellor will be sufficient in a court of law. Equity indeed regards the termination of a family controversy as a benefit in which all the members of the family share, and therefore a good ground for supporting an agreement, when it might otherwise be invalid; *infra*, p. 1725; but this seems to be merely one of those make-weights which influence a chancellor in granting or refusing a specific performance, or otherwise exercising the discretion which forms one of the distinguishing features of equity jurisdiction. There is, however, another element which is viewed in the same aspect by equity and law, and which both have always concurred in holding a good and sufficient consideration. For nothing is better established in either jurisdiction than that the hope or apprehension of a loss or gain is a sufficient foundation for that class of contracts which are known as aleatory. And it has always been held that the validity of such contracts depends on the knowledge and belief of the parties at the time when the contract is executed, and cannot be overthrown by proof that an event which they esteemed doubtful, was certain, or that the danger against which they intended to guard, had passed by. Accordingly, by far the larger class of cases in this country take the ground that the surrender or sale of a claim or right will not be less valid because it ultimately proves to have no real existence, if the party by whom it is assigned, or relinquished, believes that it is, or

may be valid, and the party by whom it is acquired agrees, expressly or by implication, to purchase or pay for it as if it were doubtful; because, under these circumstances, fraud cannot justly be charged against the seller, nor is there, in any proper sense of the term, a failure of consideration as regards the buyer; *The Earl of March v. Pigot*, 5 Burrow, 2802; *Shaw v. Whiteman*, Peake's Cases, 42; *Durham v. Wadlington*, 2 Strobbart's Eq. 248; *Allis v. Billings*, 2 Cushing, 19; *Ken v. Lucas*, 1 Allen, 279; *Holcomb v. Stimpson*, 8 Vermont, 141; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Organ v. Stewart*, 1 Hun, 412; *Barnum v. Barnum*, 8 Conn. 469; *Stoddard v. Mix*, 14 Id. 12; *Union Bank v. Geary*, 5 Peters, 99; *Bispham v. Price*, 15 Howard, 162, 176; *McKinley v. Watkins*, 13 Illinois, 140; *Merritt v. Fleming*, 42 Alabama, 234; *Curry v. Davis*, 44 Id. 283; *McClure v. Mansell*, 4 Brewster, 119; *Burnham v. Dunn*, 35 N. Hamp. 556; *Pitkin v. Noyes*, 48 Id. 294, 304.

In *Russell v. Cook*, 3 Hill, 504, a note given in pursuance of a compromise was held to be equally valid whether the original demand could or could not have been enforced, and the court said that the question should have been determined as one of law instead of being left to the jury. The law was held the same way in *Holcomb v. Stimpson*, 8 Vermont, 141; and in *Seaman v. Cook*, 12 Wend. 381, a similar view was taken with reference to the withdrawal of opposition to the probate of a will. Nelson, J., said: "The plaintiff had

filed a caveat with the surrogate and was entitled thereby to contest the validity of the will in due form of law; 1 R. L. 446, § 9; Laws of 1823, p. 63, § 3. This right, secured to him by law, he gave up in consideration of the agreement upon which this suit is brought. Whether he would have succeeded in the litigation is not the test; if it were so, there would be no security nor anything gained by compromising a doubtful or litigated claim by stipulation to be afterward fulfilled; for then, to procure a fulfillment of it, the party would be obliged to show he gave up a right or claim which he could have enforced at law, and the old controversy must be litigated over again. It is enough that he yielded to his adversaries the right he possessed to contest the will, and that he has done, and the compromise itself proves *prima facie* an acknowledgment by the defendants that there was color for his objections."

In *McKinley v. Watkins*, 13 Illinois, 143, the question arose on a bill of exceptions to the charge of the judge before whom the cause was tried, and the Supreme Court held the following language in giving judgment: "The instruction in other respects is very nearly, if not quite, correct. It assumes that, in order to support the promise, there must have been an exchange out of which a difficulty had arisen, and that the plaintiff was threatening to sue the defendant, and not deceiving him by any misrepresentations. If by this is to be understood that the plaintiff must in good faith have

supposed that he had a good cause of action against the defendant, growing out of the exchange, the instruction is strictly proper. It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right. It has often been decided that the compromise of a doubtful right is a sufficient consideration for a promise; and it is immaterial on whose side the right ultimately turns out to be, as it must always be on one side or the other, because there can be but one good right to the same thing; *Taylor v. Patrick*, 1 Bibb, 168; *Russell v. Cook*, 3 Hill, 540; *Moore v. Fitzwater*, 2 Randolph, 442; *O'Keson v. Barclay*, 2 Penna. Rep. 531. If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretence to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise, there must be such a claim as to lay a reasonable ground for the defendants making the promise, and then it is immaterial which side the right may ultimately prove to be; *Edwards v. Baugh*, 11 M. & W. 641; *Perkins v. Gay*, 3 Serg. & Rawle, 331."

The doctrine that the transfer of a right treated as doubtful may be good foundation for a contract, although it ultimately proves to be

invalid, is not confined to compromises, but applies where the question grows out of a sale to one who is a stranger to the controversy. A conveyance of all the vendor's right, title and interest is a sufficient consideration for a promise to pay the price, although he has in fact nothing to convey; and it has been held that an agreement to accept such a deed may be specifically enforced against a purchaser who waits for the event before determining to repudiate the contract; *Bates v. Delavan*, 5 Paige, 307; *Bowen v. Vickers*, 1 Green Ch. 520, 526. A similar view was taken in *Costar v. Brush*, 25 Wendell, 628, and *Ken v. Lucas*, 1 Allen, 279; and the purchaser of a right which is sold as doubtful said to be precluded from relying on its failure or invalidity as a defence to an action for the price—a want of title being obviously no answer in the mouth of a man who has agreed to take the risk.

The extent and nature of this principle are illustrated by the case of *Barnum v. Barnum*, 8 Conn., 469, where a sale of the share of one of the holders of a lottery ticket, which was reputed to have drawn a prize, to the other for \$200, with a full understanding on both sides that the rumor was doubtful, and might prove to be false, was sustained on the ground that a contingent gain is a valuable consideration, and does not lose that character because the purchaser is disappointed by the event.

These decisions are obviously in point where the question grows out

of an agreement between adverse claimants to the same right or title. If a controverted demand may be assigned to a stranger, it may, for a stronger reason, be released to the party in possession or who is alleged to be indebted. There is, under these circumstances, an additional consideration growing out of his interest to put an end to litigation and secure himself against risk, and having bought without a warranty, he cannot rely upon the failure of title as a defence; *Sigourney v. Clark*, 17 Conn., 54.

It is essential to the validity of a compromise that the party who seeks to enforce it should have believed that there was a reasonable doubt which, if resolved in his favor, would show that the right lay with him, and that the circumstances should be such as to exonerate him from the imputation of having knowingly made an unfounded demand; *Edwards v. Baugh*, 11 M. & W. 645. In this instance the declaration alleged the existence of a controversy as to whether or not the defendant was indebted to the plaintiff in the sum of 173*l*., and a promise by the defendant to pay 100*l*. in consideration of the plaintiff's promising not to sue for a larger amount, and the declaration was held insufficient for the failure to aver that the controversy had a foundation in an actual liability or reasonable doubt. Lord Abinger said: "The question in this case is whether there is on the face of this declaration a good consideration for the promise alleged, and I am of opinion that there is not. Mr. Henderson has

treated the words used in the declaration as if they implied that a reasonable doubt existed between the parties as to the existence of a debt due from the defendant to the plaintiff, but the declaration does not show, either expressly or by implication, anything of that kind; it only alleges that certain disputes and controversies were pending between the plaintiff and defendant whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word controversy to render this a good allegation of consideration. The controversy merely is that the plaintiff claims the debt and the other denies it. The case might have been different if the declaration had said, whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent, and also on an account stated that a dispute arose as to the amount of the debt so due, and, in order to put an end to all controversy respecting it, it was agreed that the plaintiff, in consideration of receiving 100*l*., should not sue the defendant in respect to his original claim. In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not indeed be bound to prove the full amount, but simply to show such a claim as to lay a reasonable ground for the defendant's making the promise; whereas, in the present case, he would not have to prove anything beyond the fact that there had been a dispute between himself and the defendant as to the existence of a

debt. A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending upon the forbearing to prosecute, it is a sufficient consideration for a promise to pay a certain sum of money, for, beside other advantages, the party promising would save the extra costs, which he would have to pay even if he was successful."

The same ground has been taken in other instances; see *Prater v. Miller*, 25 Alabama, 321; *Stewart v. Bradford*, 26 Id. 410. In *Prater v. Miller* the devisees in a will promised to pay the heir at law a certain sum in consideration of his withdrawing all opposition and suffering the will to be admitted to probate, and it was adjudged that he could not recover on the agreement without proof that he had some ground for contesting the will, or that there was a reasonable doubt as to its validity. So in *Stewart v. Bradford* it was held not to be erroneous to refuse to instruct the jury that if they believed there was a controversy between the plaintiff and defendant as to whether the former had defrauded the latter in the sale on which the action was brought, and that the plaintiff, in settlement of the controversy, agreed to deduct \$100 from the price, then the defendant would be entitled to an abatement to that amount.

The fair inference from these decisions seems to be that a compromise cannot be enforced by suit unless it is alleged and proved that the plaintiff believed in the validity of his original demand, nor when it appears in evidence that no circum-

stances existed to justify his belief. Thus regarded, the conclusion is obviously just, and essential to prevent extortion and abuse. One who knowingly makes an unfounded claim should not be allowed to use it as a means of profit, nor should he be allowed to rely on his ignorance as a proof of good faith, when he has the notice, which is equivalent to knowledge. It was said in *Cook v. Wright*, 1 Best & Smith, 569, that perhaps "the declaration in *Edwards v. Baugh* ought to have been construed as disclosing a compromise of a real *bona fide* claim;" and Lord Abinger virtually conceded that if this had sufficiently appeared, the action might have been maintained. For if the judgment is to be regarded as going beyond that point, and determining that a declaration on a compromise must aver that it was made in consideration of the settlement of a demand that could have been enforced by suit, it is contrary to the main current of authority in the English courts, and in our own.

In *Richardson v. Mellish*, 2 Bing., 229, Best, C. J., remarked, on the authority of a passage in Viner's Abridgment, that although the surrender of an estate at will by the tenant could not, of itself, be a consideration, yet, if there was a doubt whether it was an estate at will, the case would be different, and the consideration good. So, in *Cook v. Wright*, 1 Best & Smith, 559, the defendant, being the agent for certain houses, was notified by the commissioners that he was personally liable for some local assessments; believing himself not to be

liable, but knowing that the plaintiffs thought otherwise, and would institute proceedings against him, he compromised the claims by giving two promissory notes, and in the action brought upon the notes judgment was entered for the plaintiffs. So, in the recent case of *Callisher v. Bischoffsheim*, Law Rep. 5 Q. B. 449, the declaration averred the existence of debts due from several persons to the plaintiff, and that in consideration the latter would refrain from proceeding thereon, the defendant promised to deliver certain securities, for the breach of which agreement the present action was commenced. The plea alleged that no such debts existed; but upon demurrer the declaration was sustained. "Our judgment," said Cockburn, C. J., "must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract or destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bond fide*

believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority. It would be another matter if a person made a claim which he knew to be unfounded, and, by compromise, derived an advantage under it; in that case his conduct would be fraudulent. [*Infra*, p. 1731.] If the plea had alleged that the plaintiff knew he had no real claim, that would have been an answer to the action." "If," said Blackburn, J., in the same case, "we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook v. Wright*. In that case it appears from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court says, that 'the real consideration depends on the reality of the claim made, and the *bond fides* of the compromise.'"

Although a compromise is not less obligatory because the event shows that there was no foundation

for the doubt which lay at the foundation of the agreement, it is also true that aleatory contracts may, like all others, be set aside, if it appears that a material fact, which was regarded as certain, did not exist. A policy of insurance on a ship from one port to another may be valid, although she had reached her destination or was lost before the insurance was effected; but no recovery can be had upon it if the vessel did not sail, or sailed upon a different voyage. So, seaworthiness at the inception of the risk is a condition precedent, without which the insured is not liable for the premium, nor the insurers for the loss; see 2 American Lead Cases, 766, 5 ed. In like manner, if a written contract were to recite that the father of the parties of the first part had bequeathed his estate to them, and that they had agreed to pay a sum certain to the party of the second part in full of his claim as next of kin, and for the purpose of preventing litigation as to the validity of the will, it would be a good answer to a suit on the agreement that it was founded on a belief in the illegitimacy of the defendants, which had been shown to be erroneous by the discovery of the marriage certificate of their parents, or an entry in the parish books. So, when the liability of the defendant is taken for granted, and the only dispute is as to the amount due, the agreement will not be enforced if it appears that he was not liable; *Lawton v. Campion*, 18 Beavan, 87; *ante*, p. 1690. So a settlement based on the supposition that an account has been correctly

stated may be set aside on proof of the existence of errors which had passed unperceived; *Ross v. McLaughlin*, 7 Grattan, 86.

The question in such cases is, What was the risk against which the parties intended to provide? Risk necessarily implies uncertainty, and it is not an answer that the doubt would not have arisen if they had been better informed. But a mistake of law or fact on a point which lies without the risk, and which both parties regard as certain, may invalidate the contract; *Stokeley v. Stokeley*, 1 Vesey & Beames, 31; *Bellas v. Hays*, 5 Serg. & Rawle, 427, 440; *Trigg v. Read*, 5 Humphreys, 537; *Nabours v. Cocke*, 24 Mississippi, 52.

In *Bellas v. Hays*, the question was whether the defendant in an action of covenant for the price of a patent which had been sold to him by the plaintiff, could prove that the invention was not original, and that the patent was consequently invalid, and it was contended that such evidence was inadmissible, because the purchaser had implicitly agreed to take the risk. Gibson, C. J., said: "At first view, there appears to be some contradiction in the cases on the subject. In several, mistake only, without suppression of the truth or suggestion of a falsehood, has been held insufficient to set aside the agreement, as in *Can v. Can*, 1 P. Wms. 723. So in *Pullen v. Ready*, 2 Atk. 587, Lord Hardwicke says, 'there is nothing more mischievous than for this court to decree a forfeiture after an agreement, in which, if there is any mistake, it is the mistake of *all* the

parties to the articles, and *no one of them is more under an imposition than the others.*' It will be found, however, this doctrine is applicable only to cases where the right or thing, which is the subject of the contract, is evidently itself doubtful, which is a circumstance always sufficient to support an agreement, if no unfair advantage be taken in other respects. In such case, the assent of the parties to treat on the subject as it then stood being complete and full, they proceed on an evident supposition that the fact which is the cause of the agreement is doubtful, and each is understood to take on himself the risk of its turning out in a way favorable to him. On this principle, every wager and every contract of insurance depend, and without it there could be no such thing as a compromise of a doubtful right. Where a particular fact is known to be doubtful, or supposed to be so, if the party to be benefited neglect to secure himself by a covenant, he will be without remedy, if it turn out contrary to his expectations, for he will be considered as having paid his money for the benefit of a chance. It would seem to me, that whether the invention which is the subject of the plaintiff's patent were valuable or not, was in its nature doubtful, and that the defendant took the risk of that matter on himself; but the validity of the right, on the ground of originality of invention, is another matter of which I will speak hereafter. The cases of this kind to be found in the books mostly relate to agreements the intention of which was to settle

family disputes, which is a favorite object with courts of chancery; yet even there it is held the parties must be acquainted with their rights *as far as they can be ascertained*, or at least *with the nature and extent of the information that can be obtained respecting them*, which in the absence of fraud is going pretty far; *Pusey v. Desbouvrie*, 3 P. Wms. 316. There is, however, another class of cases where an agreement entered into on an erroneous presumption by one of the parties of the existence of a fact, is held to be as to him of no force, for he gave his assent to the agreement, not absolutely, but on conditions which are not verified by the event: and it will be immaterial whether all parties were equally ignorant or not; for if there was any concealment of a fact within the knowledge of the opposite party, that of itself constitutes fraud, which is a distinct ground of relief. Thus in *Cocking v. Pratt*, 1 Ves. 400, an intestate's widow and daughter entered into an agreement as to the personal estate: the daughter married and died: the husband brought a bill to be relieved against the agreement, on the ground of mistake on the part of his wife as to the value of her share. Sir John Strange, in the absence of the chancellor, observed, that whether there had been *suppressio veri*, was not clear on the evidence, but that there was *another* foundation to interpose, to wit, that it afterward appeared the personal estate was greater than the daughter supposed, and that the husband would be permitted to come into chancery to take advantage of her

want of knowledge. So in *Lansdown v. Lansdown*, Mosely, 364, where two brothers claiming an estate, applied to a country school-master, who (as was to be expected), ignorantly gave it in favor of the younger, because he had read in the clerks' remembrancer that lands cannot ascend, and thereupon the eldest having consented to divide the land, saying he would rather do so than go to law, even if he had the right, and having created [executed] deeds of lease and release, these were decreed to be delivered up, although there was nothing like concealment, or exclusive knowledge of a fact or anything else, imputable to any one. There are many other cases to the same purpose; *Turner v. Turner*, 2 Ch. Rep. 11; *Bingham v. Bingham*, 1 Ves. 126; *Gee v. Spencer*, 1 Vern. 19, and *Luxford's case* there cited. If then the patent right were invalid, there can be little doubt the defendant would not be bound by the contract; for it is out of all reason to suppose he purchased the right under any other notion than that of its being a valid one."

The line is also accurately drawn in the following extract from the judgment in *Trigg v. Read*, 5 Humphreys, 529: "In the case of *Stokeley v. Stokeley*, 1 Vesey & Beames, 31, Lord Eldon seems to have thought that there might be a distinction between cases where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases where the parties act upon a supposition of right in one of the parties without a doubt upon it. The former might

be held obligatory when the latter ought not to be; but his lordship admitted that the doctrine attributed to Lord Macclesfield was otherwise. Mr. Story, in commenting upon this case (sect. 129, Equity Jurisprudence), says: 'It may be gathered from these remarks that Lord Eldon's own opinion was that an agreement made or act done, not upon a doubt of title, but upon ignorance of any title in the party, ought not to be obligatory upon him though arising solely from a mistake of law.' If this great chancery lawyer thought that a legal misconstruction of a party's title, he having knowledge of the existence of it, by which he is induced to part from it, ought not to be obligatory upon him, how much stronger would have been his opinion in favor of one who had thus parted from his right without a knowledge of its existence in point of fact, and not upon a misconstruction of it.

"This doctrine is so consonant with reason, and a contrary one would be so monstrous in its consequences, that it is strange there should be any controversy about it. In point of fact, when it is properly understood, we think there is none. A tenant for years sells his interest in the premises; the reversioner or remainderman has previously died, bequeathing him the fee, or has conveyed it to him by a release, or which fact he is ignorant at the time of his contract of sale. Shall the purchaser acquire the fee? Surely not; for the parties contracted for the term, and in mutual ignorance that it had been previously vested with the fee. And so, vice

versed, if the vendee had bought the fee believing it to be vested in the vendor, and it turns out that the vendor's interest is but for a term of years, the vendor shall be relieved. Such is the law when the contract is made in ignorance of the existence of any right or title in the party. So it is if it be made with the knowledge of the existence of some right or title, but in ignorance of any material fact, affecting the nature or value of this right or title, essential to the character of the contract, and an efficient cause in its concoction.

"Therefore, although, as we have seen, it was held in England as unquestionable doctrine, in cases of ordinary contracts, that if a party acting in ignorance of a plain and settled principle of law is induced to give up a part of his indisputable property to another, a Court of Chancery will relieve him; yet in the case of a compromise of a doubtful right, if the compromise be fairly made in mistake of the law as applicable to that doubt, the compromise is binding. In illustration: if it be doubtful in the construction of a will, or deed, whether the words 'heirs of the body,' 'issue,' 'children,' be words of limitation or words of purchase, and a compromise be made, by which either a life estate or an absolute estate is assured to devisee or vendee, as the fair construction of the will or deed, the compromise will be binding upon the parties though the true legal construction of the instrument be different; but this compromise does not affect any right the parties may have from any

other source, and is only obligatory so far as the construction of the instrument is involved; therefore, though a release may have been executed under this construction, yet, if either party have right or title to the property paramount to the will or deed, and is in ignorance of it, this right is not affected by the release. So it is, if the right compromised be doubtful in point of fact, no other fact than that upon which the doubt is supposed to rest, and which is presented for compromise, is precluded by the compromise. As if the party claims as heir at law, and it be doubtful if he be the heir at law, and in case of this doubt he compromise his right; yet, if it turn out that, though not heir at law, he is devisee of the property, his right as devisee is not compromised. So if he compromise upon the mistaken apprehension that he is or is not devisee, but it turns out that he is entitled as heir at law, his right as heir at law is not compromised."

It results from what has been said, that although a compromise is not necessarily invalid because the parties believed that to be doubtful which was in fact certain, it is, nevertheless, a good ground for setting aside such an agreement that it was based on a belief in the validity of a right which was doubtful, and ultimately proved not to exist. The presumption, however, is that a compromise was intended to cover the whole ground and put an end to controversy, and that the onus is on him who alleges that anything was excepted from the operation of the agreement, and remains open to

litigation; see *Bennet v. Paine*, 5 Watts, 259.

For like reasons, a controverted or doubtful question of fact or law is not a sufficient basis for a compromise, unless it appears that the party who seeks to enforce the agreement had a beneficial interest in the fund or property in dispute; *Seaman v. Seaman*, 12 Wendell, 381; *Busby v. Conoway*, 8 Maryland, 66; and in these instances it was held to be a fatal objection to a suit on an agreement to pay a sum of money in consideration of the withdrawal of a caveat to a will, that the declaration did not allege that the testator had left assets to which the plaintiff would have succeeded if the will had been set aside. In the latter case Eccleston, J., said: "The case of *Seaman v. Seaman*, 12 Wend. 381, is very similar to the present in several important particulars. There the count alleged that the father of the plaintiff and of the defendants left a will, in which he gave to the defendants and others a large amount of property, real and personal, and after death of the father, and before the will was proved, the plaintiff became dissatisfied with its provisions, and entertaining doubts in regard to the sanity of the testator at the time of the execution of the will, he filed a caveat against its being admitted to probate; that subsequently, in consideration that the plaintiff would withhold all opposition to the proving of the will, the defendants promised, in case the will should be proved and allowed, to pay the plaintiff \$500. The plaintiff also averred that, in consideration of the promise of the

defendants, he promised to withhold all opposition to the probate of the will, and that he made no further opposition thereto, and that the will was therefore duly proved and allowed, and letters testamentary were issued thereon to the defendants, who were named as executors in the will. Upon a demurrer judgment was given in favor of the defendants, and Nelson, J., speaking for the Court, says: 'As, however, it does not sufficiently appear in the declaration that the plaintiff was particularly interested in setting aside the will of his father, and without this he could have no interest in contesting it before the Surrogate, and, of course, lost nothing by the agreement, I think the demurrer well taken.' In the particular which rendered the narr defective, the one before us is certainly quite as defective."

Risk is of the essence of an aleatory contract, and the latter will fail if the case be one where, from the nature of things, no doubt could exist. A wager whether two and two make four would be within this principle, and so is an agreement for an indemnity against an imaginary risk. See *Cabot v. Hoskins*, 3 Pickering, 83; *Hayes v. Thorn*, 8 Foster, 386. And it has been contended in some instances that when the facts are ascertained, and the only question is as to the law, it is in legal contemplation sure, and cannot be the subject of a compromise or serve as the consideration for a contract of sale. See *Morey v. Newfane*, 8 Barb. 645; *Sherman v. Bernard*, 19 Id. 291; *Busby v. Conoway*, 8 Maryland, 55; *Jarvis v. Sutton*, 3 Indiana, 289; *Cabot v. Hoskins*, 3

Pickering, 83; *Porter v. Miller*, 25 Alabama, 320; *Stewart v. Beadford*, 26 Id. 414; *Spohn v. Hollingshead*, 8 Blackford, 415; *Kidder v. Blake*, 45 New Hampshire, 530.

In *Sherman v. Bernard*, 19 Barbour, 291, the Court of Appeals declared an Act of Assembly unconstitutional and void, and that agreements made in pursuance of it were invalid; and it was held to follow that the sale of such a contract did not constitute a good consideration, although the question was pending when the contract was executed, and the purchasers agreed to take the risk.

Strong, J., said: "The naked legal proposition that the sale of an absolutely void chose in action will not form any consideration for a promise is, I think, incontrovertible. If void, no legal obligation is created by it; and it is in the view of the law as if it did not exist. Void things are as no things, and some value is essential to a valid consideration (*Story on Contracts*, § 443). The principle is the same, notwithstanding such chose in action is salable in market for the full value that would attach to it if valid. If the law does not recognize it as having some binding force and will not enforce it, a note given upon the sale of it will be invalid for want of consideration. It has no intrinsic, no legal value, and therefore in law no value. Although salable in market, if the sale is on credit no legal debt is thereby created; payment may be resisted for want of consideration; and if the sale is for cash, if the money paid cannot be recovered back, it is not because a

consideration was received for it, but upon the principle which precludes the recovery of money voluntarily paid, with a full knowledge of all the facts. It is set up in the answer in this case, that at the time of the sale of the canal contract, and the execution of the notes, the question of the constitutionality of the Act of the Legislature, and the validity of the contracts made under it, was pending and undetermined in the Court of Appeals, and that the purchase of the contract was made with express reference thereto, and at the risk of the purchasers, in respect to that question and the decision; they agreeing to pay a certain sum absolutely, and a further sum in case the law should be declared valid. And it is claimed on the part of the defendant that these facts distinguish the present case from that of *Rodman v. Munson*, and bring it within the principle of the law that the compromise or purchase of a doubtful claim is a good consideration for a contract. The learned justice at special term took this view of the case, and placed his decision upon that principle. Compromises of doubtful claims are held by the law a sufficient consideration for a promise founded upon them, for the reason that they have for their object the prevention of litigation, which is important to the parties and the public. *Chitty on Contracts*, 4th Am. ed., 36; *Story on Contracts*, § 440; *Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Denio, 189. But the claims must be really doubtful; if they are manifestly without foundation, a

settlement of them will not support a promise.

"The doctrine that a sale of a doubtful right is a good consideration, must stand upon a different foundation. It must be that the claim has some legal value; that there is a legal possibility that it can be enforced, and prove a benefit to the purchaser. When the doubts relate to the facts, then there is such value and such a possibility. The mere circumstance that the purchasers stipulated to take the risk as to the validity of the Act of the Legislature, and the contract, does not vary the law of the case. It is important as evidence that the transaction was regarded and treated as the sale and purchase of a doubtful right; but if the contract was of no value, and the principle as to doubtful rights which is invoked is not applicable, that stipulation was without consideration and void. In all cases of sales of choses in action or possession, having any value so as to constitute a consideration for the price paid or agreed to be paid, in the absence of fraud, and warranty express or implied, and any express stipulation on the subject, the law casts on the purchaser all risks. The only doubts in relation to the contract in this case which existed were, whether the Act of the Legislature was in conflict with the constitution or not, and if it was, whether contracts under it were void or valid. All the facts connected with them were well understood, and the questions were purely questions of law.

"No case has been cited holding that the sale of a worthless claim is

a good consideration merely because doubts were entertained as to the law in relation to it, when all the facts were known and conceded, and I have not found any such case. I am not able to assent to the position. The existence and extent of doubts on legal questions must, in fact, depend very much on the legal attainments of individuals; legal principles familiar and clear to some, are unknown or quite obscure to others; and to ascertain whether there were serious doubts in any given case, an issue must be formed and proof given upon it, or the court must speculate on the subject. I think no such inquiry can be instituted, and that the maxim of the law applies, that every man is presumed to know the law. *Broom's Legal Maxims*, 122.

"In *Cabot v. Haskins*, 3 Pick. 83, the defendants erroneously supposed they were under a legal liability to the United States, arising out of facts well known to the parties, and promised to pay the plaintiffs a sum of money on their assuming the risk and agreeing to indemnify the defendants. The promise was held to be without consideration and void. Parker, Ch. J., in delivering the opinion of the court, says: 'We cannot suppose that a mere ideal danger, which has no foundation in fact or in law, can form the substratum of a contract by which the one who assumes it can claim indemnity.' And again: 'There must be, as a legal foundation for a promise, either an actual danger or a suspension or forbearance of right, or a possibility of loss, occasioned to one to whom the promise is made,

to give it validity.' In *Morey v. The Town of Newfane*, 8 Barb. 645, it was held that a claim against a town for damages occasioned by a highway being out of repair, being without foundation, was not a sufficient consideration for a promise made by the town, by a vote of the electors at town meeting, to pay the claim."

It does not appear that there is any sufficient ground for the distinction which was relied on in these instances. Whether the point in dispute is one of fact or law, the material inquiry is, had the party who seeks to enforce the agreement reasonable and probable cause for believing that the question was doubtful, and that the right might ultimately prove to be with him? The point may be so clear that this question can only be answered in one way, and the compromise will then be invalid; but if the question was one about which counsel differed and courts might disagree, it is preposterous to treat that as assured which every one regarded as more than ordinarily hazardous. Strictly speaking, everything is certain, and there is no such thing as chance, that which men call doubtful being simply that which they cannot ascertain from a defect of knowledge; or if there be any problem which science admits her inability to compute, even if furnished with formulæ and data, it must be sought in that class of events which, like the verdict of a jury or the decision of a court, depends in a greater or less degree on the human will, and not on the order of the physical universe. The

true requisite to the validity of a compromise, insurance, or other aleatory contract, is not that the fact shall be uncertain, but that the parties should labor under an honest doubt, which it is not less worth their while to set at rest because the result may show that one or both of them had no cause for anxiety; *McKinley v. Watkins*, 13 Illinois, 140. "Whether the uncertainty rests upon a doubt in point of fact, or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be effected by a subsequent investigation and result;" *Leonard v. Leonard*, 2 Ball & Beatty, 180. The same view was taken in *Durham v. Wadlington*, 2 Strobbart's Eq. 250, 261.

As uncertainty is essential to an aleatory contract, whether it be a compromise, wager or insurance, so if either party to an agreement for the settlement of a controversy knew that either the facts or the law were against him, and was aware that the other party would not have assented if he had been equally well informed, it is a sufficient ground for refusing to carry the agreement into effect, or for setting it aside after it has been executed by payment or a release, and restoring the parties to their original position. This is the more just, because the nature of the case calls for entire good faith, and the failure to disclose a material fact is tantamount to fraud; *Bishop v. Reed*, 3 Watts & Serg., 261; *infra*, p. 1731. "When," said Lord Manners, "it is made manifest that the compromise was entered into between parties

under a misapprehension of a fact known to the one party or his agent, and unknown and misrepresented to the other, the compromise is deficient in that which is essential to its validity, that both parties were in equal ignorance;" *Leonard v. Leonard*, 2 Ball & Beatty, 180. This language was cited and approved in *Barnwell v. Threadgill*, 3 Jones' Eq., 50; and it may be said in general that when a material mistake of fact is mutual, there is a failure of consideration. Where it is confined to one of the parties, and the other is cognizant of and does not correct the error, a court of equity may relieve on the ground of fraud; see *Bishop v. Reed*.

It has been held in some instances, that, to uphold a compromise, the circumstances must afford room for a reasonable doubt; and, whatever may be thought on this point, it is clear that the demand which forms the consideration for the defendant's promise must not be so entirely destitute of foundation as to justify the inference that the plaintiff knew it was invalid, or closed his eyes that he might not become acquainted with the truth; see *Story's Eq. Jurisprudence*, § 128; *Doyle v. O'Donnel*, 56 Maine, 28; *Kidder v. Blake*, 45 New Hampshire, 536; *Cogan v. Stewart*, 1 Hun, 412. And it may be said in general, that a compromise will, not less than other contracts, be set aside where it appears that undue advantage has been taken of age, imbecility, or ignorance; *Underwood v. Brockman*, 4 Dana, 309; *Wheeler v. Smith*, 58 *ante*, pp. 1234, 1237; *infra*, p. 1731.

In determining whether the consideration of a compromise is ade-

quate, regard must be had to the chances as they were known or susceptible of being computed at the time. An insurer cannot refuse to pay the loss because it is largely in excess of the premium, nor can one who has taken the odds at a race complain of being required to pay more than he could by possibility have gained. For a like reason, the consideration of an agreement among rival claimants to divide the fund or property in dispute may be adequate, although a judicial investigation would have shown that one of them relinquished nothing that he could have successfully maintained. But one who surrenders an assured title, or gives value in any other form to quiet a demand which any judicious mind would have regarded as invalid, may justly allege inadequacy; and if this is gross and coupled with circumstances indicating imposition or undue influence, it may be a ground for the interposition of a chancellor; *ante*, p. 1237.

COMPROMISE OF PENDING SUIT.

Whatever the rule may be under other circumstances, it is generally conceded that the settlement of a pending suit is a valuable consideration, whether it could or could not have been prosecuted to judgment; *Longridge v. Dorville*, 5 B. & Ald. 117; *Edwards v. Baugh*, 11 M. & W. 641; *Morey v. Newfane*, 8 Barb. 645; *Steele v. White*, 2 Paige, Ch. 478; *Downer v. Church*, 44 N. Y. 647; *Prater v. Miller*, 25 Alabama, 320; *Stewart v. Bradford*, 26 Id. 410; *Paris v. Dexter*, 15 Vermont, 379. In *Smith v. Monteith*, 13 M. & W. 427, the release of the defendant from cus-

today under a *capias* was accordingly adjudged to be an equivalent for a promise on his part to pay the demand for which the writ was issued, notwithstanding a plea that there was not at the time of commencing the said action, or during the prosecution, any claim or demand in respect whereof the plaintiffs could have recovered thereon, which the plaintiffs well knew, and that they did not, by discharging the defendant, part with any available remedy against him. The court held that the plea did not aver fraud or duress, or that the debt was not due, and that it was entirely consistent with the inference that the plaintiffs had a just demand against the defendant which might have been enforced in some other form of action. These decisions were approved in *Cook v. Wright*, 1 Best & Smith, 559, and are sustained by *Okeon v. Barclay*, 2 Penrose & Watts, 531, where a note given in compromise of a suit for slander was held valid, although the words laid in the declaration were not actionable. In *Cooper v. Parker*, 14 C. B. 118; 15 Id. 822, the principle was applied conversely in aid of the defendant, and the withdrawal of a plea of infancy, followed by the payment of 50*l.* and the costs, said to be a good satisfaction of a demand for a larger amount, whether the defence which had been waived was or was not true.

Good faith, and the existence of an honest doubt which is shared by both parties, are, nevertheless, not less essential to the validity of a compromise after suit brought than before; *Wade v. Simeon*, 1 C. B. 610;

2 Id. 548; and in this instance it was held to be a sufficient answer to a suit on such a contract that the plaintiff at the time of instituting the original proceeding, and thence until the making of the promise in the declaration mentioned, knew that he had no cause of action against the defendant. Various grounds were assigned for the judgment, but the true reason seems to have been given by Chief Justice Tindal, "that it is *contra bonos mores*, and certainly contrary to all principles of natural justice, that a man should institute proceedings against another when he is conscious that his demand is without foundation."

It is established on general principles that a compromise extorted through an illegal or malicious arrest, or by taking an undue advantage of the distress resulting from imprisonment, is invalid, and will not be sustained by the courts; see *The Duke de Cadaval v. Collins*, 4 Ad. & Ell. 858; *Smith v. Monteith*, 13 M. & W. 427, 439; *Foss v. Hildreth*, 10 Allen, 76; *ante*, 1247; *infra*, p. 1733.

SETTLEMENT OF FAMILY DISPUTES. — Although the principles upon which equity supports compromises are general in their operation, and not confined to any particular field of litigation, yet they apply with peculiar force to family disputes and controversies, which, being generally embittered by causes foreign to other actions, are necessarily more painful to the feelings of the parties than if the contest were between strangers; and the instances are therefore numerous in which equity has refused to set aside, or, when it

would not ordinarily have granted such relief, has upheld and enforced agreements designed to prevent strife and ill feeling, and restore unity to a family which might otherwise have been permanently disunited; *Bailey v. Wilson*, 1 Dev. & Bat. Eq. 182; *Cruger v. Douglas*, 4 Edw. Ch. 433; *Worrall's Accounts*, 5 Watts & Serg. 111; *Williams v. Sneed*, 3 Cald. 533; *Leach v. Fobes*, 11 Gray, 506; *Faust v. Birner*, 30 Missouri, 414. "When a suit has been compromised," said Huston, J., in *Worrall's Accounts*, 5 Watts & Serg. 11, "and a doubtful question settled, it will in no case be opened unless there has been fraud or imposition. It is not enough that, by loss of proof on one side, or discovery on the other, there now appears reason to believe that one party can gain it. And when a cause involves matters which will reflect on a member or members of a family or families, it shall not be opened because some or all of the members of one family are reckless of the feelings of the rest; and in both cases, if the agreements or releases express the object to be to end the dispute, that intention shall be carried into effect if the words will bear that construction." "Equity will not interfere for misconception alone," said Gibson, C. J., in *Lies v. Stub*, 6 Watts, 48, "to overturn an agreement made to prevent a domestic feud or family dishonor." And this doctrine applies equally to those acting in a fiduciary capacity (*Long v. Shackleford*, 25 Mississippi, 559; *Anonymous v. Gelpcke*, 5 Hun, 245), or those under the dis-

ability of coverture or infancy; *Williams v. Sneed*, 3 Caldwell, 534; *Barron v. Sollibello*, 26 La. An. 289; *Reynolds v. Brandon*, 3 Heiskell, 593; *Brooks v. Mostyn*, 2 De Gex Jones & Smith, 373; although in the latter cases it is, of course, necessary that a chancellor should be satisfied that the compromise was conducive to their best interests; *Reynolds v. Brandon*, *supra*. It has accordingly been frequently determined that if parol partition of land between members of the same family "be made by the agreement of the parties without legal process, and be fair and equal, it will be good and binding upon all, whether femes covert or not, if their husbands join, or minors, with the consent of their guardians;" *Calhoun v. Hays*, 7 Watts & Serg. 128; *McMahan v. McMahan*, 1 Barr, 376; *Darlington's Appropriation*, Id. 430; *Williard v. Williard*, 6 P. F. Smith, 119. So, in the very recent case of *Cowan's Appeal*, 24 P. F. Smith, 329, where a ward, shortly after attaining majority, joined with the other members of the family in releasing to her former guardian all her interest in certain land, in pursuance of a partition consummated during her minority by proceedings in the Orphan's Court, the release was considered to partake of the nature of a family settlement, and not to be invalidated by reason of the presumptive influence arising from the relation of the parties. "What was the character of the release?" said Agnew, J., in delivering the opinion of the court. "Clearly it was a family arrangement to carry

out and reaffirm what had been done before, and not a mere release from a ward just out of leading strings, such as is condemned in *Stanley's Appeal*, 8 Barr, 431; *Eberts v. Eberts*, 5 P. F. Smith, 110, and other cases. Such papers, obtained by a guardian before his influence has been fairly thrown off, are justly condemned. But here the whole family, all bearing similar relations to the subject, united in the release, attesting by a common concurrence its fairness and propriety. To say that in such a case the mere relationship of guardian and ward is *prima facie* presumptive of overreaching on the part of the guardian, and will set aside the legal effect of the award in the partition of a common and disinterested tribunal, having jurisdiction of the subject, is to carry the doctrine of *Stanley's Appeal* and similar cases to an unwarranted length. It contradicts also what so frequently has been said of the sacredness of family arrangements."

The validity of arrangements between members of the same family for the division of property or the prevention of litigation, was also maintained in *Jourdan v. Jourdan*, 9 Serg. & Rawle, 268; *Good v. Herr*, 7 Watts & Serg. 253; *Hume v. Hume*, 3 Barr, 144; *Follmer's Appeal*, 1 Wright, 121; *Johnston v. Furnier*, 19 P. F. Smith, 449; *Hibbard v. Kent*, 15 New Hamp. 516; *Clarke v. Clay*, 31 Id. 393. The question was presented in a somewhat different form in the recent case of *Dickey's Appeal*, 23 P. F. Smith, 218, where lands having been devised in trust for a charity,

the residuary devisees and heirs at law contested the validity of the devise, and pending the litigation informally agreed that if the devise were declared invalid, the property should, irrespectively of the actual rights of the parties, be divided in certain proportions. Upon the devise being sustained by the court below, an appeal was taken, and the defendant, who was the husband of one of the heirs, thereupon undertook to furnish the necessary expenses upon condition that, if successful, the lands should be equally divided between his wife and the other heirs, and this was assented to by the latter. The appeal was ultimately abandoned without the consent of the heirs, and the defendant subsequently purchased the lands from the trustees of the charity, and sold them at an advance. And, upon a bill filed by the plaintiffs, as residuary legatees and heirs at law of the testator, for an account of the profits, it was held that after the decree sustaining the devise, and prior to the appeal, no community of interest existed between the parties, but that the subsequent family arrangement formed a sufficient consideration for the agreement of the defendant, which constituted him a trustee for the heirs; that he could not divest himself of this fiduciary relation by abandoning the appeal without their consent; that his purchase of the lands thereafter inured to the benefit of the plaintiffs, according to their respective interests, and hence the defendant was decreed to account.

So, in *Woolfolk v. Woolfolk*, 4

Dana, 535, an executory agreement for the settlement of a family dispute was sustained in equity, although not so executed as to be binding at law; and a decision to the same effect was made in *Hurlbut v. Phelps*, 30 Conn. 42.

It seems to have been taken for granted in some instances that the settlement of a family controversy is a distinct head of equity, and may render an agreement valid when it would otherwise fail from a want of consideration; and the case of *Bailey v. Wilson*, 1 Dev. & Bat. 182, goes still further, and implies, if it does not actually determine, that an agreement among a family for the division of their ancestor's estate, may derive validity from its tendency to promote harmony and union, even when there are no doubtful questions involved, and when there is, strictly speaking, nothing to compromise. The agreement in this case was under seal, and might therefore have been made the ground of a recovery at law, in the absence of a consideration; but the mere existence of a seal is not sufficient to induce chancery to enforce a voluntary agreement, under ordinary circumstances (*ante*, vol. 1, p. 420,) and apart from special equities. A sealed agreement, between those who are connected by blood, may be good as a covenant to stand seized, but it is difficult to believe that a naked promise, by one brother, to share his fortune with another, could be made the subject of a specific performance, merely because it was prompted by a generous wish to allay strife, or allay dis-

satisfaction. This, however, is only true of agreements made after the descent of the property has removed all uncertainty; and there seems no reason to doubt that an agreement among the members of a family to share the fortune of an ancestor, before it has been devised or descended, will be binding, as between themselves, unless it operates as a fraud on the ancestor; *Fitch v. Fitch*, 8 Pickering, 480; *Trull v. Eastman*, 3 Metcalf, 121; *Power's Appeal*, 13 P. F. Smith, 443; *ante*, vol. 1, p. 828.

It is obvious, on the one hand, that the peculiar favor extended to compromises of this nature cannot apply where the compromise is not strictly in the nature of a family settlement, such as an adjustment of business relations between persons not then members of the same family, though subsequently becoming connected by marriage; *Norris v. Slaughter*, 3 Greene, 116; and equally clear, on the other, that arrangements between near relations with regard to property which was derived from a common source, must be conducted with the most entire and liberal good faith on all sides, and, like the contract of insurance, may be vitiated not only by positive fraud or misrepresentation, but by the failure of either party to communicate every material fact or circumstance which lies more immediately within his own knowledge, and of which the other may consequently be supposed to be ignorant; *ante*, 1213; *Smith v. Pencombe*, 3 Mac. & Gor. 653; *Lies v. Stub*, 6 Watts, 52; *Barnwell v. Threadgill*, 3 Jones, Eq. 50; *Wheeler*

v. *Smith*, 9 Howard, 55; *Campbell's Appeal*, 1 Law & Eq. Reporter (May, 1876), 442; *infra*, p. 1731. For the application of this doctrine to deeds of separation between husband and wife, see *ante*, p. 1697.

Nor will an incomplete agreement of compromise be regarded with more favor because relating to family matters than would be extended to ordinary settlements of disputed rights. "The principle of supporting family settlements," said Sharwood, J., in the very recent case of *Wistar's Appeal*, 33 Legal Intelligencer (Pa.), 212; 2 Weekly Notes, 613 (May, 1876), "is not to be carried so far as to work practical injustice. Especially it does not override every other rule upon which courts in equity proceed in the enforcement of the specific performance of contracts. A bill for that purpose is always an appeal to the conscience of the chancellor, on which he exercises a sound discretion under all the circumstances, and he will not interfere if the bargain is hard or unconscionable, or the terms unequal, or the complainant is taking an undue advantage from the strict legal construction of the words; *Oil Creek Railroad v. Atlantic and Great Western Railroad*, 7 P. F. Smith, 65. Even at law it may be stated as a sound principle of determination, that if the reasonable interpretation of an alleged offer and acceptance shows that something material as between the contracting parties is left to be afterward arranged, that the mind of the defendant never assented to all the terms proposed, never was as one with the mind of the plaintiff, there would be

no agreement between him and the plaintiff for breach of which an action would be maintainable. *A fortiori*, in a court of equity, unless it is perfectly clear that the minds of the parties have come together and been in accord upon all the material terms of the agreement, a chancellor ought to decline to interfere, and leave the parties to their legal remedies. In the compromise of family disputes particularly, the agreement of compromise should be complete in itself, not a mere aim looking to a future adjustment of details; more especially when, so far from settling the family difficulties, it will be itself merely the germ of future litigation. Otherwise, instead of promoting peace and harmony, it may be the source of prolonged discord and dissension."

PAYMENT OF A SMALLER SUM IN SETTLEMENT OF A LARGER.—Although the payment of a smaller sum cannot be a satisfaction of a larger, it may yet, when the debt is unliquidated, and the amount admits of a reasonable doubt, have the validity as a compromise which it would want if considered merely as the execution of an accord; see 1 *Smith's Lead. Cases*, 635, 7th Am. ed.; *Cooper v. Parker*, 14 C. B. 118; 15 Id. 822; *McDaniels v. Lapham*, 21 Vermont, 222; *Abbott v. Wilmot*, 22 Id. 437; *Babcock v. Hawkins*, 23 Id. 561; *Lamb v. Goodwin*, 10 Iredell, 320; *Mathis v. Bryson*, 4 Jones, Law, 508; *Palmerton v. Huxford*, 4 Denio, 166; *Taylor v. Nussbaum*, 2 Duer, 302; *Pierce v. Pierce*, 25 Barlow, 243; *Neary v. Boswick*, 2 Hilton, 514; *Bryant v. Proctor*, 14 B. Monroe, 451; *Donohue v.*

Woodbury, 6 Cushing, 148; *Tuttle v. Tuttle*, 12 Metcalf, 551; *Stearns v. Johnson*, 17 Minnesota, 142; *Goodwin v. Follett*, 25 Vermont, 386; *Norris v. Slaughter*, 3 Iowa, 116; *Foersch v. Blackwall*, 14 Barbour, 607; *Hammond v. Christie*, 5 Robb., 160; *Bliss v. Swartz*, 7 Lansing, 186; *S. C. 64 Barbour*, 215; *Burge v. Koop*, 48 New York, 225; *Warren v. Skinner*, 20 Conn., 559; *Stone v. Lawman*, 28 Indiana, 97; *Riley v. Kershaw*, 52 Missouri, 224; *McKensie v. Oulbreth*, 66 N. Car. 534; *Bryan v. Foy*, 69 Id. 45; *Mitchell v. Sawyer*, 71 Id. 70.

To make such an agreement a legal defence, it must be executed by payment, and a chancellor will not enforce an executory agreement to accept a smaller sum by way of compromise, unless the defendant acted in good faith, and it is clear that there was a reasonable ground for questioning the account; 1 Smith's Lead. Cases, 611, 7th Am. ed.; *Markel v. Spiller*, 28 Indiana, 488; *Gardner v. Shert*, 19 New Jersey Eq. 341; *Norris v. Slaughter*, 3 Iowa, 117; *White v. Sheppard*, 16 Texas, 163; *Andrews v. Winkler*, 27 Id. 170; *Loury v. Sloan*, 51 Georgia, 633; *Wright v. Wright*, 31 Michigan, 380; *Read v. McLe-more*, 34 Mississippi, 110.

It is a general rule that payment must be received *in modum solvantis*, and hence, when a smaller sum is paid with a stipulation that it shall be in full of a doubtful or unliquidated demand, the creditor must reject it or comply with the terms prescribed, and he cannot avoid the condition by declaring that he takes the money on account;

Croft v. Luxley, 2 Ellis, Bl. & El. 1069, 1081; *McDaniels v. Lapham*, 21 Vermont, 222; *McDaniels v. The Bank of Rutland*, 3 Williams, 230; *Hall v. Holden*, 116 Mass. 172.

In *McDaniels v. The Bank of Rutland*, a payment made professedly in full of a debt secured by a mortgage, was accepted with a declaration that the complainant took it on account, and the court held that he was bound and could not maintain a suit of foreclosure for the balance. "It cannot," said Isham, "be contended that the mortgagee acted under any mistake of fact in the case. He was ignorant as to the balance due on that mortgage debt; he so represented himself at the time the money was offered. The money was taken with full consciousness of the want of that information. But, as it was observed by Lord Loughborough, and by Chancellor Kent in *Penny v. Martin*, 4 Johnson, 567, ignorance is not mistake; *Canal Bank v. Bank of Albany*, 1 Hill, 287; a mistake of fact is an error of opinion. The plaintiff had made no estimate of the amount due on those mortgage notes derived from a computation of the same, and which computation proved to be erroneous. If an estimate of the amount due had been formed under those circumstances, it might be said that the plaintiff acted under a mistake of fact. It is true courts of equity will grant relief for ignorance as well as for a mistake of fact; but the principles on which relief is granted in those cases are very different. When the party has acted in ignorance of facts merely, courts

of equity will never afford relief where actual knowledge could have been obtained by the exercise of due diligence and inquiry. That was the very point determined in the case of *Penny v. Martin*, 4 Johnson, Ch. 567. Justice Story has also observed, 1 Eq. Juris., sec. 146 and note, that it is not sufficient that the fact is material; but it must be such that he could not by reasonable diligence get knowledge of when he was first put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence. In relation to the amount due on these notes, the plaintiff had as great and even greater means of knowledge than the defendants. The notes were under his control, and subject to his order; and he must have known with greater certainty the amount which had been paid upon them. With reasonable diligence, and on inquiry, he could have ascertained the amount which he considered due on those notes, and if he assumed to receive the money on the offer that if accepted it must be in full satisfaction of the mortgage debt, he is bound by the conditions imposed. Under such circumstances there is no mistake or ignorance of fact from which equity will relieve, even if upon a subsequent computation a larger sum is claimed.

"The plaintiff, however, in accepting the money, was not aware that he would legally be bound by the conditions under which the money was offered, or that in its

effect it would operate as a satisfaction of the mortgage debt. His mistake in this particular was purely one of law, and disconnected, as we have seen, from any fraud, undue advantage, surprise, mistake or ignorance of fact, or any other consideration which equity ordinarily regards as a just foundation for relief.

"The general rule on the subject of relief for a mistake in a matter of law is given in Fonb., Eq. 1, ch. 2, sec. 7 and note: 'That ignorance of the law will furnish no excuse for any person; it will not affect agreements nor excuse from the legal consequences of particular acts;' and Justice Story has remarked, 1 Equity Juris., sec. 111, that in that rule '*he is fully borne out by the authorities.*' It is quite obvious, however, that there are many cases in which a party has been relieved from the consequences of acts which have arisen from an ignorance of the law. It would seem that those cases were decided upon particular circumstances involved in them, rather than upon the application of general equitable rules. As observed by Justice Story, 1 Eq. Jur., secs. 137, 138, 'the real exceptions are very few, and generally stand upon some very urgent pressure of circumstances. The rule itself is relaxed in cases where there is a *total ignorance of title*, founded on a plain and settled rule of law, and in cases of *imposition, misrepresentation, undue influence, misplaced confidence and surprise*; but it may be safely affirmed, as a well-established doctrine, that a mere mistake of law, unattended with any such

special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity, and the present disposition of courts is to narrow rather than to enlarge the operation of exceptions.'

"Without examining the various cases on this subject to which we were referred, it is sufficient to refer to the case of *Hunt v. Rousmanier*, 1 Peters, 15, where the party acted under a mistake of law, and under the advice of counsel; and yet the court refused relief. In the case of *The Bank of the United States v. Daniels*, 12 Peters, 32, this subject and the authorities were fully examined, and in that case the court observed: 'That mere mistakes of law are not remediable, is well established in *Hunt v. Rousmanier*, and we can only repeat what was then said, that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision.' Those cases are regarded as having settled the doctrine in the courts of the United States. In England, in the case of *Stewart v. Stewart*, 6 Clark & Finnelly, 964, Lord Cottenham has recently critically examined the authorities on this subject, and came to the same conclusion, and his opinion was subsequently confirmed by the House of Lords. In the case of *The Bank of Whitehall v. Pettes*, 17 Vermont, 444, the same doctrine was sustained in this State, and relief in equity was refused where a party acted under a mistake in law, and upon the advice of counsel. There is

nothing in this case that takes it from the operation of this general rule, and unless we disregard the general current of both English and American cases, we think the plaintiff is bound by the act of receiving the money to the conditions upon which it was offered, and that, in equity as well as at law, the mortgage debt must be regarded as compromised and discharged."

FRAUD AND DURESS.—Agreements of compromise tainted with fraud will, of course, like all other agreements similarly vitiated, be set aside; *Hoge v. Hoge*, 1 Watts, 163; *Underwood v. Brockman*, 4 Dana, 309; *Spohr v. Hollingshead*, 8 Blackford, 415; *Michigan R. R. v. Dunham*, 30 Mich., 128; and in such cases the merits of the former controversy may become a legitimate subject of inquiry, as throwing light on the motives and conduct of the parties; *Preston v. Hill*, 38 California, 686. So a settlement will not be enforced when one party has taken advantage of the ignorance or weakness of the other; *Barnwell v. Threadgill*, 3 Jones, Eq. 50; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Carpenter v. Groff*, 5 Serg. & Rawle, 162, 165; *Wheeler v. Smith*, 9 Howard, 55; for such compacts require the fullest good faith, and may be vitiated by concealment, as well as by positive misstatement. The parties must meet on an equal footing, or must place themselves on an equality after they have met (*Barnwell v. Threadgill*), by a frank and free disclosure of the knowledge derived from superiority of learning or position; *Puckard v. Ober*, 26 La.

AN. 424; at all events, when one is manifestly relying on the opinion of the other, and looks to him for advice and counsel; *Wheeler v. Price*. It is not, however, requisite to state all the circumstances that may have a tendency to influence the judgment, but mutual facts affecting the basis of the agreement, and exclusively within the knowledge of one of the parties, should be communicated as being the common property of all; *Wade v. Simeon*, 1 Com. Bench, 610; 2 Id. 548; *Brooks v. Mostyn*, 2 De Gex Jones & Smith, 373, 416; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Bellas v. Hays*, 5 Serg. & Rawle, 427, 440. "A compromise of doubtful rights between adult parties," said Turner, L. J., in *Brooks v. Mostyn*, *supra*, "cannot, as I conceive, be set aside on any other ground than fraud. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed; but if there is knowledge on one side, which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts, in the view of a court of equity, to fraud." And this is peculiarly true of arrangements between members of the same family; *Wheeler v. Smith*, 9 Howard, 55; *ante*, 1727.

But mere non-disclosure will not, of itself, vitiate the compromise, unless a loss results from such concealment, or the settlement would not otherwise have been made. Thus in *Currie v. Steele*, 2 Sandford's Sup. Ct. 542, a widow executed as a compromise a release of all her interest in the estate of her deceased husband, and subsequently filed a bill to

set the same aside upon the ground that she was kept in ignorance of its value. But the court said: "The complainant, even upon the supposition that all the facts she was entitled to know were not disclosed to her, is not entitled to the relief she seeks merely upon the ground that the sum which she agreed to accept as the consideration for releasing her claims was less than that proportion of her husband's estate which, as his widow, she might justly demand; for a partial sacrifice of this description is involved in every compromise of a just demand, and the very term compromise implies its existence. To entitle her to relief, it must also appear that the voluntary sacrifice which the compromise involved was greater than, with a full knowledge of the nature and value of the assets in which she was entitled to share, she would have consented to make. In other words, it must appear that, owing to the concealment of which she complains, she has sustained a loss, the amount of which this court has not the means of ascertaining. For such a loss, if any such has been sustained, she may justly claim to be remunerated."

No doubts can exist that a compromise made with full knowledge of the falsehood of representations used to induce its execution will be binding, and cannot be defeated by averring that it was entered into by a belief in the repetition of the statements previously known to be false; *Ham v. Ham*, 29 Georgia, 40; *Parsons v. Hughes*, 9 Paige, Ch. 591; *Adams v. Sage*, 28 New York, 105;

Baker v. Spencer, 47 Id. 562; and obviously, a compromise obtained by misrepresentations amounting to fraud may be ratified by acquiescence therein after full knowledge of the deception that has been practiced; *Bryant v. Proctor*, 14 B. Monroe, 451; *Stearns v. Johnson*, 19 Minn. 540. But mere suspicion, not founded on facts or investigation, will not amount to knowledge; *Baker v. Spencer, supra*. So, when both parties have acted in good faith, a compromise will not be set aside merely because one of them has expressed an opinion to the other as to the nature and validity of his claim which goes beyond its real merits; *Blake v. Peck*, 11 Vermont, 483; *Saltonstall v. Gordon*, 33 Alabama, 49.

Nor can a compromise be affected because of the motives, however unwise or unfortunate, which have led to its execution by one of the parties, unless the other contracting party was instrumental in producing those causes, or obtained the settlement by the improper exercise of influences founded upon the existence of such motives; *Taylor v. Patrick*, 1 Bibb, 169; *Mitchell v. Long*, 5 Littell, 71; *Hoge v. Hoge*, 1 Watts, 163; *French v. Shoemaker*, 14 Wallace, 314; and in *Allis v. Billings*, 2 Cushing, 19, the discovery that a man of weak mind had used artifice to induce the plaintiffs to make a compromise with the committee or guardian to whose care his estate had been entrusted by the court, was deemed to be insufficient to justify the reopening of the contro-

versy, the guardian having been free from all imputation of wrong, and there being nothing to show that the impression produced on the minds of the plaintiffs was false, although fraudulent means had been used to produce it.

It seems that formerly threats unattended with actual restraint or violence did not constitute duress, and in *Moon v. Adams*, 8 Ohio, 372, the court sustained a compromise which had been made in order to avoid a criminal prosecution; but the tendency of the modern authorities is to the more liberal rule that any undue pressure which prevents the free exercise of the will or judgment may be a ground for relief in chancery or an equitable defence at law; *ante*, 1245; *French v. Shoemaker*, 14 Wallace, 314, 332; *Foss v. Hildreth*, 10 Allen, 76; *Briggs v. Withey*, 24 Michigan, 136; *Underwood v. Brockman*, 4 Dana, 309; *Central Bank v. Copeland*, 18 Maryland, 317; *Eadie v. Slimmon*, 26 New York, 12; *Miller v. Miller*, 18 P. F. Smith, 486. But a threat of pushing the debtor to bankruptcy or insolvency, or that the creditor will proceed to judgment and execution, or a levy under process issued in due course of law, does not come under this head, or afford ground for vacating a settlement which, though unwise or hasty, is yet made with a knowledge of the facts, unless there are other circumstances indicating that an undue advantage was taken of the necessity or weakness of the defendant. *French v. Shoemaker*; *United States v. Childs*, 13 Wallace, 230; *Gates*

v. *Shultz*, 7 Mich. 127; *Mayhew v. Insurance Co.*, 23 Id. 105; *Stover v. Mitchell*, 45 Illinois, 213.

MISTAKE OF LAW.—It is familiar, that for a mistake of a material fact not made the subject of the compromise, relief will usually be granted; *Cooper v. Phibbs*, Law Rep. 2 Eng. & Ir. Ap. 170; *Jenks v. Fritz*, 7 Watts & Serg. 201; *Gross v. Leber*, 11 Wright, 520; *Nalours v. Cocke*, 24 Mississippi, 45; *Trigg v. Read*, 5 Humphreys, 529; *King v. Doolittle*, 1 Head, 77; *Freeman v. Curtis*, 51 Maine, 140; *Packard v. Ober*, 26 La. An. 424, 430; while it will be refused for a mere mistake of law not induced by the party seeking to enforce the contract; *Shortwell v. Murray*, 1 Johnson, Ch. 512; *Arthur v. Arthur*, 10 Barbour, 9; *Rankin v. Mortimere*, 7 Watts, 372; *McAninck v. Laughlin*, 1 Harris, 373; *Norris v. Sheppard*, 8 Id. 475; *Smith v. McDougal*, 2 California, 586; *Kenyon v. Welty*, 20 Id. 637; *Broadwell v. Broadwell*, 1 Gilman, 600; *Shafer v. Davis*, 13 Ill. 395; *Wintermute v. Snyder*, 2 Green's Ch. 489; *Lyons v. Saunders*, 23 Mississippi, 530; *Mellish v. Robertson*, 25 Vermont, 604; *McMurray v. Oil Co.*, 33 Missouri, 377; *King v. Doolittle*, 1 Head, 77; *Freeman v. Curtis*, 51 Maine, 141; *Midland Co. v. Johnston*, 6 House of Lords Cases, 798, 811. (In *Loundes v. Chisolm*, 2 McCord, Ch. 455, the contrary is asserted, but the decision is based upon the language used in *Hunt v. Rousmanier*, 8 Wheaton, 174, and proceeds upon a misconception of the doctrine which finally prevailed in that instance; see *Hunt v. Rousmanier*, 1 Peters, 1.)

In the application of these principles, much uncertainty has existed as to when a mistake as to the validity or extent of a right of property amounts to a mistake of fact; *Trigg v. Read*, 5 Humphreys, 529; *Freeman v. Curtis*, 51 Maine, 140; although the distinction suggested in *Cooper v. Phibbs*, L. R. 2 Eng. & Ir. Ap. 170, may serve to some extent to reconcile the cases. "It is said," remarked Lord Westbury, "*Ignorantia juris haud excusat*;" but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

Whatever the rule may be in other cases, it is clear that when an agreement of compromise is based on the supposition that the right is doubtful, it will not be set aside because the parties on one side or the other act under a mistaken belief that the law is less in their favor than it subsequently proves to be, and it is immaterial that the doubt would have been solved in their favor on an appeal to the judgment of a court, because this would involve the risk, delay and expense which it is the object of the compromise to avoid.

"If," it was said in *Lewis v.*

Cooper, Cooke (Tenn.), 467, "we undertake to set aside agreements which were designed to stop litigation merely because one party mistook the law, we establish a principle by which all such agreements may be destroyed. It must invariably happen that one of the parties to a compromise was mistaken in the law, and upon this discovery, if the agreement is to be annulled, it will be a fruitful source of litigation. At the time of a compromise, with the information then possessed, it might be the opinion of all that, according to the terms of the compromise, the party undertook to pay no more than the law compelled him to pay without the compromise. But a few years afterward new light is shed upon the subject; the law is understood differently, and then the agreement must be rescinded. In a still more enlightened period legal opinions rechange, and the law is understood certainly to be as it was originally understood; and then ought we to review the cause and hold the party to his agreement?" The doctrine thus announced has been repeatedly approved, and applies whether the compromise be made under a mistaken view of the existing authorities, or in reliance on decisions which are subsequently reversed; *Lyon v. Richmond*, 2 Johnson, Ch. 60; *Durham v. Wadlington*, 2 Strobhart, Eq. 258; *Steele v. White*, 2 Paige, Ch. 478; *Jacobs v. Morange*, 47 New York, 51; *Hunt v. Roumanier*, 1 Peters, 15; *Bank v. Daniel*, 12 Id. 32, 55; *Taylor v. Patrick*, 1 Bibb, 168; *Fisher v. May*, 2 Id. 448; *Trigg v.*

Read, 5 Humphreys, 529; *Brandon v. Medley*, 1 Jones, Eq. 313; *Rankin v. Mortimere*, 7 Watts, 372; *McDaniels v. Bank of Rutland*, 3 Williams, 230 [*ante*, p. 1729]; *Good v. Herr*, 7 Watts & Serg., 258; *Kenyon v. Welty*, 20 California, 637; *Adle v. Prudhomme*, 16 La. An., 343; *Faust v. Birner*, 30 Missouri, 418; *Stover v. Mitchell*, 45 Ill., 214. "A subsequent decision of a higher court in a different case," said Chancellor Kent in *Lyon v. Richmond*, *supra*, "giving a different exposition of a point of law from the one declared and known when a settlement between the parties takes place, cannot have a retrospective effect and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences."

The case of *Jones v. Munroe*, 32 Geo. 189, diverges from the current of the authorities, and a more correct exposition of the law will be found in the previous decision of *Morris v. Munroe*, 30 Geo. 630.

It has been said in some instances

that a doubt arising from a plain mistake of law does not afford ground for a compromise; see *Naylor v. Winch*, 1 Simons & Stuart, 555; *Coy v. Stucker*, 31 Indiana, 161; *Morey v. Newfane*, 8 Barbour, 645; *Underwood v. Brockman*, 4 Dana, 309; and this may be just if by a plain mistake we are to understand one which no sound and ordinarily informed mind could have entertained, and which, consequently, implies gross ignorance or imbecility. The difficulty is in the application of a criterion which depends essentially on opinion and may be falsified by the event.

The law is not, and from its nature never can be, an exact science in all its branches, and its principal triumph has been its capability of adapting itself to the growing wants of society. What may to-day be a plain mistake, may at a subsequent period become doubtful, or rank as an established rule. Prior to the case of *Quain's Appeal*, 10 Harris, 510, no one who was conversant with the law of Pennsylvania would have doubted that a covenant for the payment of rent reserved on a grant in fee, by the grantee for himself, his executors, administrators, and assigns, would have the effect which its terms import, and bind the personal assets of the covenantor in the hands of his executors and administrators. By that decision, the operation of such a covenant is confined to the life of the party who makes it, and no recovery can be had upon it against his personal representatives, except for the purpose of charging the land. Such instances might be

multiplied indefinitely, and it can hardly be said that any legal question is so certain as not to admit of a compromise, or that any compromise can be held void on the ground that the case did not admit of a reasonable doubt, and could have had but one termination, if brought before a judicial tribunal.

Mistake of perfectly established and elementary principles of law may indeed afford ground for inferring undue influence or advantage, and thus constitute an equitable defence; *Jordan v. Stevens*, 51 Maine, 78; *Hunt v. Moore*, 2 Barr, 105; *Haden v. Ware*, 15 Alabama, 149; *Dill v. Shahan*, 25 Id. 694; but when such an inference is excluded by the circumstances, a chancellor will not intervene. This is nowhere better stated than in the opinion in *Good v. Herr*, 7 Watts & Serg., 253, 258, where Rogers J., said: "A mutual mistake of law, without more, is not the subject of equitable relief. In such a case, we think it is of no consequence whether it be a plain and familiar principle, or the reverse, whether it be a case of heirship, or any other misapprehension of law. We fully agree with Mr. Justice Story, that the distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law not plain to persons generally, but what is yet constructively certain as a foundation of title, is not of itself very intelligible, or, practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although

they have not, as yet, been recognized by public adjudication. The learned commentator pertinently asks, 'What are to be deemed plain and settled principles? Anything such as have been long and uniformly established by adjudications only? Or is a single decision sufficient? What degree of clearness constitutes the line of demarcation? If there have been decisions in different ways at different times, which is to prevail? If a majority of the profession hold one doctrine, and a minority another, is the rule to be deemed doubtful, or is it to be deemed certain?' Is it, we may add, confined to a mistake of a principle of common law, or is it extended to a mistake in the construction of a statute, and particularly the construction of the ever-varying statute of distribution of the estate of intestates? Take the case in hand; would this be such a mistake of a plain and familiar canon of descent as, *per se*, to afford ground for the equitable interposition of the court? We grant that, when there is a mistake of a clear, well-established and well-known principle of law, whether common or statute law (for in this respect we can conceive no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But it is obvious that, in such cases the mistake of itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to infringe

the general rule. We therefore are of the opinion that in no case is ignorance or mistake of the law, with a full knowledge of the facts, *per se*, a ground for equitable relief." If these objections could be answered, the argument would still be inapplicable to an agreement which, like a compromise, is intended to avoid expense and delay and free the mind from anxiety and doubt. A wager, whether a devise to one for life, remainder to the heirs of his body, is an estate tail, would hardly be deemed invalid because one or both of the parties was laboring under a plain misconception of the rule in *Shelley's* case, and whenever there is room for a wager there may be ground for a compromise; see *Cavode v. McKelvey*, Addison, 56. The better opinion, therefore, is that a compromise cannot be avoided merely because the parties acted under an erroneous impression of the law, which a more familiar acquaintance with it would have shown to be free from reasonable doubt or difficulty; *Hunt v. Roumanier*, 1 Peters, 15; *Trigg v. Read*, 5 Humphreys, 529; *Good v. Herr*, 7 Watts & Serg. 253; *Faust v. Briner*, 30 Missouri, 414; 1 Story's Eq. Jur. § 126. The result thus attained is, in fact, nothing more than the application of the rule which prevails where a controverted right is bought from a stranger, to cases where one of the parties to a controversy ends it by conveying all his right, title and interest to the other; *Moore v. Fitzwater*, 2 Randolph, 442.

[*858]

*TOWNLEY v. SHERBORNE.

SATURDAY, JUNE 6TH, 9 CAR. 1.

REPORTED BRIDG. REP. 35, 1

LIABILITY FOR A CO-TRUSTEE.]—*How far a person is liable for the acts and receipts of a co-trustee.*

UPON hearing and debating of the matter, as well on the 15th as the 18th of June last, the Court being assisted with Mr. Justice Hutton and Mr. Justice Jones, upon the plaintiff's bill of review, for the reviewing and reversal of a decree made in a cause, wherein Richard Mountford, deceased, executor of Thomas Challoner, was plaintiff, against the now plaintiff, and Thomas Forster, Esquire, concerning the sum of 1700*l.*, raised out of the rents and profits of certain lands and tenements in Linsted, Ardingley, and Worth, in the county of Sussex, in trust for the said Thomas Challoner, during his minority, and which the now plaintiff, by the decree of this Court, was to pay, in case the said Forster should fail to pay the same.

Several matters were offered by the plaintiff's counsel, for the reversal of the said decree, *namely*, that the now plaintiff was decreed to pay the sum of 1700*l.*, as raised out of the profits of the infant's lands, settled upon an account made up by the said Forster with the said Thomas Challoner the infant, after he came of age, whereto the plaintiff Townley was neither party nor privy, nor ever consented, nor ought to be bound thereby.

And *secondly*, that the said plaintiff is by the said decree made liable to the payment of all the profits raised out of the said infant's estate, whereas he never received any profits at all; and [*859] although he gave some acquittances, **yet* the same were but to balance an account, the moneys disbursed amounting to as much as the receipts; and there being three other co-trustees with him, the plaintiff's counsel conceived that he ought not to be charged with more than he himself received, especially for that the other parties trusted, and who received the profits, were, or were reputed to be, men of ability and responsible. Touching which last point (being that whereon the plaintiff's counsel chiefly insisted for the reversal of the said decree as against the now plaintiff), it appeared unto this Court, that Challoner, father of Thomas the infant, did heretofore make a lease of the said lands to one Weeks, for five-and-thirty years, and afterward conveyed away the reversion to Thomas Challoner, his brother; and after the death of Francis (according to an award made between

the said Weeks and Thomas Challoner the brother, who was uncle to Thomas the infant) the lease of five-and-thirty years and the reversion in fee simple were to be assigned to parties trusted by the said Weeks, and one Barbara Challoner, mother of the said infant, and by the said Thomas the uncle, the lease to be in trust for Weeks for life, the remainder to Barbara for life, the remainder to Thomas the infant, and the reversion in fee to be in trust for the said Thomas the infant. But upon the limitation or condition that the said Thomas the infant, when he came of age, should make some assurance to Thomas the uncle, according to the award, wherein, if he failed, then the trust limited to him should cease, and the trustees should be seized for Thomas the uncle. In pursuance whereof, the now plaintiff and the said Forster were trusted, together with one Langworth and Lovell, to take the estate in the lease, and did take an assignment thereof from Weeks, the 12th of June, 9 Jacobi; and all the trustees sealed the counterpart; and the same day the now plaintiff and Forster assigned their moiety in the said lease to one Mr. Peacock and Robert Forster, who were not privy nor acquainted therewith; and on the 13th of June, the 9th of King James, the said Thomas Challoner *the uncle passed over the inheritance [860] to the now plaintiff and Thomas Forster, whereby it was probable that the said assignment made by the now plaintiff and Thomas Forster, of their interest in the moiety of the lease, was to keep the same from being extinguished; after which assurance so made, Weeks, during his life, and Barbara after him, during her life, received the profits of the said lands; and Barbara, in the year of our Lord 1614, died. And it appeared, that, soon after the death of the said Barbara, viz. 23d of March, 12 Jacobi, Langworth, one of the trustees of the lease, being dead, whereby his interest in the moiety survived in Lovell, and Thomas Challoner the uncle procured the said Lovell to assign over his interest in the said lease to the said Thomas Challoner the uncle, liable to the said trust, as by a copy of the assignment now read appeared. And it appeared by the confession of the now plaintiff, and by his answer to the former bill, and by the acquittances now produced, that the now plaintiff joined with the said Thomas Forster in giving acquittances for the three first half-years' rents; but it did not appear that he ever received any after, or gave any more acquittances; but it doth appear by the proofs, that the said Thomas Challoner the uncle, who had the assignment from Lovell, did receive the rents of the tenants, and paid the same over to the said Thomas Forster; and that, when the infant came of age, he called the same Thomas Forster and Thomas the uncle to an account; and that they did account; and that the said Thomas Forster did then deliver him a book of account, which the defendant now produced in Court; by which it did appear, that, for the three first half-years, the rents were received by the said Thomas the uncle, and by him paid to the now plaintiff and the said Thomas Forster, for the use of the

infant; but for all the subsequent time the same were received by the said Thomas Challoner the uncle, and by him paid to the said Thomas Forster alone, who (as was not now denied) was, at the time of such receipts, generally taken to be of great ability, and responsible, as it also appeared by the proofs; that the said [*861] infant, after *he came of age, had declared the said Thomas Forster to be his debtor, and did by his will, read in Court, give the said sum of 1700*l.* to the said Mountford as a debt owing by the said Thomas Forster solely, not mentioning the now plaintiff. Upon all which this Court was fully satisfied that the now plaintiff received no penny of profits after the three first half-years; but whether he ought to be charged with all that the said Thomas Forster received, being a co-trustee with him, in respect the said Thomas Forster is now declined in his estate (as is conceived), this Court somewhat doubted. And although a precedent was produced, wherein this Court had charged parties trusted, but only according to their several and respective receipts, and not one for the other, yet, in respect the defendant's counsel opposed the same, alleging many precedents to be on the other side, and the Lord Keeper¹ conceived the case to be of great consequence, and thought not fit to determine the same suddenly, but to advise thereof, and desired the Lords the Judges' assistants to take the same into their serious considerations, and to assist him with their advice therein, whereby some course might be settled that parties trusted might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trusted, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side.

And the Lord Keeper and the Lords the Judges' assistants, afterward conferring together, and, upon mature deliberation, conceiving the case to be of great importance, his Lordship was pleased to call unto him also Mr. Justice Crook, Justice Barclay, and Mr. Justice Crawley, for their assistance also in the same, and appointed precedents to be looked over, as well in this as in other Courts, if any could be found, touching the point in question; whereupon several precedents were produced before them, some in this Court and some in the Court of Wards, where parties trusted were chargeable only according to *their sev- [*862] eral and respective receipts, and not one to answer for the other; but no precedent on the contrary was produced to them.

Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this day, in open Court, declare the resolution of his Lordship and the said Judges: That where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the

¹ Coventry.

most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court to answer for the receipts of him so dying or decayed, unless some purchase, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And, it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale or perception of the profits; and, if such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust.

And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and, in that case, *equitas sequitur legem*, there having been many precedents resolved in this Court, that one executor shall not answer nor be charged for the act or default of his companion.

And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, *it falling out many times that some of the trustees live far from the lands*, and are put in trust out of other respects than to be troubled with the receipt of the profits¹.

But his Lordship and the said Judges were of opinion, *that if two trustees were, and one of them, without warrant of the party that trusteth him, or of a Court of [*863] equity, assigneth his estate, and the assignee doth receive the profits, and becometh non-solvent, he that made the assignment shall answer it for him, but the other original trustee shall answer for no more than what he receiveth himself, because the assign cometh not in by him, or his assent or appointment. And that in case, if the original trustee, that did not make the assignment, receive the whole profits and become non-solvent, neither the assignor nor the assignee shall be answerable for them.

And if an obligation be made to two in trust, and one of them release the whole debt, as by law he may, this shall not charge his companion for any part. And albeit, in all presumption, this case hath often happened, yet no precedent hath been produced to his Lordship or the Judges, that in any such case the co-trustee hath been charged for the act or fault of his companion. And, therefore, it is to be presumed that the current and clear opinion hath gone, that he is not to be charged (it having not, till of late, been brought in question) in a case that, by all likelihood, hath frequently happened.

¹ See *Williams v. Nixon*, 2 Beav. 472.

But his Lordship and the said Judges did resolve, that if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he may be charged, though he received nothing.

And his Lordship and the said Judges did declare, that in this particular case they did not find any material proof against Mr. Townley, to make his case worse than the general case aforesaid, but rather better (except only for the three half-years' rent, which he joined in acquittance with Mr. Forster); for the receipt of the profits alone by Mr. Forster is no breach of trust in Mr. Townley; and Mr. Challoner, when he came of full age, took Mr. Forster for his debtor.

And therefore it was ordered and decreed, that so much of the [864] said decree as chargeth Mr. Townley with any *more of the profits than the three half-years, for which he joined his acquittance, shall be reversed; but as for those three half-years' profits, if the same were not disbursed or employed for the use of Mr. Challoner, then for so much thereof as hath not been so disbursed or employed, the said complainant, Mr. Townley, ought to be answerable, and the defendant may call the plaintiff before Mr. Page, one of the Masters of this Court, to audit the account touching these three half-years, if any difference be thereabout. And lastly, it is ordered, that the recognizances given on the plaintiff's part, to perform the order of this Court, be discharged.

BRICE v. STOKES.

[865]

JULY 22^d, 1805.

REPORTED 11 VES. 519.

LIABILITY OF TRUSTEE FOR THE RECEIPTS OF HIS CO-TRUSTEE.]—

A trustee charged, though he did not receive the money under the circumstances, having joined in the receipt: the sale unnecessary; and permitting his co-trustee to keep and act with the money contrary to the trust.

Not charged in respect of the interest of one of the cestuis que trust, having notice of the breach of trust, and acquiescing.

By the decree in this cause, an account was directed of the money arising by sale of part of the testator's estates, come to the hands of Henry Mooring, John Fielder, and John Sparrow, the trustees, or their executors, &c.; and an inquiry, in what manner the purchase money was paid, the receipt signed, and in what manner and by whom the interest was paid during the lives

of Mooring and Fielder, and in whose hands the principal remained.

The Master's report stated the will of John Taylor, devising and bequeathing to his executors, Sparrow, Mooring, and Fielder, their heirs, executors, &c., all his freehold and leasehold estates, upon trust to pay the rents and profits to the testator's niece, Elizabeth Sparrow, while unmarried, and after her marriage, upon trust for her, her heirs, executors, &c.; and he gave full power to his said trustees and executors, and the survivors, &c., to sell and dispose of all or any part of the said estates; and directed the moneys arising from such sale or sales to be put out by his said trustees, or the survivors, &c., upon government or real security; and *such moneys and the interest, and proceeds thereof, in the meantime, to be applied upon the trusts [*866] before directed as to the estates, and the rents, &c.; and he declared, that the trustees, and the survivor, &c., should have full power and authority to make such settlement of all or such of the estates as should be unsold, and the money produced by the sale, as the said trustees should judge fit, on the marriage of Elizabeth Sparrow, to the use of her and her issue, and under such restrictions as his said trustees, or the survivors of them, should think fit and proper; and he directed, that his said trustees and executors should not be answerable or accountable for any loss which might happen of all or any part of his real and personal estate, so as such loss be not through their willful neglect or default; and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults only.

The report also stated the marriage of Elizabeth Sparrow with Thomas Brice, the plaintiff, in 1783, upon which occasion a settlement was made to the separate use of Mrs. Brice for life, with remainders to her husband surviving her, for his life, and to the issue. She died, leaving no issue, September, 1784. That settlement also contained a power, similar to that in the will, to the trustees to sell, with the consent of Mrs. Brice, if living, the receipt of the trustees or the survivor to be a discharge to the purchaser, and forthwith, and with all convenient speed, to invest the money in their names, upon government or real securities, &c.; with a declaration, that the trustees, their heirs, &c., should not be chargeable with, or accountable for, any more of the said trust moneys and premises than he or they should actually receive, nor with or for any loss which should happen, of the same moneys and premises, or any part thereof, so as such loss happened without his or their willful default; nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

*The report further stated that, by indentures dated the 27th of November, 1784, it was witnessed, that Mooring and Fielder, in consideration of the sum of 1260*l.* to them [*867]

paid (with the approbation of Thomas Brice) by Robert Lillington, conveyed part of the freehold estate to him and his heirs; for which sum of 1260*l.*, the said consideration-money, Mooring and Fielder respectively signed a receipt on the back of the deed. No part of that sum was laid out; but some money, by way of interest on part of it, was paid by Fielder to Brice. Fielder died insolvent, in April, 1794, and Mooring died in October following.

The Master certified, that, though the evidence appeared exceedingly contradictory, yet, as the receipt for the 1260*l.*, the consideration-money, written on the back of the conveyance, was signed both by Mooring and Fielder, and witnessed by four witnesses as to the signatures by them, it must be presumed that they received such consideration-money; therefore, the defendant Stokes, as executor of Mooring, and Braxton, the surviving administrator, with the will annexed of Fielder, ought to be charged with the consideration-money and interest.

Exceptions were taken by the defendant Stokes to the Master's report, for charging the defendant, as executor of Mooring, with the sum of 1260*l.*, as having been received by him with Fielder, and interest.

The examination of the plaintiff Brice stated, that he was ignorant of the treaty for the sale, except that, for the purchaser's satisfaction, he joined in the conveyance. Mooring resided at Christchurch, twelve miles from Lymington, where the plaintiff and Fielder resided, the latter being an attorney. The plaintiff never received any money from Mooring, but received various sums from Fielder, by way of interest for part of the trust estate. On account of Mooring's residence at a distance, the plaintiff never applied to him for any interest during the life of Fielder, but always applied to Fielder, who lived near him.

[*868] The evidence as to the fact of payment was contradictory. Mooring's widow stated that she was present at the execution of the conveyance, but did not see the money paid to any one. Fielder told Mooring it was necessary for him to execute the conveyance and sign the receipt, to which Mooring objected, alleging that Fielder never consulted him in the management of the trust: but Fielder pressed him, saying it was only matter of form, for he should receive the purchase-money, and place it in the stocks for the benefit of the children; and at length Mooring, after much hesitation, executed.

There was also evidence, that among Mooring's papers was found an account, in the handwriting of Fielder, showing that the whole of the money was received by Fielder, and the greater part invested in securities; and that, by an account discovered among Fielder's papers, it appeared that he received the money, deducted 400*l.* for legacies, retaining the 860*l.*, for which he paid interest to the plaintiff.

Mr. Romilly and Mr. Hart, in support of the exceptions.—Upon

the evidence, this transaction is much in the dark. The question is, whether, from the mere circumstance that this trustee joined in the receipt, in order to make a title, he ought to be charged personally, and whether he may not discharge himself by showing, that, though he joined in the receipt, the other trustee received all the purchase-money. It was indispensably necessary for the trustee to join, for conformity. The distinction between the cases of an executor and a trustee, though much discussed, has never been overruled. As it is not necessary for the executor to join, his act in joining makes him liable; but as it is necessary for a trustee to join, the mere circumstance that he joins in the receipt, in order to make a title, is not sufficient to charge him, unless you go further, and show that he actually received the money.

Mr. Richards and Mr. Bell, for the report.—This is not the ordinary case, but the case of a trustee voluntarily joining in this sale, for the mere purpose of converting *real estate into personal, the personal estate being equal to all the charges, [*869] and no purpose to be answered. The nature of the trust called upon both the trustees to take care that the cestuis que trust should be as safe as if the estate had remained as it was. As there was no other object, therefore, than merely to secure the property for the benefit of the infant cestuis que trust, Mooring was bound to see to the application. The signature of the receipt throws it upon him to show that he did not receive the money. The effect of the distinction is merely, that the Court will more easily believe that the trustee did not receive the money; but it does not go the length of throwing the proof that he did receive it, when he has signed the receipt, upon the cestui que trust. The circumstances account for the fact, that the interest was paid by Fielder. It was natural that he, being an attorney, should be trusted for that purpose. How can this Court infer that it was not laid out upon security in their joint names, or that Mooring did not receive the whole from Fielder? There is no evidence that can weigh against the signature of the receipt. The paper writing by Fielder charges him, admitting that he received the money; but it does not discharge Mooring. To counteract the evidence from the receipt, he must produce the most satisfactory evidence that he joined for conformity only, and is, therefore, within the indulgence allowed to trustees.

Another principle upon which these trustees must be charged, arises from the deed of settlement executed, under which they are to exercise a discretion whether it is proper to sell the estate, a most important duty imposed upon them. The will is, therefore, out of the question. The Court will not, after that, hear a trustee say it is immaterial to him what becomes of the fund. He does not, as he might, give up the trust under the will, but he accepts another trust under the deed; the only object of which was to take care of the property, which is very different from the case of a trust thrown upon him, and not assumed voluntarily. This is a case, therefore, of gross and willful negligence.

[*870] *LORD CHANCELLOR ELDON.—It does not appear for what purpose this sale was made, except for the mere purpose of converting real estate into personal. If the sale was made for a purpose not authorized by the settlement, Brice, the husband, being an executing party, could not complain of that sale. The money must, upon this evidence, be taken to have been paid to Fielder.

At law, where trustees join in a receipt, prima facie, all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity.

In the case of executors, it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application, as far as it is connected with the particular transaction in which he joins. Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*Chambers v. Minchin*, 7 Ves. 198), that it is much safer for executors to abide by a general rule of that sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds.

In this case it was absolutely necessary that all the trustees should join in the receipt; for the law empowering the sale is the settlement, which, in principle and terms, requires that the purchaser should not be discharged but upon the joint receipt of all. The money was not, in a strict sense, received by both trustees; for the weight of evidence is, that Mooring let Fielder, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence that he would lay it out either in the funds, or such other security as it might be [*871] invested in, consistently with the *settlement, viz., a good real security. It is a clear fact now, that it remained with Fielder until his death in 1794.

Two questions arise: 1st, whether Brice, the husband, can complain with respect to his interest in the produce of this sale as against Mooring? 2dly, whether those who are to take after him can complain?

It is clear, upon settled cases, that, if there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular cestui que trust has acted in authorizing that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated in a question between that cestui que trust and that trustee, the latter cannot be called upon by the former. There is very satisfactory

evidence that Brice must be considered as having for ten years permitted this money to remain with Fielder alone, and, therefore, cannot complain, as against Mooring, that it was not laid out by Fielder with Mooring. Upon the evidence, Brice received the interest from Fielder alone, having no communication with Mooring until shortly before or after the death of Fielder, and made no demand upon Mooring. He ought to be taken upon the account to know, that, as late as 1786, this was cash in the hands of Fielder, charged in account as one of the executors having that money. There is not one item in respect of which he debits himself, that does not expressly name the security upon which the money was out, except the sum of 860*l.*; and then it is no longer interest at 4*l.* per cent. but 5*l.* per cent., charging himself with a larger interest, after he received it, than he gave credit for before he received it. Afterward, from 1787, he proceeds dealing with Fielder only, receiving the interest of that particular sum until 1794. The result of the evidence is, that, with Brice's permission, this money was suffered to remain with Fielder upon his personal security: that if Mooring knew as much as Brice, so Brice *knew as much as Mooring, and cannot complain that this was a misapplication, permitting it with respect to his own interest. [*872]

Mooring also placed so much confidence in Fielder, that though the money got into the hands of Fielder alone, it is very difficult to say, as against those who come after Brice, that Mooring is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary. There was no necessity in respect of which the other should join. But, though a trustee is safe, if he does no more than authorize the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that, for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee that it had got into a course of abuse. Of that, it seems, Mooring was distinctly informed, the paper connected with the marriage settlement stating upon the face of it a breach of trust. Though not very intelligible, it shows that an account of the securities taken by Fielder for 1260*l.* was put into the hands of Mooring. That gave him information that Fielder was lending some of the money upon notes, some upon bonds; and, as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back

into the joint custody of those who ought to take better care of it.

The conclusion is, that Brice cannot call upon Mooring as to the interest; but as to the principal, Mooring is *answerable, but he is not to be charged with more than was actually misapplied.

Townley v. Sherborne, and *Brice v. Stokes*, are leading authorities as to the liability of persons for the acts and defaults of their co-trustees and co-executors—a subject which will be considered at some length in this note; although it is proposed, in the first place, to notice some of the duties of trustees and executors, with respect to their cestui que trust, and of the liabilities which result therefrom, but more especially with respect to the getting in, the custody, and investment, of the property committed to their care.

It may here be first mentioned that in charging trustees with breaches of trust it is immaterial how the trust was created, whether for valuable consideration, or by the voluntary gift of the trustees themselves (*Drosier v. Brereton*, 15 Beav. 221), and that persons assuming to act as trustees, although they are not actually or legally such, will incur the same liabilities, in respect of a breach of trust, as trustees regularly appointed: *Rackham v. Siddall*, 16 Sim. 297; 1 Mac & G. 607; *Pearce v. Pearce*, 22 Beav. 248; *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 58; *Aveline v. Melhuish*, 2 De G. Jo. & Sm. 288; *Hennessey v. Bray*, 33 Beav. 96; *Quinton v. Frith*, 2 I. R. E. 396.

Moreover, where a trustee employs an agent, so long as the acts done by the person so employed are confined to mere agency on behalf of the trustee—his employer—generally speaking, the agent cannot be made accountable as a constructive trustee: Per Stuart, V. C., in *Morgan v. Stephens*, 3 Giff. 235. And see *Myler v. Fitzpatrick*, 6 Madd. 360; *Keane v. Roberts*, 4 Madd. 332; *Nickolson v. Knowles*, 5 Madd. 47; *Lockwood v. Abdy*, 14 Sim. 437; *Fyler v. Fyler*, 3 Beav. 550; *Maw v. Pearson*, 28 Beav. 196; *Marshall v. Sladden*, 7 Hare, 428. But where the agent obtains possession of the trust funds, and his acts are not in strict conformity with his duty as agent, he ceases to be a mere agent, and will be liable as a trustee. Thus, in *Morgan v. Stephens*, 3 Giff. 226, a solicitor got possession of trust moneys, and through his intervention the executrix, who was entitled to the income only, was enabled to misapply the principal. It was held by Sir John Stuart, V. C., that an account ought to be directed against the solicitor as if he had been a trustee. See also *Attorney-General v. The Corporation of Leicester*, 7 Beav. 176; *Pannell v. Hurley*, 2 Coll. 241; *Salomans v. Laing*, 12 Beav. 377; *Bodenham v. Hos-*

kyns, 2 De G. *Mac. & G. 903; *Bridgman v. Gill*, 24 Beav. 302; *Hardy v. Caley*, 33 Beav. 365; *Portlock v. Gardner*, 1 Hare, 606. [*874]

But it has been held that where trustees authorize agents to receive trust money, who misappropriate it, so that it is lost, a bill by the cestuis que trust seeking to charge the agents alone cannot be maintained, as it is only through the trustees that the agents can be made liable: *Robertson v. Armstrong*, 28 Beav. 123.

As to getting in Outstanding Property.—Trustees and executors ought not to leave money outstanding upon personal security; and though, in the exercise of a fair discretion, they are not obliged to commence legal proceedings unnecessarily, they must exert themselves to get it in, and, although the money may have been advanced by the testator himself, if necessary, to commence compulsory proceedings (*Lowson v. Copeland*, 2 Bro. C. C. 156; *Bailey v. Gould*, 4 Y. & C. Exch. Ca. 221; *Powell v. Evans*, 5 Ves. 839; *Caney v. Bond*, 6 Beav. 486; *Fenwick v. Greenwell*, 10 Beav. 412; *Bullock v. Wheatley*, 1 Coll. 130; *Ticker v. Smith*, 3 Sm. & Giff. 42, 46), even against a co-executor (*Styles v. Guy*, 1 Mac. & G. 422; *Egbert v. Butter*, 21 Beav. 560; *Candler v. Tillett*, 22 Beav. 257); and where a debt is payable by installments, trustees will not be justified in giving any great indulgence; for the debtor's inability to pay the sums accumulated, by permitting them to run together, will be constantly augmented (*Caffrey v. Darby*, 6 Ves. 488). In fact, a direction to convert with all *convenient speed*, is no more than the ordinary duty implied in the office of executor: *Buxton v. Buxton*, 1 My. & Cr. 93.

In *Tebbs v. Carpenter* (1 Madd. 291), executors were directed by the testator to receive rents and invest them in the 4l. per Cents. They employed a person to receive the rents, but according to the Master's report, there were arrears amounting to 1500l.; and the impression on the Master's mind, as appeared by his report (*Ib.* p. 298), was, that, by using proper means, the whole might have been recovered. It was held by Sir Thomas Plumer, V. C., that the executors were liable to make good the arrears, though without interest. "It cannot," said his Honor, "be admitted as an excuse, that they devolved the care of this estate to another; they must answer for his negligence. I am anxious not to discourage persons from acting as executors, by throwing difficulties in their way, and am willing to make every proper allowance; but I must not forget the established doctrine of this Court. If persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer infants to be injured by their *negligence. . . . If there be crassa negligentia, and a loss sustained by the estate, it falls [*875] upon the executors. Here, for want of evidence, I cannot say that all this rent could not have been recovered; and I am reluctantly obliged to assume, that no exculpatory evidence could be produced, and therefore they must be charged with these arrears. Interest upon the arrears was

but faintly pressed for, and ought not to be given. Interest was asked for in *Lowson v. Copeland*, but refused." See also *Wiles v. Gresham*, 2 Drew. 258; *M'Gachen v. Dew*, 15 Beav. 84; *Grove v. Price*, 26 Beav. 103; *Waring v. Waring*, 3 Ir. Ch. R. 335; *Macken v. Hogan*, 14 Ir. Ch. R. 285; *Rowley v. Adams*, 2 Ho. Lo. Ca. 725.

It is clear that an executor ought not, without express authority, to carry on the trade of the testator (*Kirkman v. Booth*, 11 Beav. 273), except for the purpose of winding up the concern; but he may, and in some cases is bound to, complete the contracts entered into by his testator: *Collinson v. Lister*, 20 Beav. 356. The Court, however, has jurisdiction in an administration suit to direct that a trade or business in which infants are interested be continued, and will so direct if it be for their benefit: *Perry v. Perry*, 3 I. R. E. 452. Executors must be allowed a reasonable time for breaking up a testator's domestic establishment and discharging his servants: *Field v. Peckett*, 29 Beav. 576.

Although a loss may have taken place by an executor not converting the assets, he will not be liable for it, if the delay was caused by his exercising a reasonable discretion, even although there may have been a direction in the will that he was to convert with all convenient speed. And a difference of opinion between two executors as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand. Thus, in *Buxton v. Buxton* (1 My. & Cr. 80), John Buxton, an executor, whose testator died on the 21st of March, 1826, in the exercise of his discretion did not sell some Mexican bonds for more than a year after the death of the testator, viz., part in the month of June, and part in the month of October, 1827, although there was a direction in the will to pay legacies within four months, and to *convert with all convenient speed*, and although Alice Buxton, his co-executrix, requested him to sell at an earlier period. Lord Cottenham, then Master of the Rolls, held, that as John Buxton [*876] appeared to have acted throughout with diligence and good faith, he was not liable for the loss consequent on his not having sold the bonds sooner. "Except," said his Lordship, "the provision for the payment of the legacies within four months, there is nothing peculiar in the will. A direction to convert with all convenient speed is no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion. If a reasonable discretion were to be denied to an executor—if it were to be laid down as an inflexible rule, that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would, of necessity, be always an immediate sale: the executor would be bound to sell, at whatever loss. Such a rule would be, in its operation,

most injurious, and it has never been acted upon by the Court, which, in cases of this kind, has always considered what is for the interest of all parties concerned.

"The real question for the consideration of the Court is, whether a reasonable discretion has been here exercised by the executor. I cannot think that it was his duty to come to an immediate sale of these bonds, any more than of any other description of property. Looking to the correspondence, it is impossible to impute anything to the executor but an anxious desire to increase an estate in which, undoubtedly, he had himself a large personal interest. The testator had bought these bonds at a very high price, and a considerable depreciation had taken place in their value prior to the time of his death. It is to be observed also, that, at the end of the four months, when the legacies were directed to be paid, the bonds were lower than the prices which they afterward realized; and if they had been then sold, it could only have been on the ground that it was a convenient time to convert them. On the 21st of July, at the expiration of the four months, the bonds were only at 40*l.*, and, early in that month, they had been sold as low as 31*l.*, a depression from which, toward the middle of the month, they began gradually to recover. Now, there were no circumstances at that time to render a sale of them a matter of pressing moment. On the contrary, indeed, if they had been sold, nothing could have been done with the proceeds; nor did the parties interested require a sale. The application by Alice Buxton was made in the following October, the leasehold estates not being at that time adequate to the payment of the legacies. The executor, however, still entertained an opinion that it was not advisable to sell; and if he did exercise that discretion, as it was within his authority to do, there was no immediate purpose to which the produce could be applied.

*"Thus matters went on until the time arrived when there was a pressing necessity for realizing the whole of the assets, and [*877] then the bonds were sold at a price higher than they would have brought in July, though not so high as they would have produced in October, 1826. This, then, was the state of circumstances: there was property to be converted for a legitimate purpose, which purpose could not be carried into effect at the particular time, although, if the conversion had taken place at that time, a large profit would have been derived from the transaction. No authority has been produced in which, under such circumstances, the personal representatives of a testator have been held liable for the loss occasioned by their not selling at the earlier period. In *Lovson v. Copeland* (2 Bro. C. C. 156), an executor was held liable for a bond debt, which had been allowed to remain due for several years after the testator's death, the report stating, that only one application had been made to the obligor for payment, and that no further steps had been taken against him. These, too, are, in a certain sense, bond debts; but they could only be realized by a sale of the securities. In its circumstances, therefore,

that case was totally dissimilar to the present. The same observation applies to *Powell v. Evans* (5 Ves. 839), which was also the case of a bond debt: there, three years had elapsed from the death of the testator, and, besides the lapse of time, the executor had never, during that period, made any inquiry as to the circumstances or solvency of the obligor. Then comes the case of *Tebbs v. Carpenter* (1 Madd. 290), which, as reported, is a very strong decision; but whatever may be the merits of that case, it was a neglect sought to be charged on the executors for the loss of arrears of rent due for several years, and from a great variety of tenants. In the two cases first adverted to, there was not only considerable delay, far exceeding that which occurred in the present case, but also several additional circumstances implying or amounting to crassa negligentia on the part of the executors, and showing that they took no care or trouble, and did not attempt to exercise any judgment as to the time when the money should be called in.

"In the present case nothing of that kind can be imputed. On the part of the executor, there was a vigilant attention throughout; he exercised his best discretion, and, if he has erred, it was an error in the judgment he formed with respect to the propriety of leaving the property in that state of investment in which he received it from the testator. If, therefore, he was entitled to exercise a discretion—and the proof is that he [*878] did so, although he came to an unfortunate conclusion—the *question is, whether he is to be charged with the loss. I can find no case, and none has been produced, in which an executor has been called upon to bear the loss that has arisen, because, in the *bond fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately.

"If, then, an executor be, in general, entitled to exercise such a discretion, the next question is, how far that discretion was limited in the present instance by the application made to Buxton by his co-executrix; in other words, did that application render it his imperative duty to sell? If that were so, the effect would be to vest the whole discretion in Alice Buxton, and totally to deprive John Buxton of any. If a discretion rests with one of two executors, it must surely follow that the discretion cannot be taken away by the other coming to a different conclusion. One is not bound to agree with the other. In case of a diversity of opinion, they can only resort to some higher authority which is competent to control them both. The Master's view, however, was different, although certainly one would have supposed that the time which there was most reason to consider as the proper time was the month of July, soon after the time when the first application was made to the executor, rather than the following October. I cannot, therefore, think, that if Buxton was entitled to exercise a discretion in the matter, he was bound to surrender his own judgment, because one of his co-executors entertained a different

opinion from himself." And see *Prendergast v. Lushington*, 5 Hare, 171, 176; *Selby v. Bowie*, 4 Giff. 300; 11 W. R. (L. J.) 606.

Where a loss is occasioned in consequence of trustees having taken no steps at a proper period to get in the trust property, they will be liable for the loss (*Grove v. Price*, 26 Beav. 103; *Devaynes v. Robinson*, 24 Beav. 86; *Fry v. Fry*, 27 Beav. 144; and see *Wroe v. Seed*, 4 Giff. 425; *Grayburn v. Clarkson*, 3 L. R. Ch. App. 605). And in *Sculthorpe v. Tipper*, 13 L. R. Eq. 232, where the loss took place two years and a quarter after the testator's death, one of the trustees, who did not attain twenty-one until seventeen months after the death of the testator, was held liable equally with his co-trustees.

Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period from which the loss for which they are liable is to be calculated, as it depends upon the nature of the property and the evidence affecting it. Thus, in *Hughes v. Empson*, 22 Beav. 181, where the executors found a portion of the testator's property invested in Crystal Palace Shares, which were at a premium at the testator's death, but subsequently fell to a discount, *the ex- [*879] ecutors were charged by the certificate of the Chief Clerk with the value at the end of two months; but Sir J. Romilly, M. R., varied the certificate to twelve months. "I concur," said his Honor, "with the argument that there is no fixed period, and that it is impossible to say it is one year. You cannot fix one period for selling every species of property. Thus, suppose the testator possessed a large quantity of horses, it would be culpable to keep them, at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. . . . Under the circumstances, I consider that the executor may properly exercise a reasonable discretion, and I cannot fix any particular period. I think, in my own view, that two months would have been a reasonable time, but he might fairly have considered twelve months. I shall, therefore, only charge him with the loss which would have occurred if he had sold them at the end of twelve months. I have considered whether I could lay down any general rule, but find it impossible. The question depends on the particular nature of the property and the evidence affecting it." See also *Bate v. Hooper*, 5 De G. Mac. & G. 338; *Wilkinson v. Duncan*, 23 Beav. 469; *Grayburn v. Clarkson*, 3 L. R. Ch. App. 605.

The result of the authorities seems to be, that there is no fixed rule that conversion must take place at the end of the year from the testator's death, but that is the *prima facie* rule, and that executors who do not convert by that time must show some reason why they did not do so, and where the question is distinctly and fairly raised upon the pleadings, there is an onus thrown on the executors to justify the delay. Per Sir W. Page Wood, L. J., in *Grayburn v. Clarkson*, 3 L. R. Ch. App. 606; *Sculthorpe v. Tipper*, 13 L. R. Eq. 232.

In ordinary cases it is the duty of trustees to get in the trust funds, and

the Court charges them for neglecting that duty; but where a discretion is given to trustees upon the question, whether the funds should be got in or not, it is the duty of the trustees not to call them in, if in the exercise of their discretion they are of opinion that it is inexpedient to adopt that course. And in cases of this latter description, it is incumbent upon those who seek to charge a trustee to establish a case of misconduct on his part: *Paddon v. Richardson*, 7 De G. Mac. & G. 563, 582, 583.

As the Court, in the administration of an estate, would not permit a real security to be called in without an inquiry as to its expediency (*Howe v. Earl of Dartmouth*, 7 Ves. 150), so an executor is not obliged to call in a mortgage, if the security be good, and the money be not wanting to pay debts. "What," asks Lord Camden, "is *the executor to do? [*880] Is he to call in the securities before creditors require payment of their debts? Must the money lie dead without interest, or must he put it out on fresh securities? On the original securities he has the testator's confidence for his sanction; but on any new securities, it will be at his own peril. He should not be required to call in the securities until the creditors call for payment of their debts, or unless he has reason to suspect the solvency of the debtor:" *Orr v. Newton*, 2 Cox, 276. Even if a trustee found part of the trust funds invested upon a second mortgage, it does not seem that he would be bound to call it in. See *Robinson v. Robinson*, 1 De G. Mac. & G. 252.

If, however, a trustee has reason for supposing that a security is not good, his duty will be to call the money in at once: *Ames v. Parkinson*, 7 Beav. 384; *Harrison v. Theuton*, 4 Jur. N. S. 550.

Although an executor or administrator should have taken no steps at all to obtain payment of a sum of money, if it appears that, if he had done so, they would have been, or there is reasonable ground for believing that they would have been, ineffectual, then he is exonerated from all liability. Per Sir J. Romilly, M. R., in *Clack v. Holland*, 19 Beav. 271; and see *East v. East*, 5 Hare, 343, 348; *Maitland v. Maitland*, 16 Sim. 233; *Ratcliffe v. Winch*, 17 Beav. 217; *Hobday v. Peters*, 28 Beav. 603; *Ball v. Ball*, 11 Ir. Eq. Rep. 370, 375; *Stiles v. Guy*, 16 Sim. 232; *Maitland v. Bateman*, Ib. 233, n.; *Alexander v. Alexander*, 12 I. Ch. R. 1.

Trustees, in the exercise of a sound discretion, may release or compound a debt (*Blue v. Marshall*, 3 P. Wms. 381; *Ratcliffe v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 8 De G. Mac. & G. 827). And where trustees compounded with a bankrupt debtor to the trust, they have been held liable to make good the full amount of the debt, where it was impossible to show that the bankrupt would have obtained his certificate, or that the debt might not have been recovered in full: see *Wiles v. Gresham*, 5 De G. Mac. & G. 770; affirming S. C., 2 Drew. 258, where, however, Lord Justice Turner expressed a doubt whether the trustees should have been charged without further inquiry. See also *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. R. 125; *Re Alexander's Minors*, 13 I. Ch. R. 137.

But executors under wills executed since the 28th August, 1860, are authorized "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration, all debts, accounts, claims, and things whatsoever, *relating to the estate of the deceased without being responsible for any loss to be occasioned thereby." 23 & [881] 24 Vict. c. 145, s. 30.

When trustees are ordered by the Court to realize securities, and they neglect to do so, they will be liable for the loss sustained by their neglect, that is to say, the difference between the price which the securities actually realized, and that which they would have realized if sold at the time when the trustees were directed to sell them: *Davenport v. Stafford*, 14 Beav. 319, 338.

It is, moreover, the duty of trustees to do, or procure to be done, such acts as are necessary for the security of trust property, by putting it out of the power of third parties to deal with it. Suppose, for instance, the subject of a settlement is a fund standing in the names of other trustees of the settlor, the trustees of the settlement must give notice of it to the former trustees; for if they neglect to do so, and the settlor is thereby enabled to deal with the fund in favor of third parties, who gain priority by giving the first notice, the trustees of the settlement must make good the loss: *Jacob v. Lucas*, 1 Beav. 436; and see *Macnamara v. Carey*, 1 I. R. Eq. 35.

Upon the same principle, where a trustee of a settlement (requiring registration) neglected to see that it was registered, and by reason of his neglect the settlor was enabled to mortgage the property, he was held answerable for the loss occasioned thereby: *Macnamara v. Carey*, 1 I. R. Eq. 9. See also *Lester v. Lester*, 6 I Ch. Rep. 513.

As to the liability of a trustee who is abroad, see *Byrne v. Norcott*, 13 Beav. 336.

As to the Custody of Trust Property.—Trustees or executors are bound to take the same care of trust property as they would of their own; and if they have done so, they will not be liable for any accidental loss—as, for instance, by a robbery of the property while in their own possession (*Morley v. Morley*, 2 Ch. Ca. 2), or by a robbery or loss whilst in the possession of others with whom it has necessarily (that is to say, in the ordinary course of business) been intrusted. Thus, in *Jones v. Lewis*, 2 Ves. 240, where an administratrix put goods, to be delivered to the plaintiff, into the hands of her solicitor, from whom they were stolen, Lord Hardwicke held, that she was not liable for the loss. "I do not know," said his Lordship, "that bailees, executors, administrators, or trustees, are bound to keep goods always in their own hands. They are to keep them as their own, and take the same care. If, therefore, a man lodged trust-money with a banker, if lost, in many cases the Court has discharged

[*882] the trustee, especially if *lost out of the banker's hands by robbery. In the present case, what has been done is, what she would have done with her own, leaving them with her solicitor, in order to be delivered to the plaintiff when proper so to do. And why might she not do that? It is the same as if they had been in her own custody; and there is no pretence that they were collusively put into the hands of her solicitor. It would be too hard to charge her with these things lost."

So, executors or trustees will not be liable, if, in the ordinary discharge of their duty, they deposit the assets in a bank, although the bank may fail—if, for instance, in the case of executors, the deposit be made within a year after the testator's death, and it is necessary for them to have money *in hand* for the payment of debts, legacies, or other purposes (*Johnson v. Newton*, 11 Hare, 160; and see *Wilks v. Groom*, 3 Drew. 584; *Swinfen v. Swinfen*, 29 Beav. 211); or to keep money in the bank with the view of investing it in a mortgage, in order to meet deferred legacies: *Fenwick v. Clarke*, 31 L. J. N. S. (Ch.) 728.

Nor will they be liable for a deposit on a sale, necessarily left in the hands of the auctioneer as the agent both for them as vendors, and for the purchasers: *Edmonds v. Peake*, 7 Beav. 239. So, pending the preparation of a mortgage security, a trustee is justified in investing the money in Exchequer bills: *Matthews v. Brise*, 6 Beav. 239.

But if money be left unnecessarily in the hands or in the power of third parties, it will be at the risk of the trustees or executors; if, for instance, money be left in the hands of a banker more than a year after the death of a testator, and after debts and legacies have been paid, and whether it be productive or unproductive: *Darke v. Martyn*, 1 Beav. 525; *Moyle v. Moyle*, 2 Russ. & My. 710; *Gibbins v. Taylor*, 22 Beav. 344; *Rehden v. Wesley*, 29 Beav. 213; and see *Lunham v. Blundell*, 27 L. J. N. S. (Ch.) 179; *Browne v. Butter*, 24 Beav. 159. In *Castle v. Warland*, 32 Beav. 660, a testator died in August, 1861, and his executors remitted to their solicitor 80*l.* to obtain probate, and 25*l.* to pay legacy duty. The solicitor became bankrupt in November, 1861, and the money was lost. Sir J. Romilly, M. R., allowed the executors the 80*l.*, but not the 25*l.*, as it was advanced prematurely. So trustees will be liable for money left in a bank which fails, where it ought to have been paid into Court (*Wilkinson v. Bewick*, 4 Jur. N. S. 1010), or to new trustees: *Lunham v. Blundell*, 4 Jur. N. S. 3.

So, if money be handed by a trustee to his solicitor to invest, and the solicitor misapplies it, the trustee will be liable: *Bostock v. Floyer*, 1 L. R. Eq. 26; 35 Beav. 603.

[*883] *So, where trustees for sale, having sold the property, place the conveyance executed by them, and having their receipt indorsed, in the hands of a solicitor, who receives and misapplies the money, they are liable for a breach of trust: *Ghost v. Waller*, 9 Beav. 497; *Rowland v. Witherden*, 3 Mac. & G. 568.

So, where a trustee properly invested money in Exchequer bills, pending the necessary delay in completing a contemplated mortgage security, he was held by Lord Langdale, M. R., personally liable, because he left them undistinguished in the hands of the broker, who acted as banker: *Matthews v. Brice*, 6 Beav. 239. And a trustee or executor will also be liable, if, upon failure of a bank, it be found that the money has been placed to his own credit, or mixed with his own moneys: he ought to pay it to the credit of the trust; for if, instead of distinguishing it, he pays it to his own account, on his becoming bankrupt it would go to the credit of his estate; and if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid to his account. See *Massey v. Banner*, 1 J. & W. 241; *Wren v. Kirton*, 11 Ves. 377; *Pennell v. Deffell*, 4 De G. Mac. & G. 386, 392.

Although a trustee may not have parted with the control over a trust fund, so as to enable another person to deal with it without his concurrence, he will still be liable, if he parts with his *exclusive* control by associating and incorporating with himself the authority of another person. Thus, in *Sahway v. Sahway*, 2 Russ. & My. 215, a receiver paid into a banking house the sums he received to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held by Lord Brougham, reversing the decision of Sir John Leach, M. R. (reported 4 Russ. 60), that the receiver was liable for the loss. "Is it not," said his Lordship, "one part of the discretion of a trustee—taking him to be a mere naked trustee—is it not one part of the discretion of an agent, to whom the receiver may more properly be likened, to keep the funds in the hands of the bankers so long only as they shall be safely there lodged, and to seize the moment when peril threatens, to withdraw them to a place of safety? Will it be said, that he is able to exercise that discretion, when he has tied up his own hands, and can no longer exercise it himself, but must apply for the consent and co-operation of another?" This decision, under the name of *White v. Baugh*, was affirmed by the House of Lords: 2 Russ. & My. 220; 9 Bligh. 181; 3 C. & F. 44.

Upon the same principle, that *trust property ought not unnecessarily to be left with strangers, so it ought not to be left under [884] the entire control of a co-trustee. Thus, if money is paid into a bank, to the credit of the trust estate, it should be in the names of all trustees jointly, and to be payable upon their joint order or check. See *Clough v. Bond*, 3 My. & Cr. 490; there, on the death of Ann Dixon, intestate, administration of her estate was granted to her son, Thomas Reup Dixon, and her daughter, Emily Bond, the wife of John Bond. The assets were, in May, 1831, paid into a banking house, to the joint account of John Bond and Thomas Reup Dixon; and the whole of the fund, with the exception of the share of one of the next of kin, who was abroad, was soon

afterward paid away among the several parties entitled, by means of checks signed by the two persons in whose names the account stood. John Bond died in 1831, and ten months afterward Thomas Reup Dixon drew out the balance, and, having applied it to his own use, absconded. It was held, by Lord Cottenham, affirming the decree of Sir L. Shadwell, V. C. (reported 8 Sim. 594, nom. *Clough v. Dixon*), that the estate of John Bond was answerable for the loss. "It will be found," said his Lordship, "to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property, when it ought to be sold, and it be afterward lost, without any fault of his, he is liable: *Phillips v. Phillips*, (Freem. Ch. Ca. 11): or if he leave money due upon personal security, which, though good at the time, afterward fails: *Powell v. Evans* (5 Ves. 839); *Tebbs v. Carpenter*, (1 Madd. 290). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorized fund. Thus, he is not liable, upon a proper investment in the 3l. per Cents., for the loss occasioned by the fluctuations of that fund: *Peat v. Crane* (2 Dick. 499, n.); *but [885] he is for the fluctuations of any unauthorized fund: *Hancom v. Allen* (2 Dick. 498); *Howe v. Earl of Dartmouth* (7 Ves. 137-150, ante, p. *320). So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator: *Langford v. Gascoyne* (11 Ves. 333); *Lord Shipbrook v. Lord Hinchinbrook* (11 Ves. 252; 16 Ves. 477); *Underwood v. Stevens* (3 Mer. 712).

"Applying these principles to the present case, the inquiry is necessarily confined to two points: first, was the payment into Child's, of the money in question, in the joint names of Mr. Bond and Mr. Dixon, a proper mode of deposit? and, if not, secondly, was the loss occasioned by such mode of deposit? Bond had nothing to do with the estate, except as husband of the administratrix. During the coverture he was entitled

to interfere in her right; but that authority was determinable with the determination of the coverture. In the event, therefore, which happened, of his death before his wife, her authority would remain to be exercised by herself alone, and so she would be enabled to control her co-administrator—a security to the estate of which he had no right to deprive it. By depositing the money in his own name and that of the co-administrator Dixon, he did exclude the administratrix from ever possessing this control, so far as affects the funds in question, and, in the event of Dixon's death before him, gave to himself the absolute power over it, and in the event, which has happened, of his dying first, enabled Dixon to appropriate it to himself without the control of his co-administratrix. This mode of deposit, therefore, was an act by which, without necessity, one of the personal representatives was excluded, who had at one time possession, and by which exclusive possession was likely to vest in a person not entitled to it; and, that event having happened, and such person having, by virtue of such possession, appropriated the fund to himself, there can be no doubt that the deposit was improper, and that it has been the cause of the loss. The principle, therefore, of the case referred to, subjects Bond's estate to the liability of making good this fund; for, although the wife was the personal representative, and she survives, yet the devastavit consisted in the improper deposit, which took place during the coverture; the money *lost was part of the estate which came to the hands of the husband, and from which nothing has taken place that can [*886] discharge him. He was himself the author of the devastavit, and his estate is liable. . . . I have, therefore, no difficulty in dismissing the petition of appeal with costs:" *Trutch v. Lamprell*, 20 Beav. 116; *Browne v. Butter*, 24 Beav. 159.

So, where two trustees, instead of investing the trust moneys on proper securities, deposited them in a bank, and the surviving trustee drew out the balance and applied it to his own use, it was held by Sir J. Romilly, M. R., that the estate of the deceased was liable to make good the loss: *Gibbins v. Taylor*, 22 Beav. 344. See also *Ingle v. Partridge*, 32 Beav. 661; 34 Beav. 411.

When the trust funds comprised stocks or securities which were payable to bearer and passed by delivery, and of which the interest was payable upon coupons, it has been held that the trustees might, without a breach of trust, deposit such securities in a box at a banker's on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons; and though the bankers, without the privity or concurrence of the co-trustees, delivered the box to the trustee who had the key, the co-trustees remaining ignorant of the fact, were not liable to make good securities which the latter subsequently withdrew from the fund: *Mendes v. Guedalla*, 2 J. & H. 259.

But where two of three trustees had committed a box containing such securities to the third (a stock broker) for the purpose of conversion, it

has been held that they were bound to ascertain, when the box was returned to the bankers, that such conversion had been effected, and the new securities restored to the joint custody of all the trustees (*Ib.*); and where two of three trustees under such circumstances rested satisfied with the assurance of the solicitor for the trust that he had seen the box returned to the bankers without more, it was held by Sir W. Page Wood, V. C., that they were liable to make good such of the new securities as the third trustee had appropriated to his own use (*Ib.*).

Trustees authorized by a testator to invest his property upon the stocks, shares, or securities of any incorporated company paying a dividend are not justified in allowing part of his assets to remain on shares, as invested by the testator himself, which by the rules of the company could only stand in the name of a single trustee (*Consterdine v. Consterdine*, 31 Beav. 330), but where such shares were specifically bequeathed, it has been held that they might, with the consent of the tenant for life, be lawfully held in the sole name of one trustee (*Ib.*).

[*887] *Where the trust has terminated, trustees will be justified in paying the proceeds of the trust estate to an executor of the person absolutely entitled, and they will not be liable for his misapplication of it. Thus, in *Waugh v. Wyche*, 2 Drew. 318, a trustee of the legal estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor. It was held by Sir R. T. Kindersley, V. C., that the money having got into the hands of the executor, the trustee was not liable. See also *Hayes v. Oatley*, 26 L. T. Rep. (N. S.) 816.

As to Investment.—Notwithstanding the opinion of Lord Northington, in *Harden v. Parsons*, 1 Eden, 148, it is clear that trustees or executors will not be justified in lending the trust-money on personal security (*Terry v. Terry*, Prec. Ch. 273; *Adye v. Fuilleteau*, 1 Cox, 24; *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 63; *Drake v. Martin*, 1 Beav. 525), although it be joint (*Holmes v. Dring*, 2 Cox, 1), or with sureties (*Watts v. Girdlestone*, 6 Beav. 188), unless they have an express authority to do so (*Forbes v. Ross*, 2 Bro. C. C. 430; *S. C.*, 2 Cox, 113; *Child v. Child*, 20 Beav. 50; *Pickard v. Anderson*, 13 L. R. Eq. 608); mere general expressions, leaving the nature of the investment apparently discretionary, not being sufficient (*Pocock v. Reddington*, 5 Ves. 794; *Wilkes v. Steward*, G. Coop. 6; *Mills v. Osborne*, 7 Sim. 30); and trustees authorized to lend money on personal security will not, unless expressly authorized so to do (*Paddon v. Richardson*, 7 De G. Mac. & G. 563), be allowed to lend to one of themselves (*Forbes v. Ross*, 2 Bro. C. C. 430; 2 Cox, 113; ——— v. *Walker*, 5 Russ. 7; *Stickney v. Sewell*, 1 My. & Cr. 814; *Francis v. Francis*, 5 De G. Mac. & G. 108), or to a relation, for the purpose of accommodating him (*Langston v. Ollivant*, G. Coop. 33; *Stickney v. Sewell*, 1 My. & Cr.

15; *Cock v. Goodfellow*, 10 Mod. 489; *Fitzgerald v. Pringle*, 2 Moll. 534). And the terms upon which money is authorized to be lent upon personal security must be strictly complied with. Thus, if a power is given to trustees to lend the trust-money to the husband, on his bond, *with the consent of his wife in writing*, the trustees will be liable, if they lend to the husband without the security of a bond, or without having previously obtained the wife's written consent (*Cocker v. Quayle*, 1 Russ. & My. 535); her subsequent consent, though in writing, will not exonerate them: *Bateman v. Davis*, 3 Madd. 98.

Where, however, trustees had power to lend a certain sum to a * tenant for life, the power was held not to be exhausted by one loan, [*888] but that, after repayment, it might be exercised by lending the same sum again (*Versturme v. Gardiner*, 17 Beav. 338); and where a testator empowered his trustees to lend such part of the trust-moneys as they should think proper to A. and B., who were respectively his son and son-in-law, it was held that this authorized a loan to either: *Parker v. Blozam*, 20 Beav. 295.

It is not necessarily a breach of trust for an executor to take a new bond in lieu of an old one, instead of calling up the money due thereon. In *Charlton v. Earl of Durham*, 4 L. R. Ch. App. 433, a testator gave the residue of his estate to two executors upon certain trusts. Part of his estate consisted of a bond, given by the trustees of a minor, who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly, in the place of the bond given by the trustees. Ten years afterward a part of the money was paid by the obligor to one of the executors, who misappropriated the money. It was held by the Lords Justices, affirming the decision of Sir W. M. James, V. C., that, under the circumstances, the acceptance of the bond from the obligor, in the place of the bond from his trustees, was not a breach of trust by the executors.

Until the recent interposition of the legislature, in the absence of any express authority to invest, although some judges have thought that an executor or trustee would be justified in making an investment upon good real securities (*Brown v. Litton*, 1 P. Wms. 141; *Knight v. Earl of Plymouth*, 1 Dick. 126; *Pocock v. Reddington*, 5 Ves. 800), the current of decisions appears to have been against such an investment (*Ex parte Calthorpe*, 1 Cox, 192; *Norbury v. Norbury*, 4 Madd. 191; *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgeway*, 1 Hog. 309; *Ex parte Ellice*, Jac. 234; *Raby v. Ridehalgh*, 7 De G. Mac. & G. 104); *a fortiori* if an investment in the funds were directed (*Pride v. Fooks*, 2 Beav. 430).

Nor would trustees or executors have been justified, without an express authority, in investing money in any other stock or funds than *Government or Bank Annuities*; for example, as observed by Lord Hardwicke, "Neither South Sea Stock nor Bank Stock are considered as good security,

because they depend upon the management of the governor and directors, and are subject to losses; for instance, it is in the power of the South Sea Company to trade away their whole stock while they keep within the terms of their charter. But South Sea Annuities and Bank Annuities are of a different consideration; the *directors have nothing to do with the principal, and are only to pay the dividends and interest till such time as the government pay off the capital; and it is not in their power to bring any loss upon them, and they therefore are only and properly good securities:" *Trafford v. Boehm*, 3 Atk. 444; and see *Howe v. Earl of Dartmouth*, ante, p. *320; *Mills v. Mills*, 7 Sim. 501. And as the Court has selected for its own purposes the 3l. per Cent. Consolidated Bank Annuities, trustees or executors could not, upon a proper investment in the 3l. per Cents., be liable for any loss occasioned by the fluctuations in that fund: *Peat v. Crane*, 2 Dick. 499, n.; *Clough v. Bond*, 3 My. & Cr. 496. It would, indeed, appear, from *Hansom v. Allen*, as reported in 2 Dick. 498, that trustees would be held liable for any fluctuation in the value of any government funds in which they invested, instead of the 3l. per Cent. Consolidated Bank Annuities; but that case, which, however, is no authority for such a proposition, was afterward reversed in the House of Lords (see 7 Bro. P. C. 375, Toml. edit.); and it is by no means probable that the Court would act with such harshness.

Where it was more convenient to invest trust funds in the 3l. per Cents. Reduced, as where the income of the trust fund was directed to be paid on the days when the dividends of the 3l. per Cents. Reduced were payable, an investment in that stock would be directed by the Court: *Caldecott v. Caldecott*, 4 Madd. 189.

If power be given to the trustees by the instrument creating the trust to invest in the public funds, or upon government or real securities, the trustees are not confined to 3l. per Cents., but may invest in any other government security; *Baud v. Fardell*, 7 De G. Mac. & G. 628.

As to investments in Exchequer Bills, see *Ex parte The Southeastern Railway Company*, 9 Jur. 650; *Ex parte Chaplin* 3 Y. & C. Exch. Ca. 397; *Knot v. Cotte*, 16 Beav. 77.

Although trustees may have full power by a will to invest money as in their absolute discretion they may think fit, that will not enable them, in favor of a tenant for life and so as to bind remainder-men, to invest upon securities which at the time are commanding a higher rate of interest in consequence of their being determinable: *Stewart v. Sanderson*, 10 L. R. Eq. 26.

Of late the legislature has on several occasions very widely enlarged trustees' powers of investment. Thus, by 22 & 23 Vict. c. 35, s. 32, it is enacted that, "When any trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom,

*or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." It having been held that this section did not apply to trustees appointed by instruments executed and in operation before the passing of the Act (*Re Miles' Trusts*, 27 Beav. 579), it has since been made retrospective by 23 & 24 Vict. c. 38, s. 12. [*890]

Again, by general order made the 1st day of February, 1861, in pursuance of 23 & 24 Vict. c. 38, s. 10, "Cash under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, and 2l. 10s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3l. per Cent. Annuities, Reduced 3l. per Cent. Annuities, and New 3l. per Cent. Annuities." And since the making of the general order of the 1st of February, 1861, trustees, executors, or administrators, *having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities*, or any of them, may invest such trust funds, or any part thereof, in any of the stocks, funds, or securities, in or upon which by such general order cash under the control of the Court may from time to time be invested: 23 & 24 Vict. c. 38, s. 11.

As might have been supposed, there have been numerous decisions upon the construction and operation of these Acts, which it may be useful to mention.

In the first place, it has been decided that the 32d section of 22 & 23 Vict. c. 35, does not apply to a case where the trust fund is already invested in Bank Annuities; and the trustee has no power, independently of the Act, to vary any investment: *In re Warde*, 2 J. & H. 191.

Bank Stock and East India Stock are clearly within both the Acts and orders, but not, it seems, the New East India Loan: *Peillon v. Brookings*, 4 L. T. Rep. N. S. 731. And the Court will in no case authorize an investment in the New East India Loan: *Re Colne Valley and Halstead Railway*, Johns. 528; 1 De G. F. & Jo. 53; *Re Fromow's Estate*, 8 W. R. (V. C. S.) 272.

As a general rule, it seems, upon the application of the tenant for life, in the absence of special circumstances, making an increase of income beneficial to those in remainder, irrespective of pecuniary calculations, the Court will not authorize a transfer from Consols, or New Three per Cent. Stock, into another investment *authorized by 23 & 24 Vict. c. 39, and producing a larger income, if on pecuniary calculation it may be injurious to those in remainder. See *Cockburn v. Peel*, 3 De G. F. & Jo. 170, 172, where a transfer from Consols into East India Stock was refused: see *In re Boyce's Minors*, 1 I. R. Eq. 45. [*891]

There are, however, cases where, from the exigencies of families, it

would be desirable for the children that the income of the parents should be increased, and in such cases the circumstances should be stated in the petition: per Turner, L. J., in *Cockburn v. Peel*, 3 De G. & Jo. 174. And see *Hurd v. Hurd*, 11 W. R. (V. C. K.) 50; *Vidler v. Parrott*, 12 W. R. (V. C. K.) 976.

In the *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379, a fund in Court was ordered to be invested in Bank Stock and East India Stock on the application of the tenant for life, herself the settlor, the reversioners who opposed such investment being only volunteers. And see *Bishop v. Bishop*, 9 W. R. (V. C. K.) 549.

So where the object of the trusts is to produce a certain annuity for the tenant for life, and trustees have the power of varying securities if an investment in Parliamentary Stocks of Great Britain according to the power should prove insufficient to produce the annuity, the Court, on finding that to be the case, will, on the application of the person entitled to the annuity, and without the consent of those entitled in remainder, direct the conversion of the Parliamentary Stock into East India Stock: *Mortimer v. Picton*, 12 W. R. (L. C.) 292.

The Court, however, seems more readily to order Consols in Court to be invested in Bank Stock (*Cohen v. Waley*, 9 W. R. (V. C. S.) 137; *Re Langford's Trusts*, 2 J. & H. 458; *In re Boyce's Minors*, 1 I. R. Eq. 45), or upon mortgage of freehold securities (*Re Simson's Trusts*, 1 J. & H. 89; and see *Mortimer v. Picton*, 12 W. R. (L. C.) 292).

Where a testator died in 1854, being possessed among other personalty of English and Irish Bank Stock, having by his will given the same to trustees upon trust to convert such part of his personal estate as should not consist of money or securities for money in government securities into money, and to invest the same in the public stocks or funds of Great Britain, and to stand possessed thereof upon trust for several persons in succession, and the Bank Stock was not converted at the time of the passing of 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, it was held by the Lords Justices, after the passing of those Acts, that the trustees were not bound to convert the Bank Stock, and that for the period between the [*892] death of the testator and the passing of 22 & *23 Vict. c. 35, the tenant for life was not entitled to the full dividends of the Bank Stock, but to an amount equal to the dividends of so much Consols as might have been purchased, if the Bank Stock had been sold and converted into stock immediately after the testator's death: *Hume v. Richardson*, 10 W. R. (L. J.) 528; 8 Jur. N. S. 686.

When the fund is not in Court, trustees, in making an investment in East India Stock, will be entitled to the protection of the Court, if they act bona fide to the best of their discretion: *Cockburn v. Peel*, 3 De G. & Jo. 174, per Turner, L. J.

Doubts having arisen as to the legal effect and signification of the words "East India Stock" in the 32d section of 22 & 23 Vict. c. 35, it

was by 30 & 31 Vict. c. 132, enacted "that the words 'East India Stock' in the Act passed in the session holden in the 22d and 23d years of Her Majesty, c. 35, shall include and express as well the East India Stock which existed previously to the 13th day of August, 1859, when the said Act received the assent of Her Majesty, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received Her Majesty's assent on or after the 13th day of August, 1859; and it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th day of August, 1859." (Sec. 1.) And it is also enacted "that it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control, in any securities the interest of which is or shall be guaranteed by Parliament, to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid." (Sect. 2.)

Money received by trustees upon a sale, under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120; 23 & 24 Vict. c. 38), may be invested in any of the investments in which cash under the control of the Court may be invested: *In re Cook's Settled Estates*, 12 L. R. Eq. 12; and see *Wall v. Hall*, 11 W. R. 298; *In re Birmingham Blue Coat School*, 1 L. R. Eq. 632; *In re Wilkinson's Estate*, 9 L. R. Eq. 343.

By another Act it is enacted that trustees having trust-money in their hands *which it is their duty to invest at interest*, shall be at liberty, at their discretion, to invest the same in any of the Parliamentary Stock, or public *funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds [*893] invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment, as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person: 23 & 24 Vict. c. 145, s. 25.

Where trustees or executors are authorized to advance money upon mortgage, if they act with ordinary prudence, they will only advance two-thirds of the value of property even of a permanent value—as freehold land; but the same rule does not apply to property in houses and buildings, which fluctuates in value and is always deteriorating, upon which still less ought to be advanced, especially where they are used in trade,

and whose value depends upon the accidental absence of competition in trade: see *Stickney v. Sewell*, 1 My. & Cr. 9: in which case it was also held, that trustees are not justified in lending money upon mortgage to one of themselves. See also *Macleod v. Annesley*, 16 Beav. 600; *Stretton v. Ashmall*, 3 Drew. 9; *Fowler v. Reynal*, 2 G. & Sm. 749; 3 Mac. & G. 500; *Waring v. Waring*, 3 Ir. Ch. Rep. 331; *Francis v. Francis*, 5 De G. Mac. & G. 108; *Vickery v. Evans*, 33 Beav. 376.

When trustees advance money *bonâ fide* upon the mortgage of property, after it has been duly surveyed and valued by a competent person, they will not be liable, although eventually less may be realized by the mortgaged estate than the sum advanced (*Jones v. Lewis*, 3 De G. & Sm. 471); but the evidence of the mortgagor, or his steward, or land agent, would not be considered as proper evidence of the value, as they are not disinterested persons: *Morris v. Wright*, 14 Beav. 291, 301.

It seems to be at least doubtful whether a trustee is not guilty of a breach of trust in advancing trust-money upon a *second* mortgage, unless he get the legal estate: at all events the circumstance of an advance being upon a second mortgage makes it the more incumbent upon a trustee to look more strictly at the question of value than if it were a first mortgage. See *Morris v. Wright*, 14 Beav. 291, 307, 308. In [*894] **Drozier v. Brereton*, 15 Beav. 221, where trustees lent trust-moneys on a *second* mortgage of house property greatly out of repair, and the principal was lost, it was held by Sir John Romilly, M. R., that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declared they should not be liable for the insufficiency or deficiency in value of any securities, except through their willful default.

Where a trust fund is lost in consequence of the ignorance or the negligence of the solicitor employed by the trustees to invest it upon a mortgage, as, for instance, by his not inquiring whether incumbrances had been created, or not obtaining a sufficient abstract of title, or a proper valuation of the proposed security, the loss will fall on the trustees, and not on the *cestuis que trusts*: *Hopgood v. Parkin*, 11 L. R. Eq. 74; whether this would be the case if a fraud were practiced upon the trustees, is questioned. *Id.* 74. However, in *Eaves v. Hickson* (30 Beav. 136), Lord Romilly, M. R., held, that if a person obtained trust property from trustees by means of a forgery, the loss fell on them, and not on the *cestuis que trusts*. So, in *Sutton v. Wilders*, 12 L. R. Eq. 373, trustees employed Mousley, a solicitor, to invest a sum of 5500*l.* This solicitor was the only one employed in the transaction, both by the trustees and the mortgagor. It turned out that the mortgagor, who had conveyed property to the trustees in fee, to secure the 5500*l.*, was only a tenant for life thereof, with power to raise 2500*l.* for his own benefit, and that the said deed had been altered after execution, by turning the 2500*l.* into 5500*l.* Upon the death of the mortgagor, the solicitor having died insolvent, and the security proving insufficient, it was held by Lord Romilly,

M. R., that the trustees were liable for the loss occasioned to the trust estate. "If trustees," said his Lordship, "employ a solicitor who neglects his duty, the principals are liable. Here it is even more so, because the trustees did not examine anything, or require any opinion on the title, or the like, but trusted implicitly to their solicitor who defrauded them. . . . Either Mousley was or was not their solicitor. If he was not, they did not take proper precautions by applying to their own solicitors; and if he was, then they employed the solicitor of the mortgagor, which, though not of itself culpable, requires trustees who do so to take additional precautions. If it be said the loss was caused by forgery, and that no precaution would have prevented it, then I have held, that when a forgery is committed upon any person, the loss must fall on him, whether he be the principal or trustee; and this view of mine *has, I believe, been affirmed by the House of Lords in the case of a forgery upon [895] one of the railway companies: *Midland Railway Company v. Taylor*, 8 Ho. Lo. Ca. 751." See also, *Bostock v. Floyer*, 1 L. R. Eq. 26.

A rent-charge charged on land by virtue of the Drainage Act (12 & 13 Vict. c. 100) is not to be deemed such an incumbrance as shall preclude a trustee of money held in trust, and with a power for the investment thereof in the purchase of land or on mortgage, from investing the same in a purchase thereof, or upon a mortgage of such land so charged, unless the terms of such trust or power shall expressly provide that the land to be so purchased or taken in mortgage shall not be subject to any rent-charge under the provisions of the Act: sect. 20.

It seems that it is not a breach of trust in a trustee to take a mortgage without a power of sale: *Farrar v. Barraclough*, 2 Sm. & Giff. 231.

An investment on an assignment by a railway company of "the undertaking tolls, &c.," the principal not payable till seven years, is an improper investment, although the trustees have power to invest in real securities: *Mant v. Leith*, 15 Beav. 524.

An investment in railway mortgages and railway debenture stock is not authorized by a power to invest "upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments:" *Mortimore v. Mortimore*, 4 De G. & Jo. 472. Nor does a power to invest funds "upon the security of the funds of any company incorporated by Act of Parliament warrant their investment in preference railway shares:" *Harris v. Harris*, 29 Beav. 107.

A power, however, to invest "upon the stock, shares, or securities of any incorporated company paying a dividend, authorizes an investment in railway stock bearing a fixed rate of interest:" *Consterdine v. Consterdine*, 31 Beav. 330.

By the Debenture Stock Act, 1871 (34 Vict. c. 27), it is enacted, that "where a power has before the passing of this Act been or shall at any time hereafter be given to trustees (including executors and administrators, and any other persons holding funds in a fiduciary capacity) to

invest trust funds in the mortgages or bonds of a railway company, or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock of a railway company, or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly." (Sect. 1.)

[*896] A power to invest "upon freehold or copyhold hereditaments" *authorizes an investment upon the mortgage of freehold ground rents: *Vickery v. Evans*, 12 W. R. (M. R.) 237.

A power, however, to invest in government stock, or upon real securities, does not authorize a sale of stock and the investment of the proceeds on a mortgage for securing the retransfer of the stock: *Whitney v. Smith*, 4 L. R. Ch. App. 513.

The Court does not seem inclined in the case of infants to transpose trust-moneys from the funds to mortgage securities under a power, for it has been said "that in ninety-nine cases out of a hundred the expenses arising from a mortgage security more than counterbalance the increase of income:" *Barry v. Marriott*, 2 De G. & Sm. 491. And see *Ex parte Franklyn*, 1 De G. & Sm. 528.

But it is not necessarily a breach of trust under a will containing a direction to invest on real securities, to continue in their actual state of investment part of the assets consisting of turnpike bonds: *Robinson v. Robinson*, 1 De G. Mac. & G. 247: see also *Halgate v. Jennings*. 24 Beav. 623.

It seems that when part of the testator's property is invested on mortgage an executor is justified in making such further advances as may be absolutely necessary to secure the first advance. It would be dangerous to lay down any rule which would prevent an executor from exercising a *bond fide* discretion in any such case, or even to charge him with a devastavit in case the result should disappoint his expectations. But if a loss should be the result, it appears to be a preliminary condition, before such advances could be allowed to him in taking his accounts, that he should have carefully investigated the probabilities of success, before he advanced the money of his cestuis que trust for any such purpose: *Collinson v. Lister*, 20 Beav. 356, 366.

Trustees, authorized to advance money upon landed securities in England, Wales, or Great Britain, may, under 4 & 5 Will. 4, c. 29 (Lynch's Act), unless expressly restricted, advance money upon real securities in Ireland, with the consent of the person whose consent may be required. And if infants unborn, or insane persons, are interested, the loan must be made under the direction of the Court, obtained in a cause or upon petition in a summary way. See *Ex parte French*, 7 Sim. 510; *Morris v. Wright*, 14 Beav. 291; *Ex parte Lord William Pawlett*, 1 Ph. 570. See also, 22 & 23 Vict. c. 35, s. 32, ante, p. *889.

If trustees bound by the terms of their trust to invest money in the

public funds, instead of doing so, retain the money in their hands, the cestui que trust may elect to charge them either with the amount of the money, or with the amount of the stock which they might *have [*897] purchased with the money: *Shepherd v. Mouls*, 4 Hare, 303.

Where there are no circumstances to lead to the conclusion that an executor has made any profit by his misconduct, in retaining in his hands the funds which he ought to have invested, he will not be charged with interest at five per cent., or upon the principle of annual rests, but with simple interest at four per cent. (*Attorney-General v. Alford*, 4 De G. Mac. & G. 843, and cases there cited; *Turner v. Mxule*, 3 De G. & Sm. 497); but where there is an express trust for accumulation, a trustee retaining trust funds in his hands will be charged with interest at 4l. per cent. with annual rests: *Knott v. Cottee*, 16 Beav. 77, 80. The pendency of an administration suit in the Duchy Court of Lancaster is no justification for non-investment by personal representatives: *Holgate v. Haworth*, 17 Beav. 259.

As to charging trustees with interest on trust-moneys which they have retained and dealt with improperly, see note to *Robinson v. Pett*, ante, p. *240.

The question has arisen, whether, where there are several distinct investments by trustees not authorized by the trust, in some of which a loss has been incurred for which the trustees are chargeable, and on others there has been a gain, which the trustee has no right to claim for his own benefit, the Court will set off one against the other. Lord Langdale, however, held that such set-off could not be allowed. "I could not," said his Lordship, "enable a trustee thus to repay himself for the losses which he has sustained, without giving him the benefit acquired from a fortunate but improper investment of the trust funds. I have no authority to do that, that I am aware of:" *Robinson v. Robinson*, 11 Beav. 371, 375. This case was reversed upon another point, but this does not affect Lord Langdale's opinion upon this question. See also, *Wiles v. Gresham*, 2 Drew. 271. Indeed, Lord St. Leonards, in a bill he brought in, had a clause enabling the Court to set off the losses against the gains of trustees in such cases, but it did not obtain the sanction of the legislature.

If trustees are directed to invest trust-money on *government or real securities*, and they do neither, after some conflict of decisions it has been finally settled, that in such cases cestuis que trusts will not be allowed the option of charging trustees with the moneys which would have been produced if the trust-moneys had been invested in the funds, and that they are only entitled to have the trust-moneys replaced, with interest at 4l. per cent. See *Marsh v. Hunter*, 6 Mad. 295; *Shepherd v. Mouls*, 4 Hare, 500; *Rees v. Williams*, 1 De G. & Sm. 314; *Robinson v. *Rob-* [*898] *inson*, 1 De G. Mac. & G. 247, reversing *S. C.*, 11 Beav. 371; and see *Knott v. Cottee*, 16 Beav. 77, 80; *Aspland v. Watte*, 20 Beav. 474. We may, therefore, consider the cases of *Hockley v. Bantock*, 1 Russ. 141;

Kellaway v. Johnson, 5 Beav. 319; *Watts v. Girdlestone*, 6 Beav. 188 and *Ames v. Parkinson*, 7 Beav. 379, to be overruled.

If trustees invest trust-moneys on an unauthorized security, they are responsible for any future loss traceable to that first error: *Fyler v. Fyler*, 3 Beav. 550. And where they have committed a breach of trust by an improper sale of the trust-fund, they will not be discharged from the consequences of that breach of trust by replacing the fund in some other stock, not being the stock the sale of which constituted the breach of trust. Thus, in *Lander v. Weston*, 3 Drew. 389, trustees sold stock, and lent the money to the tenant for life on improper security: one of them died, and the survivor received the money lent, and invested it in a different security, and shortly afterward sold it out, and again lent it to the tenant for life, and it was lost. It was held by Sir R. T. Kindersley, V. C., that the original breach of trust was not cured, and that the estate of the deceased trustee was liable for the whole fund.

And where the executor of a trustee had been ordered by the Court to invest a sum of money in stock, to the credit of a cause, and he neglected to do so for two years, during which the funds fell, it was held by the Master of the Rolls of Ireland (Smith) that he was bound to pay the price of the sum in stock: *Geraghty v. Geraghty*, 3 Ir. Ch. Rep. 414.

Of late very wide powers of investment are given to trustees, but such powers should be exercised by them with due caution. Thus, before trustees invest any money in any company authorized by the power, they must make every necessary inquiry and satisfy themselves that it is really a solvent company: *Consterdine v. Consterdine*, 31 Beav. 333.

Where trustees have advanced trust-moneys in a manner not authorized by the trust, a bill may be filed in equity to recover the moneys so advanced by a breach of trust, the remedy in such a case not being confined to a Court of law. See *Hardy v. Metropolitan and Finance Company*, 7 L. R. Ch. App. 427. There, the directors of a building society deposited money in a manner unauthorized by their rules, with a finance company, the manager of which was the manager of the building society. Afterward, the deposit was called in, and the directors of the finance company gave a check for the amount to their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was then [†899] filed by the trustees of the building society to recover the money from the finance company. It was held by the Lords Justices, reversing the decision of Lord Romilly, M. R. (reported 12 L. R. Eq. 386), that the manager held the money as agent for the finance company, until he should pay it to some person competent to give a receipt on behalf of the building society; and that as he had never paid it over, the money must be taken to be still in the hands of the former company, who were liable to repay it to the building company. And also, that as it was trust-money, a suit to recover it was maintainable, and the finance company were accordingly ordered to repay the money with interest.

How far persons are liable for the Acts or Defaults of Co-trustees and Co-executors.—In the principal case of *Townley v. Sherborne*, so far back as the reign of Charles I, it was held by Lord Keeper Coventry, who justly considered it a matter of great consequence, after much deliberation, that a trustee should not be liable for the acts or defaults of his co-trustee. And see *Leigh v. Barry*, 3 Atk. 584; *Anon.*, 12 Mod. 560. The same rule seems also to be applicable as between co-executors: *Hargthorpe v. Milforth*, Cro. Eliz. 318; *Anon.*, Dyer, 210, a. Where, for instance, as in *Townley v. Sherborne*, one trustee receives the rents of the trust-estate, or one executor receives part of the assets (*Littlehales v. Gascoyne*, 3 Bro. C. C. 73; *Riky v. Kemmis*, 1 L. & G. t. Sugd. 122, and cases in note; *Williams v. Nizon*, 2 Beav. 472), his co-trustee or co-executor will not ordinarily be liable for any misapplication thereof: and see *Cottam v. Eastern Counties Railway Company*, 1 J. & H. 243.

But any fraud, or improper dealing, or gross negligence, on the part of a trustee or executor, where, for instance, he stands by and sees a devastation or breach of trust committed by his co-trustee or co-executor, will render him likewise responsible for it. Thus, in *Mucklow v. Fuller*, Jac. 198, it was held by Lord Eldon, that a trustee, who, as executor, had proved the will, thereby became liable, notwithstanding the usual indemnity clause, to make good the loss occasioned by his suffering a debt due from his co-executor and co-trustee to remain, contrary to the directions of the testatrix, outstanding. But his Lordship said that there might, if necessary, be an inquiry, if the money could have been received from the co-trustees. See also *Candler v. Tillet*, 22 Beav. 257. So, in *Booth v. Booth*, 1 Beav. 125, a testator bequeathed to Booth, his partner in a trade, and to Batkin, his personal estate, upon trust to place the same out at interest, upon some good and *sufficient security or securities, for the benefit of his wife and children. Booth and Batkin both [900] proved the will, and Booth retained the testator's moneys in the trade, which were lost. Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it. It was held by Lord Langdale, M. R., that Batkin was responsible for the consequences of the breach of trust. "The two executors," observed his Lordship, "proved the will; they take on themselves the trust and the duty of performing it. From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately, did not consider, that, by proving the will, he had undertaken any duty, or incurred any responsibility. He says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty, or be responsible for anything. It is important that it should be well understood, that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken. I am of opinion that he became liable for the

performance of the trusts, and for any consequences arising from a breach of them.

"Part of the testator's property was engaged in trade; that trade ought to have been put an end to, and the property invested. Batkin, it appears, went to the place of business from time to time; and it is, therefore, clear that he knew what ought to be done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive, no receipt of money which he misapplied, to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken. He permitted his co-executor to carry on the trade, and, consequently, must be considered in this Court a party to this breach of duty. It is said, in extenuation, that he did this from the best motives; he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the children. All this might have been very right to do and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment; he could not, however, so act without incurring that responsibility, if a loss occurred." See also *Dix v. Burford*, 19 Beav. 409.

[*901] And not only where a person *permits a co-executor to remain without paying a debt due to the testator, but also where he passively allows him to receive the assets, and retain them in his hands without properly investing them, he will be liable for any loss which may be thereby occasioned, not because, through any act of his, the co-executor obtained possession of the assets, but from the fact of his having permitted a breach of trust by not having taken effectual measures to correct it and secure the property. See *Lincoln v. Wright*, 4 Beav. 427. These authorities, which are opposed to some early dicta, have been examined and approved of by Lord Cottenham, in the leading case of *Stiles v. Guy*, 1 Hall & T. 523; *S. C.*, 1 Mac. & G. 422, who (affirming the decree of Sir L. Shadwell, V. C., 16 Sim. 230) held executors liable to make good the loss arising to the testator's estate, by reason of their allowing a co-executor, who, at the death of the testator, had part of the estate in his hands, to retain it until he became bankrupt. "If," observed his Lordship, "a person named executor does not choose to accept the office, he has only to renounce, or, at least, to abstain from proving. But if he proves, he thereby accepts the office, and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has the means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for

the purposes of the will, is it not part of the duty which he has undertaken, to interfere and take measures, if necessary, for putting such property in a proper state of investment? Or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction." And, after citing *Mucklow v. Fuller*, *Booth v. Booth*, and *Lincoln v. Wright*, his Lordship adds, "From what I have already said, it will have been seen that I approve of the principle of these decisions, and that I cannot discover any principle for distinguishing between losses by not calling in debts due from debtors to the estate, and balances due from executors. These cases establish, that it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other; and the moment that principle is established, all ground of distinction between the two classes of cases ceases.

"Finding, therefore, a principle adopted and acted upon for many years, and in many decisions, of the justice and grounds of which I fully *approve, I cannot feel any disposition to shake its authority, [*902] because I cannot reconcile it with dicta and doctrines of a much earlier date, respecting the security of an executor who is passive.

"I have discussed this case much more at large than any difficulty in it would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors to the consideration that they cannot safely rely upon what they may find in the earlier cases, laying it down that a devastavit by one of two executors shall not charge his companion, provided he has not, intentionally or otherwise, contributed to it. The later authorities to which I have referred must show them that passiveness will in many cases furnish no protection, but that negligence and inattention in not interfering with and taking proper measures to prevent or correct the improper conduct of their co-executor, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear in this case to be free from any moral blame: they derived no benefit, but have suffered much from the breach of trust of Anthony Guy; but they knew that part of the testator's property remained in his hands, and that it was, therefore, not in a proper state of investment. They knew, therefore, that a breach of trust by him was actually in operation; and, excepting some unprofitable applications for accounts and a settlement, nothing was done by them to secure the property so known by them to be in peril." See also *Scully v. Delany*, 2 Ir. Eq. Rep. 165; *West v. Jones*, 1 Sim. N. S. 205; *Dix v. Burford*, 19 Beav. 409; *Egbert v. Butler*, 21 Beav. 560; *Thompson v. Finch*, 22 Beav. 326; *Cowell v. Gatcombe*, 27 Beav. 568.

But under a decree against executors for the common accounts, each is chargeable only with his actual or constructive receipts; and therefore, in such a suit, an executor will escape liability by showing either that he

has been wholly passive, or that he has only acted so far as it was necessary to enable his co-executor to administer the estate: *Terrell v. Matthews*, 1 Mac. & G. 433.

Having considered how far a person is liable for the acts and defaults of co-trustees or co-executors, it remains to be seen how far they will be liable for joining with them in signing receipts; but, as a distinction adverted to by Lord Eldon, in the principal case, has been taken between the consequences of joining with co-trustees and with co-executors in receipts, it will be more convenient to examine the cases separately, in order to see how far that distinction has been supported by the authorities.

[*903] **As to joining with Co-trustees in Receipts.*—In the principal case of *Townley v. Sherborne*, it was held, that a person was liable for having joined with his co-trustees in receipts, although the money for which they were given never actually came to his hands. But it has been clearly established, that a person who joins with his co-trustees in a receipt for trust-money, when it is indispensable that he should do so, for the sake of conformity, will not *thereby alone* be rendered liable for the misapplication of the money which comes to the hands of his co-trustees: *Heaton v. Marriott*, cited Prec. Ch. 173; *Fellows v. Mitchell*, 1 P. Wms. 81; *In re Fryer*, 3 K. & J. 317.

The principle of this doctrine is consistent with natural equity; “for,” as observed by Lord Cowper, “it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but notional.” See *Fellows v. Mitchell*, 1 P. Wms. 81.

But the trustee who, for mere conformity, joins in a receipt, must, in order to discharge himself, prove that his co-trustees received the money. To use the words of Lord Eldon, in the principal case of *Brice v. Stokes*, “At law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity.”

In *Fellows v. Mitchell*, 1 P. Wms. 81, where two trustees in a mortgage for 2000*l.* (one of whom became insolvent) joined in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the purchase-money, Lord Keeper Cowper, upon the authority of *Heaton v. Marriott*, held, that each trustee was answerable only for as much as he actually received. “But,” added his Lordship, “it may be reasonable, where, upon proof, it cannot be distinguished how much was received by the one trustee, and how much by the other, to charge each with the whole; for, in such case, the trustees are to blame for not keeping distinct accounts. It is like one throwing corn or money into another’s heap, where there is no reason that he who made this difficulty should have the

whole: on the contrary, because it cannot be distinguished, he shall have no part."

But although a trustee is not ordinarily liable for joining in a receipt which puts the trust-moneys under the power of a co-trustee, nevertheless, if, as in the principal case of *Brice v. Stokes*, *the transaction is [904] unnecessary, and he permits his co-trustee to keep and deal with the trust-moneys contrary to the trust, he will be charged with any loss occasioned by his co-trustee. "Though," observes Lord Eldon, "a trustee is safe if he does no more than authorize the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and, therefore, with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. . . . As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it." And see *Walker v. Symonds*, 3 Swanst. 1; *Booth v. Booth*, 1 Beav. 125; *Brumridge v. Brumridge*, 27 Beav. 5; *Ingle v. Partridge*, 32 Beav. 661.

Upon the same principle, in *Thompson v. Finch*, 22 Beav. 316, where two trustees executed a release for trust-money, but one alone obtained possession of it, and invested it on improper security, it was held by Sir J. Romilly, M. R., that the other trustee was liable, inasmuch as it was his duty to have seen that it was properly invested: affirmed 8 De G. Mac. & G. 560.

And a trustee is bound to make proper inquiries for what purpose the trust-moneys are wanted. Thus, in *Hanbury v. Kirkland*, 3 Sim. 265, on a marriage a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with the consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5*l.* per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied; the trustee sold the stock and absconded. Sir L. Shadwell, V. C., upon the ground that the co-trustees had, without any act of discretion, executed the power of attorney without inquiring, as

[*905] they ought *to have done, what was the intended security, and who was the mortgagor, held them liable. "If," said his Honor, "this case is to be decided by the rule laid down in *Brice v. Stokes*, that rule would condemn the trustees; for *they have taken no care of the property*. . . . I am of opinion, that the trustees have been guilty of most culpable negligence; and it is my duty to decree that they do reinvest the stock, and account for the dividends since the last payment, and pay the costs in the suit." And see *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16; *Mendes v. Guedalla*, 2 J. & H. 259.

As to joining with Co-executors in Receipts.—With regard to executors joining in receipts, there is a distinction between their case and that of trustees, because, as before observed, a trustee must generally join for the sake of conformity, and does not, by so doing, assume any power over the trust fund. But an executor, as it is not generally necessary for him to join (for one executor is competent to give a receipt), by interfering in the transaction unnecessarily, "the inference," as laid down by Lord Eldon, "is just the other way; he is to be considered as assuming a power over the fund, and is, therefore, answerable for the application, as far as it is connected with the particular transaction which he joins."

Where, however, the act of signing a receipt by an executor is merely nugatory, and has not the effect of putting the trust funds in the possession of a co-executor who received the money previously, it will not render him liable. This was all that was decided by Lord Northington, in *Westley v. Clarke*, 1 Eden, 357, although, from the expressions in his judgment, it might be concluded that he intended, not merely to modify, but to break down the rule. In that case, Thompson, an attorney, and one of the co-executors, called in money due on a mortgage for a term of years, and received the money, and the same day sent round his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. On Thompson becoming bankrupt, without having accounted for the money which he had received, a bill was filed by legatees to charge the co-executors with the money so received by Thompson; but Lord Northington held that they were not liable. "If," said his Lordship, "it appears plainly that one executor only received and discharged the estate indebted, and assigned the security, and the others joined *afterward*, without any reason, and without being in a capacity to control the act of their co-executor,

either before or after that act was done, what *grounds has any [*906] Court in conscience to charge them? Equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous. And though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right to courtesy or dower, yet there can be no rule for the future determination of this Court, concerning the acts of men. . . . The only

act that affected the assets was the first that discharged the debt, and, according to the sense of the bar, transferred the legal estate. Then, *that* they are not to answer for, and the second is nugatory." And see *Candler v. Tillett*, 22 Beav. 257.

This decision, though somewhat doubted by Lord Thurlow, in *Saddler v. Hobbs*, 2 Bro. C. C. 117, is approved of by Lord Alvanley, in *Scurfield v. Howes*, 3 Bro. C. C. 94, and *Hovey v. Blakeman*, 4 Ves. 608. Nor does Lord Eldon attempt to overrule it in the principal case, although he speaks, most probably, with reference to *Westley v. Clarke*, as one of the cases that had pared down the rule. See also *Chambers v. Minchin*, 7 Ves. 198. The dictum, however, of Lord Northington, in *Westley v. Clarke* (see 1 Eden, 360), "that the rule amounts to no more than that a joint receipt, given by executors, is a stronger proof that they actually joined in the receipt, because generally they have no occasion to join for conformity," has not been approved of. And in an important case, where Lord Eldon had again occasion to consider the subject, his Lordship observed, "that without going through all the cases, it is obvious, that, *primâ facie*, there is this distinction between executors and trustees: that one executor can, and one trustee cannot, give a discharge; and it may frequently happen, as, in *Brice v. Stokes*, it actually happened, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered. Whether the alteration is wholesome, may be a question. It may be laid down now, as in *Brice v. Stokes*, that, though one executor has *joined* in a receipt; yet, whether he is liable shall depend on his *acting*. The former was a simple rule, that *joining* shall be considered as *acting*; but in the cases since the rule, that *joining alone* does not impose responsibility, scarcely two judges agree:" *Walker v. Symonds*, 3 Swanst. 63.

The rule, as now recognized, is perhaps better explained by Lord Redesdale. "The distinction," he *observes, "seems to be this, with respect to a mere signing: that, if a receipt be given for the mere [907] purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning. He became responsible for the application of the money, just as if he had received it." *Joy v. Campbell*, 1 S. & L. 341. And again, in *Doyle v. Blake*, 2 S. & L. 242, his Lordship observes, "The

true consideration in a question of this kind is, whether the executor who merely joins in the receipt had a control; and his joining in the receipt is evidence of that control, although the money was actually received by the other."

We may conclude, therefore, that where funds belonging to executors are not under the individual control of each executor, although one of them joins with his co-executor in any act or receipt which will have the effect of putting the funds into his hands, as the joining was absolutely necessary, and was not, therefore, evidence that the executor so joining thereby assumed a control over the fund, the principle which governs the case of trustees will be applicable, and he will not be held liable, at any rate where he has used due caution, for the misapplication of the fund by his co-executor. Thus, it is laid down by Lord Rosslyn, in *Hovey v. Blakeman*, 4 Ves. 608, that if a bill of exchange is remitted to two agents, payable to them personally, who, on the death of the principal, become executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, is not sufficient to charge him who does not receive it.

So, if stock is standing in the names of two executors, the joining of one executor with the other in a sale would be considered with reference to the principles applicable to trustees: *Chambers v. Minchin*, 7 Ves. 197.

But an executor will not be justified in so joining, upon the mere representation by his co-executor that the stock is wanted for the purpose of administration; for if he neglects to make proper inquiries, he will be liable for the misappropriation of his co-executor; but he will not be charged for so much as was properly applied. This subject was much [*908] discussed in the important case of *Lord Shipbrook v. Lord *Hinchinbrook*, 11 Ves. 252, 16 Ves. 477, where three executors, two years and a half after the death of the testator, joined in executing a power of attorney to a co-executor for the sale of stock, upon his representation that it was required for payment of debts; it was held by Lord Eldon, that they were liable for so much of the money arising from the sale of the stock as was misappropriated by their co-executor, but not for such part as they could prove was applied in payment of debts, although at the time he was in possession of other funds, part of the assets which he had not received through them, and which funds he wasted; and his Lordship held, that if it could not be ascertained that any part of the money had been applied in payment of debts, the executors would be liable for the whole sum; and he directed an inquiry, whether the specific money received by the co-executor was applied in discharge of any, and what debts. "This case," said his Lordship (16 Ves. 479), "depends upon the principle applicable to trustees. The fund being vested in the names of all the executors, it was necessary that all should join in the act which placed the property in the possession of one of them; and my mind had reached this conclusion, that, as these executors could not be held answer-

able for the balance for which their co-executor was to account separately, they had a right to contend, at least, that they should be allowed so much of the fund as had been applied to the purpose to which it ought to have been applied, as they might have been compelled so to apply it.

"The question, therefore, arose as to the difference, the proof of due application being upon the executors; and the circumstances are, that, all of them having proved the will, proceeded to have the stock transferred into their own names. During two years and a half from the death of the testatrix, until July, 1779, when the transaction upon which this question arises took place, this individual had been acting in the executorship, trusted, and very naturally trusted, by the other executors, upon whom no moral blame attaches, but merely that degree of negligence which is frequently observed in very honorable men. The law, it must not be forgotten, supposes that something is to be done in a year; and these executors, intrusting their co-executor during the period I have mentioned, ought, at least, to have made some inquiry what had been doing in these affairs. If, making that inquiry, they were misled, that is a distinct case; but making no inquiry, they are satisfied with the information, which proves groundless, that he wants the money for the purpose of paying debts. They ought to have *inquired how that could be; and [*909] though it is not a consequence that they might not place the remainder of the property in his hands, it must surely be at their risk, if they were aware that he had been, not acting according to his trust, but grossly violating it. This, therefore, being the case of executors, who, making no inquiry whatever, permitted their co-executor to do just what he pleased, has no resemblance to *Bacon v. Bacon* (5 Ves. 331)—taking that decision to be right, as to which I give no opinion—or any other case; and a decision that executors are not to be charged in such a case would amount to this, that executors can in no case be chargeable." See also *Underwood v. Stevens*, 1 Mer. 712; *Bick v. Motly*, 2 My. & K. 312; *Williams v. Nixon*, 2 Beav. 472; *Hewett v. Foster*, 6 Beav. 259.

Where an executor gave a receipt for money due to the estate, purporting to be signed by his co-executor as well as himself, he having in fact forged the name of his co-executor, it was held that, although the debtor intended to have the receipt of both of the executors, the receipt of one was sufficient to discharge him: *Charlton v. Earl of Durham*, 4 L. R. Ch. App. 433.

Executor paying over assets unnecessarily to Co-executor.—According to the same principle, by which an executor is liable for joining with his co-executor in a receipt, he is also liable if he receive the whole or part of the testator's assets, and pay it over voluntarily and unnecessarily to his co-executor, and the same is embezzled or lost. See *Townsend v. Barber*, 1 Dick. 356, in which case an executor, who possessed fourteen East India Bonds, part of the testator's assets, having permitted another exec-

utor to get them into his possession, who disposed of them and afterward became bankrupt, his estate was held liable to answer the value of the bonds.

So, in *Langford v. Gascoyne*, 11 Ves. 333, the widow of the testator gave a bag of money to Spurrell, who delivered it over to Gascoyne, one of his co-executors, without Lambert, the other executor, who, it seems, was present at the time, having said or done anything whereby, or in consequence of which, the money was so placed in the hands of Spurrell. It was held by Sir W. Grant, M. R., that Spurrell and Gascoyne, but not Lambert, were to be charged with the money contained in the bag. "The rule," observed his Honor, "in all the cases is, that if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other; not where an executor is merely passive, by not obstructing the other in receiving it. But if the one *contributes in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse, as there was in *Bacon v. Bacon*, 5 Ves. 331, a justifiable object.

"In this case, Spurrell chooses to part with his money, of which he had the possession, probably from an innocent motive, thinking Gascoyne more fit to be trusted with it than himself or the other executor. But in most of these cases, where executors were charged, the motive was innocent, only the result was unfortunate. I feel very great reluctance to charge an executor in such a case; but it is impossible, without breaking through the rule, not to say he has exercised an act of judgment and discretion—an act of selection—by putting the money into the hands of Gascoyne rather than the other executor, or keeping it himself, depriving himself and the other executor of any control over it. He did that act, and this loss is the consequence. This is a very hard case, but so are all these cases.

"As to the other executor, Lambert, it is impossible to charge him. He has neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne. It is not incumbent upon one executor by force to prevent its getting into the hands of another." See also *Trutch v. Lamprell*, 20 Beav. 116.

So an executor is liable if by any other means he puts the assets into the possession of his co-executor: thus, if he joins in indorsing (*Hovey v. Blake-man*, 4 Ves. 608) or drawing (*Saddler v. Hobbs*, 2 Bro. C. C. 114) a bill. And see *Gregory v. Gregory*, 2 Y. & C. Exch. Ca. 313; but see *Balchen v. Scott*, 2 Ves. jun. 678.

And, upon this principle, it is laid down by Chief Baron Hale, in *Gill v. Attorney-General*, Hard. 314, that though, in the case of joint-executors, none is chargeable for more than comes to his hands severally, yet if, by agreement among themselves, one be to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole: because the receipts of each are pursuant to the

agreement made betwixt both ; and see *Moses v. Levi*, 3 Y. & C. Exch. Ca. 359.

But the rule does not apply, if, in the discharge of a necessary duty, an executor pays over money to his co-executor. Thus, in *Bacon v. Bacon*, 5 Ves. 331, an executor residing in London paid 700*l.* to Kirby, his co-executor, who resided in the country, who had been the confidential attorney and agent of the testator, to pay the debts of the testator owing to creditors in his neighborhood, *Kirby informing him that he had no money belonging to the testator in his hands ; and, upon Kirby [*911] afterward producing a book of accounts, containing a list of debts, which he alleged he had paid, exceeding 700*l.*, and also an account of debts remaining unpaid, which, with the debts alleged to have been paid, exceeded 1200*l.*, he induced his co-executor to advance a further sum of 500*l.*, in order to enable him to discharge the debts then remaining unpaid, Lord Rosslyn held, that the executor who had paid the money should not be charged with the loss of it. "Supposing," said his Lordship, "that Kirby had not been co-executor, but that the executor, living in London and receiving money of the testator's, had remitted to the attorney of the testator to pay the debts, could he have been liable ? Kirby was in no insolvent circumstances. He was a man in business at Ipswich, had been attorney of the testator (I take him no higher than that), was acquainted with all his affairs, had his accounts in his hands, and the first payment was three weeks after his death. In the ordinary management of executor, how was he to pay the funeral expenses and the number of small debts appearing upon the books of the testator, without sending the money ? The payment is made by the defendant only, because he happened to have money of the testator's in his hands at the time. If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair."

So, where three executors and trustees were authorized to carry on the testator's farming business, which was by arrangement managed by one of them, it was held by Sir J. Romilly, M. R., that in taking the accounts the executor who managed the farm was to be considered as an agent. *Toplis v. Hurrell*, 19 Beav. 423 ; and see *Home v. Pringle*, 8 C. & F. 288.

Upon the same principle, Lord Redesdale, putting the case of an executor living in London, remitting money to his co-executor in Suffolk, to pay debts owing there, observes, "He is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way : " *Joy v. Campbell*, 1 S. & L. 341 ; and see *Chambers v. Minchin*, 6 Ves. 193.

Nor will an executor be liable for the loss of a fund which he handed over to his co-executor, if he had no legal right to retain it (*Davis v. Spurling*, 1 Russ. & My. 64) ; nor if, having disclaimed and renounced

he applies it as the agent of the one who *proved the will (*Dove* [*912] *v. Everard*, 1 Russ. & My. 231; *Stacey v. Elph*, 1 My. & K. 195). Secus, if he has once acted: *Doyle v. Blake*, 2 S. & L. 245.

In *Churchill v. Lady Hobson*, 1 P. Wms. 241, Lord Harcourt took a distinction between the effect of a legatee and creditor seeking to charge an executor joining in a receipt with his co-executor, which, according to Lord Northington, seems to have this meaning: "that a creditor may at law charge both executors on a joint receipt; but that, in this Court, where alone legacies are received, such receipt shall not be conclusive, but the Court will see who actually received, and charge that person accordingly." *Harden v. Parsons*, 1 Eden, 148; but Lord Thurlow, in *Saddler v. Hobbs*, 2 Bro. C. C. 117, said that it seemed to him an odd distinction. However, it seems to be admitted, that, as legatees are bound by the terms of the will, and creditors are not, in many cases executors would be discharged as against legatees, when they would not as against creditors; for example, in *Doyle v. Blake*, 2 S. & L. 231, 240, 245, where the testator appointed executors, and directed them to turn all his property into cash, and deposit it with Martin Horan, Lord Redesdale said, that, if the executors had collected the effects, and had paid the amount to Martin Horan, still, if a creditor had remained unpaid, he might have charged them, upon the insolvency of Horan; whereas, in the case of a legatee, the executors might justify themselves by the directions in the will.

The usual indemnity clause, in instruments where trusts are created, that one trustee shall not be answerable or accountable for the acts, receipts, or defaults of his co-trustees, does not, it seems, give any protection against the acts of co-trustees, but merely expresses what a Court of equity would hold in the absence of such clause. See *Worrall v. Harford*, 8 Ves. 8; *Dawson v. Clarke*, 18 Ves. 254; *Moyle v. Moyle*, 2 Russ. & My. 170; *Macdonnel v. Harding*, 7 Sim. 176; *Clough v. Dixon*, 8 Sim. 594; 3 My. & Cr. 490; *Munch v. Cockerell*, 9 Sim. 339; 5 My. & Cr. 339; *Brumridge v. Brumridge*, 27 Beav. 5; *Reyden v. Wesley*, 29 Beav. 213.

And now, by 22 & 23 Vict. c. 35, s. 31, "Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words following (that is to say), 'That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of *conformity, and shall [*913] be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own willful default respectively; and also that it shall be lawful for

the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument.”

But the indemnity clause is sometimes extended so as to protect a trustee from the consequences of what might otherwise be a breach of trust. Thus, in *Wilkins v. Hogg*, 8 Jur. N. S. 25, a testatrix, by her will in 1854, after appointing three trustees, declared each trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee, and particularly that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to two insurance companies for the two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had duly invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable. It was held by Lord Westbury, C., affirming the decision of Sir John Stuart, V. C. (reported 3 Giff. 116), that, according to the true construction of the indemnity clause contained in the will, their concurrence in enabling their co-trustee to receive the money did not make them liable for the misapplication of the fund. His Lordship said that he should have been glad to find a case warranting the conclusion, that a duty having been undertaken, any words qualifying such duty should be nugatory; but such could not be the law. It was perfectly competent to a testator to define what should be the incidents to the duty of a trustee as long as he kept within the bounds of law. This clause excluded the possibility of any liability, except for actual misappropriation. There were *three modes in which a trustee would become liable, according to the ordinary rules of law: first, where, being the recipient, he [*914] hands over money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of this clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee, acting under this will, would be responsible. He would still be answerable for collusion, or if he handed over trust-money to his co-trustee with reasonable ground for believing, or suspicion that that trustee would commit a breach of trust, but no such case as this

was made by the bill. The decision, therefore, of the Vice-Chancellor was a just conclusion, "and the grounds on which the appellants relied failed."

Husband—how far liable for the devastavit of his wife as executrix or administratrix.—In this place may be considered how far a husband and his wife, being an executrix or administratrix, are liable for devastavits. The husband will, it seems, be liable during coverture for any devastavit of his wife. "When," says Lord Redesdale, in a celebrated case, "the husband of a feme covert is charged with waste committed by her *previous to the marriage*, the charge is simply by the rule of law, which throws upon the husband, *during the coverture*, all the obligations of the wife; and as he is charged by the rule of law alone, the same rule should also discharge him. The debt of the wife before coverture shall not be recovered against the husband after coverture, because he is answerable for it only in virtue of the duty imposed on him to discharge all the obligations of the wife: this in some cases is a little against conscience, but then, in other cases, the charging the husband with the debt would be against conscience also; and, such being the rule of law, Courts of equity have held that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife, that should bind his conscience in one case more than in the other:" *Adair v. Shaw*, 1 S. & L. 263; and see *Kings v. Hilton*, Cro. Car. 603; *Lumley v. Hutton*, 1 Roll. Rep. 268, 269; *Bachelor v. Bean*, 2 Vern. 61; but the husband would, upon taking out administration to his wife, in order to obtain possession of her choses in action, be liable under 30 Car. 2, c. 7, [*915] explained and made perpetual by 4 & 5 Will. & M. c. 24, s. 12. But see now 33 & 34 Vict. c. 9, s. 12, Vol. 1, ante, p. *536.

If a devastavit is committed *during the coverture*, the husband during the life of his wife is liable both at law and in equity, as he will be presumed to have authorized the dealings of his wife (*Adair v. Shaw*, 1 S. & L. 266; *Smith v. Smith*, 21 Beav. 385), even though she may have been living separate from him (*Paget v. Read*, 1 Vern. 143); and assets admitted by husband and wife may be proved as a debt of the husband's on his bankruptcy: *Ex parte M'Williams*, 1 S. & L. 173.

At law the liability of the husband, for a devastavit committed during as well as before coverture, unless a judgment has been obtained against him and his wife (*Mounson v. Bourn*, Cro. Car. 519; *Baron v. Berkley*, 1 Lutw. 670; 1 Saund. 216, a, note to *Wheateley v. Lane*), or goods remain in his hands in specie, when they may be recovered by an action of trover or detinue (1 S. & L. 262), entirely ceases at the wife's death (*Adair v. Shaw*, 2 S. & L. 261).

But in equity, the husband surviving the wife will be liable for the assets which came to his hands, upon the ground that all persons who come into possession of property bound by a trust, with notice of the

trust, will be affected by it. See Lord Redesdale's able judgment in *Adair v. Shaw*, 1 S. & L. 247, where he held, that the assets of a deceased husband of an administratrix were chargeable in equity for the waste committed during the coverture: and see *Clough v. Bond*, 3 My. & Cr. 490, stated ante, p. *884; *Smith v. Smith*, 21 Beav. 385; and *Soady v. Turnbull*, 1 Law Rep. Ch. App. 494.

But, although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet, if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged; and, therefore, the next of kin cannot sue an administrator cum testamento annexo of the husband: *Tyler v. Bell*, 2 My. & Cr. 89.

If the wife survives the husband—according to Lord Redesdale, even if she were covert when administration was taken out—she will be liable for waste, even though it were the act of the husband, because, in the language of the old cases, it was her folly to take a husband who could so misconduct himself: *Adair v. Shaw*, 1 S. & L. 258. [Calhoun's Appeal, 3 Wright, 218.] And an executrix in such position, although only responsible *at law* to creditors, would, *in equity*, be responsible to legatees. In *Clough v. Dixon*, 8 Sim. 598, however, Sir *L. Shadwell, V. C., says, "I do not think that the reasoning of Lord Redesdale is satisfactory, where he says that a married woman, an executrix, would be responsible to the creditors of the testator after coverture." But his Honor, according to the distinction which has been taken, admitted, in a subsequent case, that where a person was executrix or administratrix *before* marriage, and the assets were wasted during the coverture, a creditor or legatee of the testator had a right to sue the executrix or administratrix as well as her husband: *Kingham v. Lee*, 15 Sim. 401; *Vaughan v. Vanderstegen*, 2 Drew. 385; *Soady v. Turnbull*, 1 Law. Rep. Ch. App. 494. [*916]

Remedies against Trustees and Executors.—Proceedings in equity for a breach of trust may be taken not only against trustees or executors, but also against their representatives, even although the loss may not have happened until after the death of the trustees (*Devaynes v. Noble*, 24 Beav. 86), and although they may have distributed the assets without notice of the breach of trust, unless they have done so by order of the Court (*March v. Russell*, 3 My. & Cr. 31; *Knatchbull v. Fearnhead*, 3 My. & Cr. 122; *Underwood v. Hatton*, 5 Beav. 37; *Waller v. Barrett*, 24 Beav. 413; *Taylor v. Taylor*, 10 L. R. Eq. 477), or pursuant to 22 & 23 Vict. c. 35, s. 29. Nor can trustees who have committed a breach of trust (*Phillips v. Munnings*, 2 My. & Cr. 309; *Watson v. Saul*, 1 Giff. 188; *Downes v. Bullock*, 25 Beav. 61), or their representatives (*Obes v. Bishop*, 1 De G. F. & Jo. 137; *Story v. Gape*, 2 Jur. N. S. 706), set up

the Statute of Limitations. See also *Butler v. Carter*, 5 L. R. Eq. 276; *Brittlebank v. Goodwin*, *Ib.* 495; *Coxwell v. Franklinski*, 11 L. T. Rep. N. S. 153.

Nor will a settlor, who has covenanted to pay a sum of money, and who has constituted himself a trustee thereof (*Stone v. Stone*, 5 L. R. Ch. App. 74), be able to set up the Statute of Limitations; see also *Burrowes v. Gore*, 6 Ho. Lo. Ca. 907. But if a settlor simply covenants to pay a sum of money to trustees, he does not thereby render himself a trustee, and a breach of such covenant will be barred by the statute (*Stone v. Stone*, 5 L. R. Ch. App. 74; *Spickernell v. Hotham*, Kay, 669), but trustees neglecting to enforce the covenant, and their representatives, will remain liable: *Woodhouse v. Woodhouse*, 8 L. R. Eq. 514.

Where trustees are all guilty of a breach of trust, although the cestui que trust has obtained a decree against them jointly, he may, as each trustee is responsible for the whole loss, take out execution against any one of them separately (*Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Ex parte Angle*, *Barnard. Ch. Rep. 425; *In re Chertsey Market*, 6 Price, [917] 278, 279; *Walker v. Symonds*, 3 Swanst. 75; *Attorney-General v. Wilson*, 1 Cr. & Ph. 28); but as between the trustees themselves, a contribution or apportionment may in a proper case be ordered in the same suit (*Priestman v. Tindall*, 24 Beav. 244; *Costello v. O'Rorke*, 3 I. R. E. 172), or upon a new bill being filed (*Ex parte Shakeshaft*, 3 Bro. C. C. 198; *Perry v. Knott*, 4 Beav. 180; *Baynard v. Wooley*, 20 Beav. 583; and see *Fletcher v. Green*, 33 Beav. 513); but the Court will not interfere to enforce contribution or apportionment where fraud has been committed by the trustees: *Lingard v. Bromley*, 1 V. & B. 114; *Attorney-General v. Wilson*, 1 C. & Ph. 28; *Tarlton v. Hornby*, 1 Y. & C. Exch. Ca. 336.

Moreover, as between the trustees themselves, the loss may be thrown primarily upon the trustee most in fault, or his estate (*Fetherstone v. West*, 6 I. R. Eq. 86), and where the breach of trust was a specialty debt as regarded the cestui que trust, it will constitute under the Mercantile Law Amendment Act (19 and 20 Vict. c. 97) a specialty debt to his co-trustees: *Lockhart v. Reilly*, 1 De G. & Jo. 464; but see *Priestman v. Tindall*, 24 Beav. 244.

Where a person not under disability having a partial interest in trust funds, as, for instance, a tenant for life, has been a party to a breach of trust, whatever benefit he may take under the settlement or will is liable to be retained until the cestui que trusts or trustees have been recouped the amount of the loss sustained by the trust estate: *Ex parte Miford*, 1 Bro. C. C. 398; *Pridgy v. Rose*, 3 Mer. 105; *Woodyat v. Gresley*, 8 Sim. 180; *Burridge v. Row*, 1 Y. & C. C. C. 183, 583; *Lincoln v. Wright*, 4 Beav. 432; *M'Gachen v. Dew*, 15 Beav. 84; *Barratt v. Wyatt*, 30 Beav. 442; *Williams v. Allen*, 32 Beav. 650; *Lord Kilworth v. The Earl of Mountcashell*, 15 Ir. Ch. Rep. 565; *Keays v. Lane*, 3 I. R. E. 1, 7. And

the rule is applicable to the case of a married woman being entitled to property without restraint upon anticipation; secus, where there is a restraint against anticipation. See note to *Hulme v. Tenant*, ante, Vol. 1, p. *488; *Clive v. Carew*, 1 Johns. & Hem. 199.

Where a cestui que trust has derived any profit from a breach of trust, he will to that extent be bound to recoup the trustee (*Trafford v. Boehm*, 3 Atk. 440; *Greenwood v. Wakeford*, 1 Beav. 580; *Booth v. Booth*, 1 Beav. 125; *Fuller v. Knight*, 6 Beav. 205; *Burrowes v. O'Brien*, 15 Ir. Ch. Rep. 423; *M'Gachen v. Dew*, 15 Beav. 84), whose charge will take priority over the claims of the general creditors of a deceased cestui que trust: *Williams v. Allen*, 32 Beav. 650.

And if a cestui que trust, with *knowledge of the fact, receives [*918] the income from an improper investment, he is bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund (*Davies v. Hodgson*, 25 Beav. 177); but a cestui que trust who has merely instigated the breach of trust, without deriving any benefit therefrom, does not thereby render himself personally liable to recoup the trustees: *Raby v. Ridehalgh*, 7 De G. M. & G. 108.

When a trustee becomes bankrupt, what he owes to the trust may be proved against his estate (*Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Keble v. Thompson*, 3 Bro. C. C. 112; *Bick v. Motly*, 2 My. & K. 312; *Lincoln v. Wright*, 4 Beav. 427); and if he lent the trust-money to a bankrupt firm of which he was a partner, proof may be made either against the joint estate of the firm or the separate estate of the trustee, or any other partner who, from his participation in the breach of trust, has rendered himself a constructive trustee (*Ex parte Heaton*, Buck, 386; *Ex parte Watson*, 2 V. & B. 414; *Ex parte Woodin*, 3 M. D. & De G. 399; *Ex parte Poulson*, 1 De G. 79); but not against both the joint and separate estates (*Ex parte Barnewall*, 6 De G. M. & G. 795, 801). But if the bankrupt be beneficially interested in the trust fund, the value of such interest must be deducted from the amount due from him, and the balance only can be proved against his estate: *Ex parte Turner*, 2 De G. Mac. & G. 927.

As to the right to prove when the trust-money has been improperly invested, see *In re Montifore*, 9 Jur. 562; *Ex parte Biddulph*, 3 De G. & Sm. 587; *Ex parte Geaves*, 25 L. J. (N. S.) Bk. 53; *Ex parte Norris*, *In re Biddulph*, 4 L. R. Ch. App. 280.

Although the original debt is barred when a bankrupt trustee obtains his order of discharge (*Ex parte Holt*, 1 Deac. 248), nevertheless where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt, and if he neglect to do so, he will be liable to the loss, notwithstanding he has obtained his certificate or order of discharge. See *Orrett v. Corser*, 21 Beav. 52, where Sir J. Romilly, M. R., said, "Suppose a person owing money to a trust estate becomes bankrupt, and the trustee is a distinct and separate person; knowing of the bankruptcy, he is bound to

prove the debt; if he does not, he commits a breach of trust, and would be held liable for all that he might have received under the commission, if he had proved the debt as he ought to have done. Is the case altered because the trustee is himself the debtor? I think not. The original debt no doubt is barred; but the amount of dividends which the trustee might *have received under the commission is a liability subsequently attaching to the trustee in that character, and is not affected by the bankruptcy or the certificate."

As to trustees and executors keeping trust-moneys in their hands which ought to be invested, see cases ante, cited pp. *254, *255, and *Colyer v. Colyer*, 32 L. J. Ch. (V. C. K.) 101.

Proof may be made against a bankrupt, one of several trustees, for money lost by a breach of trust, although he may have derived no benefit thereby (*Ex parte Shakeshaft*, 3 Bro. C. C. 197), and although the other trustee be solvent (*Ex parte Beilby*, 1 G. & J. 167); but proceedings in equity may at the same time be taken against the solvent trustee to compel contribution; *Lingard v. Bromley*, 1 V. & B. 114; *Joy v. Campbell*, 1 S. & L. 335, 339; *Ottley v. Browne*, Ball & B. 360; *Ex parte Shakeshaft*, 3 Bro. C. C. 197.

Where all the trustees are bankers, proof may be made against the estates of all, provided that more than 20s. in the pound is not received: *Kebble v. Thompson*, 3 Bro. C. C. 112; *Ex parte Poulson*, 1 De G. 79.

Remedies against trustee barred—by concurrence—acquiescence or release, when.—The remedy of a cestui que trust against his trustee for a breach of trust, with regard to the investment or custody of the trust funds, may be barred—either by the concurrence of the cestui que trust, his acquiescence or his executing a release.

In the principal case of *Brice v. Stokes*, it is laid down by Lord Eldon, that when the cestui que trust concurs with a trustee in the misapplication of the trust funds, he cannot be heard in a Court of equity to complain of the acts of the trustee which he has himself knowingly authorized, ante p. *871; and see *Buckeridge v. Glasse*, 1 Cr. & Ph. 135; *Fellous v. Mitchell*, 1 P. Wm. 81; *Walker v. Symonds*, 3 Swanst. 64; *Byrchall v. Bradford*, 6 Madd. 13; *Wilkinson v. Parry*, 4 Russ. 272.

But persons under disability, as feme covert (*Parkes v. White* 11, Vea. 221; *Lord Montford v. Lord Cadogan*, 19 Vea. 639, 640; *Bateman v. Davis*, 3 Madd. 98; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Underwood v. Stevens*, 1 Mer. 717), or infants (*Wilkinson v. Parry*, 4 Russ. 276) who have concurred in a breach of trust, may nevertheless proceed against the trustees, except where they have by their own frauds induced the trustees to deviate from the proper performance of their duties: see *Savage v. Foster*, 9 Mod. 35; *Ryder v. Bickerton*, 3 Swanst. 82, note; *Vandebend v. Livingston*, 3 Swanst. 625; *Lord Montford v. Lord Cadogan*, 19 Vea. 640; *Davies v. Hodgson*, 25 Beav. 187; *Evroy v. Nicholas*, 2 Eq. Ca. Ab.

488; *Stikeman v. Dawson*, 1 De G. & Sm. 90; **Wright v. Snowe*, [*920] 2 De G. & Sm. 321.

As, however, a married woman, with regard to property settled to her separate use, is to be treated as a feme sole (*Hulme v. Tenant*, ante, Vol. 1, p. *481, and note), she may bind her separate estate by her concurrence in a breach of trust (*Clive v. Carew*, 1 Johns. & Hem. 199), unless she was herself either deceived, or was under the pressure of undue influence (*Whistler v. Newman*, 4 Ves. 129; *Walker v. Shore*, 19 Ves. 393; *Hughes v. Wells*, 9 Hare, 773), or she was restrained from anticipation: *Cocker v. Quayle*, 1 Russ. & My. 535; *Leedham v. Chawner*, 4 K. & J. 465; *Walrond v. Walrond*, 1 Johns. 24; *Clive v. Carew*, 1 Johns. & Hem. 199. See, also, cases collected, Vol. 1, p. *493.

The concurrence, however, of a feme covert in a breach of trust will not ordinarily affect any interest beyond that settled to her separate use. Thus, if a feme covert is entitled as tenant for life of a fund for her separate use, with a power to appoint the fund by will among certain persons, although she may concur in a breach of trust, she will not thereby prevent the persons taking under her appointment from proceeding against the trustees (*Kellaway v. Johnson*, 5 Beav. 319); but she may, it seems, do so where she has a general power of appointment. See *Brewer v. Swirles*, 2 Sm. & G. 219: there a married woman, with an absolute power of appointment over property settled to her separate use, having by her acts induced the trustees to lend the fund on unauthorized security, whereby it was lost, and, conceiving that she was herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost, in favor of her infant children. Sir J. Stuart, V. C., dismissed (though without costs) a bill filed by them for the purpose of charging the trustees.

Acquiescence on the part of cestuis que trusts may altogether discharge trustees from all liability. Thus, where a cestui que trust *sui juris* acquiesces in an improper investment, he cannot afterward call it in question: see *Harden v. Parsons*, 1 Eden. 145; *Langford v. Gascoyne*, 11 Ves. 333; *Booth v. Booth*, 1 Beav. 125; *Broadhurst v. Balguy*, 1 Y. & C. C. 16; *Nail v. Punter*, 5 Sim. 555; *Walker v. Symonds*, 3 Swanst. 64; *Munch v. Cockerell*, 5 My. & Cr. 178; *Farrar v. Baraclough*, 2 Sm. & Giff. 231; *Raby v. Ridehalgh*, 7 De G. Mac. & G. 104. But it must be made with his full knowledge (*Montfort v. Lord Cadogan*, 17 Ves. 489; *Munch v. Cockerell*, 5 My. & Cr. 178; *Rehden v. Wesley*, 29 Beav. 213), and without any misrepresentation or concealment on the part of the trustees (*Walker v. Symonds*, 3 Swanst. 1; *Underwood v. Stevens*, 1 Mer. 712; **Burrows v. Walls*, 5 De G. Mac. & G. 233). And a cestui que trust will not be affected with constructive knowledge of a breach [*921] of trust merely because he might by inquiries have discovered it: *Thompson v. Finch*, 22 Beav. 325, 327; and the remarks of Lord Westbury, C., in *Farrant v. Blanchford*, 1 De G. Jo. & Sm. 107, 119.

Where a cestui que trust discovers a breach of trust, but does not receive any benefit from it, or connive at it for any purpose, and does not recognize the transaction, he is not precluded from complaining of it, merely on the ground that he had abstained from making such complaint until long after he first knew of it (*Phillipson v. Gatty*, 7 Hare, 516: and see *Griffiths v. Porter*, 25 Beav. 236), especially if his interest is reversionary: *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 58.

A cestui que trust may by a release or a confirmation prevent himself from taking proceedings against trustees for a breach of trust (*French v. Hobson*, 9 Ves. 103, 107; *Wilkinson v. Parry*, 4 Russ. 272; *Aylwin v. Bray*, 2 You. & J. 517, cited); but neither will be binding upon him, unless he had full knowledge of the facts of the case (*Randall v. Errington*, 10 Ves. 423; *Walker v. Symonds*, 3 Swanst. 1; *Adams v. Clifton*, 1 Russ. 297; *Bennett v. Colley*, 2 My. & K. 232; *Downes v. Bullock*, 25 Beav. 62; *Lloyd v. Attwood*, 3 De G. & Jo. 650), and of their legal effect (*Cockerell v. Cholmeley*, 1 Russ. & My. 425; *Marker v. Marker*, 9 Hare, 16; *Burrows v. Walls*, 5 De G. Mac. & G. 254; and see notes to *Fox v. Mackreth*, Vol. 1, pp. *174, *175, and *Chesterfield v. Janssen*, ante, Vol. 1, p. *609).

Persons under disability, as married women and infants, are not ordinarily bound by acquiescence or a release or confirmation (*Walker v. Symonds*, 3 Swanst. 69; *Ryder v. Bickerton*, 3 Swanst. 80, n.; *Hopkins v. Myall*, 2 Russ. & My. 86; *Nail v. Punter*, 5 Sim. 555; *Kellarway v. Johnson*, 5 Beav. 319; *March v. Russell*, 3 My. & Cr. 31, 42), except in the case of a feme covert as to property settled to her separate use, provided there be no restraint upon anticipation (*Clive v. Carew*, 1 Johns. & Hem. 205; and see cases cited, in the note to *Hulme v. Tenant*, ante, Vol. 1, pp. *493, *520; but see *Derbishire v. Home*, 3 De G. Mac. & G. 80; *Davies v. Hodgson*, 25 Beav. 186); but the restraint does not affect income accrued due before the acquiescence, release, or confirmation: *Rowley v. Unwin*, 2 K. & J. 138.

Moreover, after an infant has attained twenty-one, nothing done by him will be effectual to release the trustees unless he has acted with full knowledge of the facts of the case (*Osmond v. Fitzroy*, 3 P. Wms. 131; *Hicks v. Hicks*, 3 Atk. 274; *Walker v. Symonds*, 3 Swanst. 69; [*922] *Wedderburn v. Wedderburn*, 2 Keen, J., 722; 4 My. & Cr. 41; *Kay v. Smith*, 21 Beav. 522), and under a proper legal adviser: *Lloyd v. Attwood*, 3 De G. & Jo. 614.

The acquiescence of a person entitled in remainder is not binding on him during the continuance of a preceding interest: *Bennett v. Colley*, 5 Sim. 181; 2 My. & K. 225; and see *Davies v. Hodgson*, 25 Beav. 177; sed vide *Brown v. Cross*, 14 Beav. 105, 112.

As to the punishment of trustees for fraudulent breaches of trust, see 24 & 25 Vict. c. 96, s. 80, the former Act, 20 & 21 Vict. c. 54, having been repealed by 24 & 25 Vict. c. 95: *Reg v. Hassall*, 9 W. R. (C. C. R.)

708; *Reg v. Fletcher*, 10 W. R. (C. C. R.) 753; *Wadham v. Rigg*, 1 Dr. & Sm. 216.

Persons acting in a fiduciary capacity, as trustees or executors, stand in the same position, in regard to liability for the subjects of their trust, as bailees and agents generally, and are only answerable for actual or constructive negligence, or willful misconduct. They are not, therefore, responsible for a loss, unless it has been occasioned by their own wrong, or when they are in default for not having interfered to prevent it; *Taylor v. Benham*, 5 Howard, 233. Hence it is well settled that, in the absence of negligence, fiduciaries will not, in equity, be charged with the value of assets stolen from their custody; *Morley v. Morley*, 2 Chan. Cas. 2; *Jones v. Lewis*, 2 Vesey, 240; *State v. Meagher*, 44 Missouri, 356; *Foster v. Davis*, 46 Id. 268; *Seawell v. Greenway*, 22 Texas, 691; although at law a somewhat different rule prevailed; *Cross v. Smith*, 7 East, 251.

LIABILITY WHERE FIDUCIARIES HAVE ACTED SINGLY.—Each of several executors or trustees is not bound to take upon himself the conduct of every part of the trust, and it seems that the management of the whole may be left to any one of the number; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 336; *Ray v. Doughty*, 4 Blackford, 115. This does not excuse the rest from exercising a general care and supervision over the trust, and intervening for its protection, if there be any-

thing in the conduct or situation of the person who has it in charge which indicates that it ought not to remain in his hands; *Clark v. Clark*, 8 Paige, 153; *Estate of Mary Evans*, 2 Ashmead, 470. But with this qualification, the general principle is undoubted that trustees may, by express arrangement, or by tacit understanding, leave the management of the estate in the hands of one of their number, so long as there is nothing to show his unfitness for the trust; and as this may be done without default on their part, they will not be answerable for losses occasioned solely by his subsequent misconduct in the discharge of the duties which he has especially engaged to perform. Thus, in *Jones' Appeal*, 8 Watts & Serg., 143, one of two guardians, upon his appointment, agreed to take charge of the real estate of the ward, but declined having anything to do with the receipt and disbursement of his money, which accordingly went into the hands of the other guardian, and was finally lost through his insolvency. It was held by the court that this apportionment of the duties of the trust was proper in itself and did not vary the liability of the parties, or render either of them responsible for the default of the other. The same point was decided still more emphatically in *State v. Guildford*, 18 Ohio, 500; 15 Id. 593, where it was held on a rehearing, in opposi-

tion to the opinion expressed in the first instance, that the trustees of a charity were not liable for the failure of one of their number whom they had appointed treasurer and intrusted with the duty of collecting and disbursing the income of the trust fund without requiring security, as it appeared that he had performed the duty gratuitously, and that his appointment was revocable at pleasure.

Hence, it is clear that trustees are not answerable for the default of their co-trustees, unless they have been guilty of an actual or tacit connivance at the breach of trust, or have rendered themselves mutually responsible by their acts or agreements; *Manahan v. Gibbons*, 19 Johnson, 427; *Banks v. Wilkes*, 3 Sandford, Ch. 99; *Weetjen v. Vibbard*, 5 Hun, 265; *Taylor v. Roberts*, 3 Alabama, 83; *Worth v. McAden*, 1 Dev. & Bat. Eq. 199; *Ochiltree v. Wright*, Id. 336; *Latrobe v. Tiernan*, 2 Md. Ch. 474, *Stowe v. Bowen*, 99 Mass. 194; and the rule is the same in the case of executors.

"It appears to be settled, and upon just principles," said Chancellor Kent, in *Sutherland v. Brush*, 7 Johnson, Ch. 17, "that one executor shall not be chargeable with the waste of the other, except so far as he concurred therein; and that merely permitting the other to possess the assets without going further, and concurring in the application of them, does not render him answerable for the receipts of the other. Each executor is liable only for his own acts, and what he receives or applies, unless he hands

over the moneys collected or received to his co-executor, or joins in the direction or misapplication of the assets." *Peters v. Beverly*, 10 Peters, 532; 1 Howard, 134; *Banks v. Wilkes*, 3 Sandford, Ch. 99; *Douglas v. Satterlee*, 11 Johnson, 16; *White v. Bullock*, 20 Barbour, 91; *Call v. Ewing*, 1 Blackford, 301; *Moore v. Tandy*, 3 Bibb, 97; *Fennimore v. Fennimore*, 2 Green, Ch. 292; *Shreve v. Joyce*, 36 New Jersey Law, 44; *Noland v. Cabit*, 12 Smedes & Marsh, 273; *Gaultney v. Nolan*, 33 Mississippi, 569; *Succession of Jody*, 5 La. An. 37; *Clarke v. Blount*, 2 Dev. Ch. 51; *Williams v. Mailland*, 1 Iredell's Eq. 92; *Kerr v. Kirkpatrick*, 8 Id. 139; *Lenoir v. Winn*, 4 Dessaussure, 65; *Knox v. Picket*, Id. 199; *Clarke v. Jenkins*, 3 Rich. Eq. 318; *Cameron v. Justices*, 1 Georgia, 36; *Hall v. Clarke*, 8 Id. 388; *Kerr v. Waters*, 19 Id. 136; *Irwin's Appeal*, 11 Casey, 294; *Fulton v. Davidson*, 3 Heiskell, 614. The true ground of the decision in *Royall v. McKenzie*, 25 Alabama, 363, which might seem to be somewhat at variance with this conclusion, will, upon examination, be found to be that the conduct of the defendant went beyond mere inaction, and amounted to acquiescence in the negligence of his co-trustees.

But, on the other hand, when a trustee does any act which impairs his control over the fund, or tends to place it within the sole power and disposition of his associate, he will undoubtedly render himself liable for the default of the latter; *Mumford v. Murray*, 6 Johnson, Ch. 7. Thus, while suffering a co-executor to retain or collect a bond

forming part of the assets will not impose any liability for his misappropriation of the proceeds (*Banks v. Wilkes*, 3 Sanford, Ch. 99), yet, where one guardian assigns a mortgage of the trust to the other, who receives and misappropriates the fund, he is answerable for the loss; *Monell v. Monell*, 5 Johnson, Ch. 283; *Trust of Penn v. Downing*, 11 Serg. & Rawle, 66; *Ducommun's Appeal*, 5 Harris, 268. So, if by the exercise of reasonable care or diligence the mismanagement of one might have been prevented by the other; *Johnson v. Corbett*, 11 Paige, 265; *Lowe v. Douglass*, 13 New Jersey Eq. 308; *Schenck v. Schenck*, 16 Id. 174; *Fonte v. Horton*, 36 Mississippi, 351: and in *Commonwealth v. The Eagle Ins. Co.*, 14 Allen, 344, the same rule was applied in holding receivers appointed by the court jointly liable for a breach of trust committed by one of them, as the other, though innocent of any misappropriation, had given no attention to the matters intrusted to his charge.

"It is a positive duty of each trustee," said Daniels, J., in the very recent case of *Weetjen v. Vibbard*, 5 Hun, 265, "to protect the trust estate from every misfeasance on the part of the others acting with him; and when it comes to his knowledge that they intend to abuse their trust by a misuse of the property committed to the charge of all, it is his duty to institute such proceedings as may be attended with the effect of preventing it. And when the act has been performed, he should promptly take all necessary measures to secure the

restoration of the fund or property misappropriated to the proper objects of the trust. A mere refusal to do that, will so far involve him in the consequences of his associates' breach of duty as to entitle the beneficiaries to maintain the necessary action in their own name for the protection of their violated interests. Active participation even in the wrong is not required to make a trustee a party to it, but silent connivance will be sufficient for the purpose when it may be observed to afford the means of rendering the misconduct of others sufficient." So, too, a trustee may make himself liable by suffering a co-trustee whose credit is doubtful to receive the assets, or by not insisting that the fund shall be placed to their joint account; *Clark v. Clark*, 8 Paige, 153; *Wayman v. Jones*, 4 Maryland Ch. 500. And, *a fortiori*, where a trustee actually delivers money or securities belonging to the trust to an associate whom he knows to be embarrassed (*Estate of Mary Evans*, 2 Ashmead, 470), or pays money to him with notice that it will be misappropriated, or used in a way inconsistent with its safe keeping, or the duties of his office. But one trustee will not be bound to take adverse measures against another, on slight suspicions, in the absence of actual knowledge; *Jones' Appeal*, 8 Watts & Serg. 143; *Irwin's Appeal*, 11 Casey, 294; *The State v. Guildford*, 18 Ohio, 500; S. C., 15 Id. 593; and, indeed, without direct proof of actual misconduct (*Wood v. Brown*, 34 N. Y. 337), it is clear that an executor cannot compel his co-executor to surrender the securi-

ties in his possession; *Burt v. Burt*, 41 N. Y. 46.

All the authorities agree that where a trustee, executor or guardian has gone so far in the management of the trust as actually to have received any portion of the assets, he is bound to see to their proper application in person, and cannot exonerate himself from liability by handing them over to a co-trustee or executor for investment or distribution; *Sterrett's Appeal*, 2 Penna. Rep. 419; *Clark's Appeal*, 6 Harris, 175; *Mumford v. Murray*, 6 Johnson, Ch. 1; *Ray v. Doughty*, 4 Blackford, 115; *Glenn v. McKim*, 3 Gill, 366; *Edmonds v. Crenshaw*, 14 Peters, 166; *Sparhawk v. Buell*, 9 Vermont, 41; *Worth v. McAden*, 1 Dev. & Bat. Ch. 199; *Graham v. Davidson*, 2 Id. 155; *Hauser v. Lehman*, 2 Ired. Eq. 594; *Hughlett v. Hughlett*, 5 Humphreys, 453; *Fisher v. Skillman*, 18 New Jersey Eq. 229; the general rule being, that a trustee is answerable for the proper management of the fund from the moment it comes into his hands for safe keeping, until it is invested or finally paid over in pursuance of the trust; *Nyce's Appeal*, 5 Watts & Serg. 254; *The Commonwealth v. McAlister*, 4 Casey, 480; *McMurray v. Montgomery*, 2 Swan, 374; *Deaderick v. Cantrell*, 10 Yerger, 263. And it was said in *Sterrett's Appeal*, that if any exception can be made to this principle, it must be on the ground of necessity, and not of convenience.

LIABILITY WHEN FIDUCIARIES HAVE ACTED JOINTLY.—Nothing is better settled than that when two or more trustees join in any act,

each will be responsible for the safe termination of the transaction, and that neither can excuse himself from liability for a loss by showing that it arose more immediately from the default of his associate, if it could have been prevented by greater diligence on his own part. Thus, where two persons acting under a power of sale and reinvestment join in a sale and receive the proceeds, they ought to take such steps for the safe keeping of the fund that it cannot be misappropriated without the concurrence of both, and if this precaution be neglected, each will be answerable for any loss that would have been averted had it been adopted; *Ringgold v. Ringgold*, 1 Harris & Gill, 11. The same rule applies with as much or greater force in the case of executors; and where both join in a sale, each will be responsible for the appropriation of the proceeds, and cannot escape from this liability on the ground that they were received and misappropriated solely by the other; *Mathews v. Mathews*, 1 McMullin, Ch. 410; *Johnson v. Johnson*, 2 Hill, Ch. 277; *Hauser v. Lehman*, 2 Iredell, Ch. 594; *Ochiltree v. Wright*, 1 Dev. & Bat. Ch. 336; *McMurray v. Montgomery*, 2 Swan, 374; *Deaderick v. Cantrell*, 10 Yerger, 263. So where trust-money is collected by two or more trustees jointly, all are answerable, and no one of them can rely on the misfeasance of the others as a justification for his own supineness; *Glenn v. McKim*, 3 Gill, 366.

To produce this effect, the joinder must, nevertheless, be real, or, at

least, in the language of Lord Chancellor Cowper, must not be merely nominal. At common law, joint ownership conferred on each of the owners the power of extinguishing rights of action by his release, and of passing his share in vested rights by grant, without the concurrence of the rest; *Bowes v. Seeger*, 8 Watts & Serg. 222. But when trustees hold jointly for the purpose of a trust, no act which requires discretion will be valid in equity unless all join; *Sinclair v. Jackson*, 8 Cowen, 543; *Vandever's Appeal*, 8 Watts & Serg. 405; *Latrobe v. Tiernan*, 2 Maryland Ch. 474; *Thatcher v. Candle*, 4 Abb. App. Dec. 387; *Anonymous v. Gelpcke*, 5 Hun, 245. Hence, as trustees are constantly compelled to unite in acts or receipts, in order to prevent the business of the trust from suffering, they should not be held liable when the concurrence has been merely formal and nominal. Executors, on the other hand, need not act jointly, each having full power to dispose of the assets (*Hall v. Carter*, 8 Georgia, 388); and they have, consequently, been held to be precluded from showing that their concurrence in each other's acts, which was not necessary in point of form, was merely formal; *ante*, p. 1776; but this rule has been questioned, as needlessly severe, and savoring of technicality rather than equity; *Boyd v. Boyd*, 3 Grattan, 118; *Hall v. Carter*, Story's Eq., sect. 1281, 1282.

In *Kip v. Deniston*, 4 Johnson, 23, it was held that a joint acknowledgment by two trustees of the receipt of purchase-money attached to a conveyance in which

both had joined, did not make one answerable, where the money was actually paid to the other; and in *Monell v. Monell*, 5 Johnson Ch. 283, Chancellor Kent inclined to the idea that the conclusion of a joint receipt should not be absolute in the case either of trustees or executors. So in *Manahan v. Gibbons*, 19 Johnson, 427, where the effect of executors joining in a receipt was treated by the Chancellor as an open question, he thought that the true rule would be found in holding, with Lord Northington in *Westley v. Clarke*, 1 Eden, 357, that no one occupying a fiduciary capacity should be charged for more than he has actually received, although the fact of joining in an acknowledgment, which is strong evidence against trustees of an actual receipt, must be regarded as still stronger as against executors. And in *Sterrett's Appeal*, 2 Penna., 219; *Jones' Appeal*, 8 Watts & Serg. 143; *Stell's Appeal*, 10 Barr, 149, the Supreme Court of Pennsylvania inclined to the milder and more reasonable doctrine, that no penalty should be inflicted either on a trustee or executor for a default in which he has not shared, unless he has been guilty of neglect in not taking proper measures to prevent it. There can, however, be no doubt that joining in an acknowledgment of the receipt of money is *prima facie* evidence that the money came to the hands of the parties as the terms of the receipt import; *Chambers v. Minchin*, 7 Vesey, 186; *Monell v. Monell*, 5 Johnson Ch. 394; *Hall v. Carter*, 8 Georgia, 388; *Brice v. Stokes*, *ante*; and it follows that the presumption

to which such a receipt gives rise cannot be repelled by the defendant's own oath in reply to the allegations of the bill, nor without the aid of extrinsic evidence (*Monell v. Monell*; *Maccubbin v. Cromwell*, 7 Gill & John, 157; *Hengst's Appeal*, 12 Harris, 413, 418), because an answer loses its effect as proof as soon as it ceases to be responsive, and sets up matter in confession or avoidance; *Simson v. Hart*, 14 Johnson, 63; *ante*, p. 104.

The presumption necessarily becomes stronger when two or more trustees, guardians or executors unite in filing an account in which they hold themselves out as jointly answerable, such a mode of accounting having most, if not all, the force and conclusiveness of an estoppel; and while all will be responsible for the proper application of the whole, neither will be permitted to exonerate himself by showing that he confided the fund to his associates, and that it was misused by them; *Ducommon's Appeal*, 5 Harris, 268; *Clark's Appeal*, 6 Id. 175; *Hengst's Appeal*, 12 Id. 413; *Wilson v. Fisher*, 1 Halstead, Ch. 493; *Lowe v. Douglass*, 13 New Jersey Eq. 308; *Schenck v. Schenck*, 16 Id. 174.

In Iowa, it is enacted that "One of several executors may receive and receipt for money. Such receipt shall be given by him in his own name only, and he must individually account for all money thus received and receipted for by himself; and this shall not charge his co-executors, except so far as it can be shown to have come into his hands." Too much weight, however, seems to have been given to this

statute in *Tretiman v. Schramm*, 23 Iowa, 521, where two executors, desiring to withdraw a deposit standing to the credit of the decedent, signed a joint receipt for the same, and, without receiving the money, directed the banker to transfer it to their individual credit in equal proportions, which was accordingly done. They subsequently filed a joint account, in which they charged themselves with the full amount of the deposit; and one of the executors having defaulted, it was held in the court below that his co-executor was not liable to account for the same, and upon appeal, after re-argument, this was affirmed by an equally divided court. But it may be doubted whether sufficient importance was attached to the effect of the joint account, and it would seem that full force could have been given to the statutory provision by holding it to be merely declaratory of the doctrines existing elsewhere.

The soundness of the course of decision which holds fiduciaries liable for the protection of securities for which they have jointly accounted, would seem unquestionable, because the effect is to lead those interested in the trust to believe that no loss can happen unless both the accountants prove insolvent, and to refrain from taking measures for their own protection. Nor is there any hardship in this doctrine, for nothing is more easy than for fiduciaries who desire to avoid responsibility for the acts of their associates, to qualify their joint account by a subsequent separate account (*Fennimore v. Fennimore*, 2 Green Ch. 293), or to account separately in

the first instance; *Davis' Appeal*, 11 Harris, 206; *Irwin's Appeal*, 11 Casey, 294; *Bellejeau v. Kotts*, 1 Southard, 359.

The same rule applies where joint bonds have been given by administrators, or, in those States wherein such security is required, by executors, for the faithful performance of the duties of their office. As was said in *Jeffries v. Lawson*, 39 Mississippi, 791, "Here is a joint bond, by which each covenants and binds himself that they will both well and faithfully administer the estate. This is a plain obligation, and it is difficult to perceive how any other construction can be given to it than that each becomes bound not only for himself, but that his associate shall faithfully perform his duty. If either fails, the obligation is broken. If this were not so, what would be the condition of the sureties in case of a receipt and squandering of the assets by one of the executors who is insolvent, without the knowledge or participation of the other? Each executor has come under the implied obligation of the sureties that they will both faithfully administer the estate. In case of a recovery against the sureties for a *devastavit* committed by one of them who might be insolvent, but without the participation of the other, could it for a moment be doubted that the sureties could maintain an action against both of them to recover money paid on such judgment? Surely not; for both were under an implied obligation to indemnify the sureties for loss which they might sustain by the unfaithful administration of either. But what is a

matter of mere implied contract with the sureties, is a matter of express obligation to the obligee of the bond, which, by its very terms, covenants that they, as joint administrators, will faithfully administer the estate. It appears to be a manifest perversion of the obligation to put any other construction upon it than that each administrator guarantees the faithful performance of the duty of his associate as well as that of himself." This view has been frequently sustained; *Babcock v. Hubbard*, 2 Conn. 536; *Brazier v. Clark*, 5 Pickering, 96; *Sparhawk v. Buell*, 9 Vermont, 41, 81; *Boyd v. Boyd*, 1 Watts, 365; *Lidderdale v. Robinson*, 2 Brock. 159; *Green v. Hanberry*, Id. 403; *Hughlett v. Hughlett*, 5 Humphreys, 453; *Boatick v. Elliott*, 3 Head, 507; but in *Hall v. Carter*, 8 Georgia, 388, merely filing a joint inventory was obviously deemed insufficient to establish a joint responsibility.

Upon the same grounds a joint liability results from the omission to perform a joint duty imposed by the testator upon his executors. Thus, in *Weigand's Appeal*, 4 Casey, 471, a bond due by one of two executors, and bequeathed to both with directions to secure the principal and pay the interest from time to time, as the will directed, was allowed to stand for many years without security, until the obligor died insolvent, and the surviving executor was held liable for the amount of the bond, on the ground that he had impliedly assumed the performance of a duty which he had failed to discharge. So an executor is liable for the acts of his co-executor, which, by agree-

ment, were done in their joint name; *Fonte v. Horton*, 36 Mississippi, 350.

The extent of this doctrine is illustrated by the very recent case of *Williams v. De Haven*, 9 Phila. Rep. 174; affirmed, 33 Leg. Int. 169, [May, 1876], where, a deposit having been made in the names of two executors, a release by one of the depositors was held ineffectual to discharge the banker from his liability for the joint deposit.

"The question presented in this case," said the court below, whose opinion was adopted by the Supreme Court, "is one of the first impression. It is, whether one co-executor can, without the knowledge and assent of the other, release a demand arising from a deposit made in the names of both, and agree to look solely to the fund in the hands of the assignee, to whom the debtor has transferred his property for the benefit of his creditors. It is well settled, in general, that the acts of one co-executor bind all the others, by reason of the confidence reposed in them individually, in consequence of which each has full power over the assets; *Belthoeffer v. Darragh*, 16 Serg. & Rawle, 327, 329. This is an exception to the rule that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is requisite to its due execution (*Sinclair v. Jackson*, 8 Cowen, 533, 583), and distinguishes executors from trustees, who are regarded by equity as forming one collective trustee, and must, therefore, execute the duties of their office in their joint capacity; *Vandever's Appeal*, 8 W.

& S. 405, 409. Hence a payment to one executor, or a release from him, extinguishes the debt, although he misapplies the money and no part of it comes to the use of the estate; *Herbert v. Pigott*, 2 C. & M. 384. For a like reason, one may, where the circumstances require it, take part and release the residue, or accept goods or securities in satisfaction (*Smith v. Everett*, 27 Beavan, 446; *Gilman v. Healy*, 55 Maine, 120); and it will make no difference, if the case be free from fraud, that the compromise is effected without the knowledge of the co-executor, or that it is against his wishes; *Murray v. Blatchford*, 1 Wend. 583; *Herbert v. Pigott*, 2 C. & M. 183. It results from this principle, that one of several co-executors is not answerable for the acts or defaults of his companions, unless he was negligent, or had notice of some fact or circumstance rendering it a duty to interfere; *Townley v. Sherborne*, 1 Bridgman, 39.

"It is at the same time equally well established, that the executors may join in the administration of the assets; and such is often the better course, as affording an additional guarantee to the creditors and legatees. Under these circumstances each is responsible for the safe-keeping of the fund, and cannot allege the neglect or misconduct of another as an excuse for a loss which would not have occurred if he had been diligent; *Mendes v. Guedalla*, 2 J. & H. 259. Ordinarily, an executor is not liable for non-feasance, but if he enters on the execution of any

part of the trust he cannot stop short, and must do all that is requisite to conduct the business to a successful termination. An executor who unites in the collection of a debt, cannot get rid of his responsibility by leaving the proceeds in the custody of his associate, and should, on the contrary, take such measures as will prevent the fund from being used without his knowledge. The place of safe-keeping must consequently be one where both can exercise a control or supervision. The authorities accordingly agree that money which has been received by a co-executor should be deposited to their joint account, and if this precaution is not observed, and a loss ensues through the fraud of him who is intrusted with the fund, a chancellor will visit the consequences on both; see *Clough v. Bond*, 3 Mylne & Craig, 490; *Langford v. Gascoyne*, 11 Vesey, 333. Under these circumstances they are still executors, but executors charged with a fiduciary obligation, which renders them virtually trustees as it regards the assets which they have received and hold in common.

"The existence of such an obligation implies the power to fulfill it. *Lex neminem cogit ad vana seu impossibilia*. It were futile to open a joint account if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check in order to discharge the banker, and it follows that he cannot rely on a compromise or release by one as a defence. This is not so much an exception to the rule, that a payment to a co-execu-

tor discharges the debt, as a return to the general rule, to which that is an exception. The right of each executor to act without the concurrence of the rest seems to have been the growth of circumstances. A testator might have assets in different counties, and lying as far apart as Canterbury and York. It might be difficult or impracticable to find any one who was able and willing to assume the whole responsibility, and he might appoint a representative in either province, in the expectation that each would collect what lay nearest to his own door. So one executor may be chosen for his knowledge of accounts, and another for his skill and sagacity in the adjustment of outstanding and disputed claims. Under these circumstances it would be useless and injurious to require that all should join in the acts that can be better performed by one. The privilege is not confined to executors, but extends measurably to trustees, who, as Lord Keeper Coventry observed in *Townley v. Sherborne*, may permit one of their number to receive all or the most part of the profits without a breach of trust, 'it falling out many times that some of the trustees live far from the lands, and are put in the trusts out of other respects than to be troubled with the receipt of the profits.' In this case, as in that of executors, the right to receive necessarily implies the power to give an acquittance.

"It results from what has been said, that the right of executors to sever in the execution of the trust is a concession to expediency, which



should not be made when the case is one for care and judgment, and it is possible for all to unite without inconvenience. It does not, therefore, exist where a fund arising from the collection or sale of the assets comes to the hands of two or more executors or administrators, or has been deposited to their joint account. Under these circumstances, there is nothing to exclude the principle that persons acting in a fiduciary capacity must concur in every measure affecting the interests which they represent. See *Belzhoever v. Darragh*, 16 Serg. & Rawle, 329, 339; *Mendes v. Guedalla*, 2 J. & H. 259."

It has been sometimes intimated that when several trustees jointly effect a sale, each will become liable for the collection of the consideration, upon the ground that trustees who unite in any special transaction are responsible for conducting it to its proper termination, which has been said not to occur until payment be made; *Mathews v. Mathews*, 1 McMullin, Eq. 410; *Spencer v. Spencer*, 11 Paige, 299; *Ringgold v. Ringgold*, 1 Harris & Gill, 11; *Robert v. Thomas*, 32 Georgia, 31. But these cases appear to carry the liability further than is warranted by the general course of decision, and the better doctrine will be found in *Atcheson v. Robertson*, 3 Rich. Eq. 132; *Griffin v. Maccauley*, 7 Grattan, 476; *Kip v. Deniston*, 4 Johnson, 157; *Jones' Appeal*, 8 Watts & Serg. 143, where it was held that the joinder of a trustee in a sale will not render him liable for the subsequent receipt and misapplication of the proceeds by his associ-

ates, unless he is guilty of negligence in not taking proper measures for the collection of the fund.

When trustees, on assuming the trust, enter into an express obligation to be answerable for each other, their liability will, of course, be co-extensive with their engagement. But even in this case it will not be construed as continuing longer than the existence of the joint interest and authority, and will not have the effect of making the estate of a deceased trustee liable for a default committed after his death by his associate in trust; *Brazier v. Clark*, 5 Pickering, 96; *Towne v. Amsmidown*, 20 Id. 535. And under no view of the law will the liability imposed on trustees for entering on the joint management of a particular transaction, continue after the latter has been brought to its conclusion. Hence the responsibility incurred by uniting in a sale, or in the receipt of trust-moneys, terminates as soon as the fund is properly invested, and does not extend to charging one trustee for the fraud of another in withdrawing the fund from investment and appropriating it to his own purposes; *Glenn v. McKim*, 3 Gill, 366.

INVESTMENTS.—The liability of fiduciaries for a depreciation of the assets is, to a great extent, regulated by statutory provisions authorizing investments in particular securities; a summary of many of these statutes will be found in Hill on Trustees, 368, n., and 1 Perry on Trusts, § 459. But, apart from legislation, the rule in some States approaches very nearly that which prevails in England, and, while per-

mitting a trustee to invest in either real or government securities, makes him answerable for going beyond or outside those limits, even when the investment has been made in good faith, and with no want of diligence or prudence; *Nyce's Estate*, 5 Watts & Serg. 254; *Morris v. Wallace*, 3 Barr, 319; *Worrell's Appeal*, 9 Id. 508; *Hemphill's Appeal*, 6 Harris, 303; *Pray's Appeal*, 10 Casey, 100; *Ihmsen's Appeal*, 7 Wright, 431; *Allen v. Gaillard*, 1 S. Car. (N. S.), 279; *King v. Talbot*, 50 Barbour, 453; *Kimball v. Reding*, 11 Foster, 352. And the doctrine is imperative that loaning money upon mere personal security is a *prima facie* breach of trust; *Gray v. Fox*, Saxton, 259; *Moore v. Hamilton*, 4 Florida, 112; *Ackerman v. Emott*, 4 Barbour, 626; *Swoyer's Appeal*, 5 Barr, 377; *Nance v. Nance*, 1 S. Car. (N. S.) 209; *Womack v. Austin*, Id. 421; *Fulton v. Davidson*, 3 Heiskell, 615. Nor is the measure of responsibility lessened by the fact that the testator, during his lifetime, had himself invested in such securities, and would, if living, have probably approved of what had been done; *Hemphill's Appeal*, 6 Harris, 303; or that the trustee had managed the trust estate with the same care as his own, and had personally lost by the depreciation; *Worrell's Appeal*, 11 Harris, 44; *Ihmsen's Appeal*, 7 Wright, 431; *King v. Talbot*, 50 Barbour, 484. In *Pray's Appeal*, 10 Casey, 100, the foregoing rules were applied to an investment in the stock of an unfinished manufacturing company, made by an executor who was authorized to invest

"in any property, real or personal, that he may see fit;" and a similar decision was made in *King v. Talbot*, 40 New York, 76; S. C., 50 Barbour, 453; *Kimball v. Reding*, 11 Foster, 352. So it is no excuse that the investment was "generally considered to be one of the most reliable that could be procured" (*Allen v. Gaillard*, 1 S. Car. (N. S.) 279; *Kimball v. Reding*, ante), although, of course, a contrary rule prevails when there is an express power to invest in "safe and productive" stocks (*Pleasant's Appeal*, 27 P. F. Smith, 356); and it is clear that subsequent events cannot impose a personal liability for investing in securities which, at the time, would have been approved by a court of competent jurisdiction; *Bodley v. McKinney*, 9 Smedes & Marsh, 340. The doctrines prevailing in South Carolina were, in the somewhat recent case of *Nance v. Nance*, 1 S. Car. (N. S.), 209, stated to be, that "A trustee will be held responsible for losses of trust funds through loans to private persons, unless securities are taken collateral to such loans. Such securities should primarily consist of mortgages of unencumbered real estate of a value sufficient to guarantee the debt against all contingencies liable to occur, or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities, unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investments

appear upon an accounting with the *cestuis que trust*."

So the English rule was adopted to its fullest extent in *Ackerman v. Emott*, 4 Barbour, 453, although in the later case of *King v. Talbot*, 40 New York, 76, 97, much doubt was expressed as to its application in that State, and the enforcement of the rule thought to depend upon the fidelity and prudence with which the trust had been administered; S. C., 50 Barbour, 453; *Smith v. Smith*, 4 Johnson, Ch. 481. And this view accords with the doctrines prevailing in Massachusetts, where trustees are permitted to range through the whole field of investment, without any other check or obligation than that of not falling short of that reasonable care and diligence which every prudent man exercises in the management of his own business; *Harvard College v. Amory*, 9 Pickering, 446; *Lovell v. Minot*, 20 Id. 116; *Harding v. Larned*, 4 Allen, 426; *Clark v. Garfield*, 8 Id. 427; *Knowlton v. Bradley*, 17 New Hamp. 458. Thus, in *Clark v. Garfield*, it was said: "If a trustee acts with good faith and a sound discretion in the investment of trust funds, he is not to be held responsible for any loss which may happen. There is no other restriction in this commonwealth upon the kinds of investment which a trustee may make than that which this rule implies;" and in *Lovell v. Minot*, the English rule was considered to be entirely inapplicable, and a trustee held not to be responsible for the loss of money loaned on personal security, with a collateral pledge of the stock of a manufacturing company; and the

same view was taken in the recent case of *Brown v. Wright*, 39 Georgia, 99. The courts of Maryland have also refused to follow the English decisions, and hold that trust funds may be properly invested in the purchase of the stock of a bank or other similar institution, unless there are specific objections to the investment other than those inherent in its own nature; *Hammond v. Hammond*, 2 Bland, 306; *Gray v. Lynch*, 8 Gill, 403; *Murray v. Feinour*, 2 Maryland Ch. 418.

But of these cases it may be observed, that the liability of fiduciaries for a depreciation of the assets is a question eminently fitted for the application of plain and exact rules. If their responsibility be allowed to depend upon the degree of prudence and ability with which the trust has been managed, a large, uncertain field of inquiry is opened, capable of producing different impressions upon different minds; while if it be established that a trustee will be liable for investing outside of prescribed limits, a rule of conduct is settled, easy of application and certain in result. And, as has been well said by Lord Eldon, in *Brice v. Stokes*, *ante*, "It is much safer for executors to abide by a general rule of this sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases."

* Where the instrument creating the trust designates the securities in which the investments are to be made, its provisions will obviously be binding upon the fiduciaries, and preclude them from adopting any

other mode than that prescribed (*Burrill v. Sheil*, 2 Barbour, S. C. 457; *Ackerman v. Emott*, 4 Id. 626; *Wood v. Wood*, 5 Paige, 597; *Gilman v. Gilman*, 2 Lansing, 1; *Harding v. Larned*, 4 Allen, 426; *McGregor v. McGregor*, 9 Iowa, 65; *Holcombe v. Holcombe*, 2 Beasley, 413; *Womack v. Austin*, 1 S. Car. (N. S.) 421; *Sanders v. Rogers*, Id. 452; *Ihmsen's Appeal*, 7 Wright, 431; *Holbert's Estate*, 48 California, 627), unless the directions should become impracticable, in which case the investment can be made in other approved security; *McIntire v. City of Zanesville*, 17 Ohio St. 352; *Lansing v. Lansing*, 45 Barbour, 182. Hence executors or trustees will not be responsible for the consequences which may result from acting in obedience to such instructions. But in the absence of express directions or a specific devise, it becomes somewhat difficult to determine how far the mode in which the testator has disposed of his property in his lifetime is to be regarded as an authority for allowing it to continue in the same state after his death, and whether executors or trustees will be justified in refraining from changing or calling in investments which they would not have been authorized to make.

In those estates wherein the range of investment is only limited by the bounds of prudence, it may well be that the confidence of the testator himself will, in the absence of circumstances amounting to negligence, justify his executors in reposing a like confidence, and that neither executors nor trustees will

be liable for any loss which may result from adhering to the course pursued by the creator of the trust while the property was still within his control; *Murray v. Feinour*, 2 Maryland Ch. 418; *Thompson v. Brown*, 4 Johnson, Ch. 619. But where investing within certain prescribed limits furnishes the only means by which to escape a personal liability, the fact that the testator had invested in securities outside of these limits will afford no excuse for his representatives to continue such investments; *Hemphill's Appeal* 6 Harris, 303; *Worrell's Appeal* 11 Id. 44; *Pray's Appeal*, 10 Casey, 100; Hill on Trustees, 380; 1 Perry on Trusts, § 465; Bispham's Eq. § 139. A contrary doctrine was asserted in *Barton's Estate*, 1 Parson's Eq. Cases, 24, but that case was substantially overruled in *Pray's Appeal*.

Nor does the fact that the testator purchased and refrained from selling afford sufficient ground for presuming that he would have desired the same course to be pursued after his death, for many investments may be safe while watched with the care and caution induced by the sense of personal interest, and by an owner who can sell out at a moment's notice, and yet be eminently the reverse in the hands of a trustee less acquainted with their true nature, and unable or unwilling to incur an immediate loss on his own responsibility for the purpose of averting a greater sacrifice in the future; *Hemphill's Appeal*, 6 Harris, 303. And, indeed, the doctrine that would justify a failure to convert illegal investments would authorize a retention

of the assets in the business of the testator, and this is universally condemned; *ante*, p. 1772. In the very recent case of *Bohlen's Estate*, 25 P. F. Smith, 304 (S. C., *nom* *McMurtrie v. The Pennsylvania Co.*, 9 Phila. R. 529), the question was much discussed whether, in the absence of an express power of sale, trustees possessed an implied power to convert illegal investments forming part of the assets, but no definite conclusion was reached. It would seem, however, that nothing short of an unequivocal expression of the views and wishes of the testator should serve as a reason for disregarding the interests of those who have survived him, and, at all events, a prudent trustee, in similar instances, should have his conduct sanctioned by his *cestuis que trusts*, if capable of acquiescing, or by an order of court.

Numerous decisions have been made in regard to investments in the bonds and other securities issued by the late Confederate States, as to which the cases are far from uniform. In Virginia and Tennessee, delivering such securities to the distributees is held to be a valid discharge to the fiduciary (*Walker v. Page*, 21 Grattan, 636; *Bird v. Bird*, Id. 712; *Myers v. Zetelle*, Id. 733; *Saunders v. Gregory*, 3 Heiskell, 507; *State v. McAuley*, 4 Id. 424), while the contrary is asserted by the courts of Texas and South Carolina; *Kleberg v. Bond*, 31 Texas, 611; *Turner v. Turner*, 36 Id. 41; *Scott v. Atchinson*, Id. 76; *Turpin v. Sansom*, Id. 143; *McGar v. Nizon*, Id. 289; *Lacey v. Clements*, Id. 662; *Becht v. Mar-*

tin, 37 Id. 720; *Creighton v. Pringle*, 3 S. Car. (N. S.) 78; *Oureton v. Watson*, Id. 451. And in other States the true measure of liability has been said to be the course of conduct that, under all the circumstances, would have been dictated by prudence; *Brown v. Wright*, 39 Georgia, 96; *Smith v. Byers*, 41 Id. 439; *Cobb v. Taylor*, 64 N. Car. 193; *State v. Harmer*, Id. 669; *State v. Pursey*, 65 Id. 497; *Jurney v. Cowan*, 67 Id. 393; *Bell v. King*, 70 Id. 330; *Williams v. Campbell*, 46 Mississippi, 57; *Succession of Spoul*, 21 La. An. 544; *Bruce v. Strickland*, 47 Alabama, 99. But an order of court directing such investment has been held to protect the trustee; *Davis v. Harman*, Id. 194; *Trotter v. Trotter*, 40 Mississippi, 704; and so of investments made under legislative authority; *Campbell v. Miller*, 38 Georgia, 304. A similar view was adopted in *Watson v. Stone*, 40 Alabama, 451; *Dockery v. McDonnell*, Id. 476; *Neilson v. Cook*, Id. 498; but these cases were overruled by the subsequent decision of *Hall v. Hall*, 43 Alabama, 488.

The mere receipt of Confederate notes has not, however, been deemed to be sufficient evidence of negligence to surcharge the trustee or executor; *State v. Mebane*, 63 N. Car. 315; *Shipp v. Hettrick*, Id. 329; *Finger v. Finger*, 64 Id. 183; *State v. Foy*, 65 Id. 265; *Oureton v. Watson*, 3 S. Car. (N. S.), 451; *Hurton v. Kennedy*, Id. 459.

It is hardly necessary to say that an executor, trustee, or other person acting in a representative capacity, cannot derive any personal

benefit from the use of the funds of the estate, for the same reasons which preclude a trustee or agent from buying at his own sale, or at a sale of which he has the management; *ante*, vol. 1, note to *Fox v. Mackreth*; *Mulligan v. Wallace*, 3 Richardson, Eq. 111; *Spear v. Spear*, 9 Id. 184, overruling *Sweet v. Sweet*, Speer, Eq. 309; *Blauvelt v. Ackerman*, 5 C. E. Green, Ch. 141. And a fiduciary converting the trust property for his own purposes may be compelled either to account for all profits made, or for interest upon the amount appropriated; *Kyle v. Barnett*, 17 Alabama, 306; *Powell v. Cooper*, 42 Mississippi, 222; *Holbert's Estate*, 39 California, 597; *Whitney v. Peddicord*, 63 Illinois, 249; *Robinett's Appeal*, 12 Casey, 174; *Norris' Appeal*, 21 P. F. Smith, 106; *Gilbert's Appeal*, 28 Id. 266; Hill on Trustees, 374.

A dictum in the case of *The Commonwealth v. McAlister*, 4 Casey, 480, might convey the idea that a deposit by a trustee or executor in a bank or savings institution stands on the same footing with an investment in its stock, and will, consequently, render him liable if the institution in which the deposit is made happens to fail before it is withdrawn. But the error of this reasoning is clearly shown by the remark of Knox, J., who dissented on this point from the opinion of the court, that a deposit is subject to the control of the person by whom it is made, and may be removed at any moment, while an investment is necessarily more or less permanent, and cannot be changed, except

by a sale, nor until some one is found who is willing to purchase. Whether, therefore, a trustee should be answerable for the loss of a deposit made in the name and to the credit of the trust, ought, it would seem, to depend on whether the exigencies of the trust were such as to require him to have the money on hand and ready for payment, for if so, a deposit in a solvent bank may, obviously, be safer than retaining it in his own possession; Hill on Trustees, 375.

All the cases agree, and there can be no doubt on principle, that a trustee or executor who makes an investment or deposits money in his own name, without designating or describing it in some way as the property of the trust, will be responsible for any loss which may subsequently occur (*Nyce's Estate*, 5 Watts & Serg. 254; *Lukens' Appeal*, 7 Id. 48; *Stanley's Estate*, 8 Barr, 431; *Royer's Appeal*, 1 Jones, 86; *The Commonwealth v. McAlister*, 4 Casey, 480; S. C., 6 Id. 536; *Parker's Estate*, 14 P. F. Smith, 307; *Hess' Estate*, 18 Id. 454; *In re Stafford*, 11 Barbour, 353; *Gunter v. Jones*, 9 California, 643; *Glenn v. Glenn*, 41 Alabama, 571; *Ivey v. Coleman*, 42 Id. 409; *McElroy v. Thompson*, Id. 656; *Knoulton v. Bradley*, 17 New Hamp. 458; *Jenkins v. Walter*, 8 Gill & J. 218; Hill on Trustees, 374), because he would otherwise be able to play fast and loose with his *cestui que trust*, and throw the hazards of his own business on them, by designating the fund on which the loss has fallen as theirs, whether it was or was not so in reality.

[*923]

***PENN v. LORD BALTIMORE.**

MAY 15, 1750.

REPORTED 1 VES. 444.

POWER OF COURT OF EQUITY OVER PROPERTY OUT OF ITS JURISDICTION, BY A DECREE IN PERSONAM.]—*Specific performance decreed, of articles executed in England, concerning boundaries of two provinces in America.*

THE bill was founded on articles entered into between the plaintiffs and defendant, 10th May, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent, granted 20th June, 8 Car. 1, by which the distinct property and government of Maryland, under certain restrictions, is granted to the defendant's ancestor, his heirs and assigns; further, reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs, derived from James, Duke of York, to the three lower counties, by two feoffments, both bearing date 24th of August, 1682. The articles recite that several controversies had been between the parties, concerning the boundaries and limits of these two provinces and three lower counties; and make a particular provision for settling them, by drawing part of a circle about the town of Newcastle; and a line to ascertain the boundaries between Maryland and the three lower counties; and a provision in what manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before the 25th of December, 1733. There was, beside, a provision in the articles, that if there should be a want of a *quorum of commissioners meeting at [*924] any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of 5000*l.* to the other party; and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause, came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney-General should be made a party¹, who now left it to the Court to make a decree, so as not to prejudice the right of the Crown.

The first objection for defendant was, that this Court has not

¹ See Ridg. Ca. t. Hardw. 444.

jurisdiction nor ought to take cognizance of it, for that the jurisdiction is in the King in Council.

Second objection, that, if there is not an absolute defect of jurisdiction in this Court, yet, being a proprietary government and a feudary seignior held of the Crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries, by their own act; for such agreement to settle boundaries, and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do. But supposing they may alien entirely, they cannot alien a parcel, as that is dismembering, for which there is a rule in the feudal books concerning feuda indivisibilia.

Thirdly, this agreement ought not to be carried into execution by this Court, as it affects the estates, rights, and privileges of the planters, tenants, and inhabitants within the district, and the tenure and law by which they live, without their consent.

Fourthly, supposing all this answered, yet this agreement is not proper to be established, from the general nature and circumstances. First, as it is merely voluntary, and the Court never decrees specifically without a *consideration; secondly, as the time for performance is lapsed; thirdly, that these [*925] articles are in nature of submission to arbitration, which cannot be supplied by interposition and act of this Court; fourthly, that defendant was imposed on or surprised in making this agreement; fifthly, that, if there was no imposition or fraud, defendant grossly mistook his original right, and, under that mistake and ignorance, the articles were founded and framed; sixthly, the agreement in some material parts is so uncertain, that it cannot be decreed with certainty, according to the intent of the parties, for that no centre is fixed, without which it is impossible to make a circle; nor is it sufficiently described, whether it should be a circle with a radius of twelve miles, or only a periphery of twelve miles; seventhly, there is a covenant for mutual conveyances, whereas the plaintiffs have no estates in the lower counties, so as to make an effectual conveyance to defendant; and an agreement must be decreed entirely, or not at all. On the plaintiff's own showing, the legal estate and property is in the Crown; so that, at most, they have but an equitable right, in which the Crown is trustee; and then, this Court cannot decree a conveyance. In *Reeve v. Attorney-General*, 1741, lands were devised to a wife, and, after her death, to be sold, and the money to be divided among the plaintiffs. The testator died without heirs, so that the legal interest in the estate descended to the Crown, but with a trust to be sold. On a bill to have the will established, and to hold against the Crown, or the lands sold, his Lordship dismissed the bill, and said, where the Crown was trustee, the Court has no jurisdiction to decree a conveyance, but they must go to a petition of right; eighthly, this Court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

LORD CHANCELLOR HARDWICKE.—I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and *the great labor and ability [*926] of the argument on both sides, it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate, rather than of a single Judge; and my consolation is, that, if I should err in my judgment, there is a judicature, equal in dignity to a Roman senate, that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence, which will fall in more naturally, and very intelligibly, under the particular points arising in the case.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this Court, the specific performance of agreements being one of the great heads of this Court, and the most useful one, and better than damages at law, so far as relates to the thing in *specie*, and more useful in a case of this nature than in most others, because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, viz.: the settling and fixing these boundaries in peace, to prevent the disorder and mischief which, in remote countries distant from the seat of government, are most likely to happen and most mischievous. Therefore, the remedy prayed by a specific performance is more necessary here than in other cases, provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shown by defendant, who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered, and, though it comes late, I am not unwilling to consider it. To be sure, a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering submits to the jurisdiction, much more when there is a proceeding to hearing on the merits, which would be conclusive at common law; yet a Court of equity, which can exercise a more liberal discretion than common law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than *where a plain want of [*927] equity appears. It is certain that the original jurisdiction, in cases of this kind relating to boundaries between provinces, the dominion and proprietary government is in the King and Council; and it is rightly compared to the cases of the ancient commotes and lordships marches in Wales; in which, if a dispute is between private parties, it must be tried in the commotes or lordships; but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party, this question often arising between the Crown and one lord proprietor of a province in America. So, in the case of the marches, it must be determined in the King's Courts, who is never considered as par-

tial in these cases, it being the judgment of his Judges in B. R. and Chancery. So where, before the King and Council, the King is to judge, and is no more to be presumed partial in one case than in the other. *This Court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal, for mutual considerations, which gives jurisdiction to the King's Courts, both of law and in equity, whatever be the subject-matter.* An action of covenant could be brought in B. R. or C. B., if either side committed a breach; so might there be for the 5000*l.* penalty, without going to the Council. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the Court originally will be brought within it. Suppose an order by the King and Council, in a cause wherein the King and Council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof, a bill must be in this Court for a specific performance, and, perhaps, it will appear this is almost literally that case. The reason is, because none but a Court of equity can decree that. The King in Council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the *King in Council might look on that, and allow it as evidence of the original [*928] right; but if that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. That Court cannot decree in personam in England, unless in certain criminal matters, being restrained therefrom by stat. 16 Car. 1, c. 10; and, therefore, the Lords of the Council have remitted this matter very properly to be determined in another place, on the foot of the contract. *The conscience of the party was bound by this agreement; and, being within the jurisdiction of this Court, which acts in personam, the Court may properly decree it as an agreement, if a foundation for it.* To go a step further, as this Court collaterally, and in consequence of the agreement, judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical Court, just as a Court of law would maintain an action for damages in breach of covenant.

As to the second objection: If it was so, it would be very unfortunate; for suits and controversies might be, for that reason, endless; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they will hold their rights between themselves; and if a proper suit is before the King in Council, on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect, also, it is properly compared to the case of lordships marches, and to counties palatine. When the marches subsisted, there might be a suit in B. R. concerning their boundaries; and the lord of each march in question

need be the only party. If a matter of equity arose, either of the lordships might have sued in equity to settle, because this is the King's court of general jurisdiction as to matters of equity; and an agreement between the parties relative to these boundaries, if proper in other respects, to carry it [*929] *into a specific performance, is a matter of equity. The Court might, indeed, by reason of their tenure, require the Attorney-General to be made a party, to know if he had anything to object; but then, might hold plea of the cause. Suppose both counties palatine were in subjects' hands (as both have been formerly), and subsisted so, and a question had arisen concerning the boundaries of these two counties palatine, and the respective Earls Palatine had entered into articles concerning these boundaries, this Court would have held plea of such articles as well as concerning the boundaries of manors, seignories, and honors; for these are honors, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for, if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it savors in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I; but it is a new notion, that the lords proprietors of these provinces may not alien to natural-born subjects. This is no opinion; but the grants themselves are framed so as to be most open to alienation, being grants to them and their heirs, to be held in common socage, not in capite of the Crown, but as Windsor Castle is. What rule of law is there, that lands or a franchise granted to be held in common socage, not in capite, but as a particular honor or manor, cannot be aliened without license? All the objections concerning knights' service or capite lands are out of the case, and the Act 7 & 8 Will. 3, c. 22, s. 16, supposes the proprietors may alien to a natural-born subject. The first words of the clause there are, that they and their assigns may be restrained from alienating without license, which supposes that it was assigned, and this appears in the case of Carolina. As to the not alienating a parcel, the rule cited out of the feudists is not applicable, those books treating of different tenures; but I admit neither of these proprietors could dismember their provinces, so as to alter [*930] *the nature of the thing granted, and thereby bind the Crown, of whom they held; for the tenure and services would still remain on the whole, and the Crown might demand the whole services from either. It is, therefore, something like the case of the office of high constable of England, held by tenure of grand serjeanty; which was very extraordinary, to hold the manors by tenure of such an office. In Kel. 170, and Dy. 285¹, the Judges reported their opinion to King Henry 8, that the tenure was not extinct by the division, but that the King had a

¹ 1 Inst. 106, 149, 165.

right to insist on the performance of that office from the Duke of Buckingham, by reason of his moiety; but this exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance, that, in honors and tenures of this kind, the King cannot be prejudiced by any alienation, division, or severance between the parties; and if material services are reserved on the grant (though here it is by fealty only, in lieu of all), the entire services might be exacted from either, not being apportionable. But the settling limits is not a dismembering, and if a license to do this was necessary from the Crown, in law or policy, it sufficiently appears there was such; for it appears, by Orders of Council made in 1686 and 1709, the Crown has not only recommended, but ordered, this division to be made, so far as respects the three lower counties, as to which there is no dismembering; for the dividing line is thereby exactly the same; indeed, the circle is not within these Orders; but as to that no difficulty can arise.

As to the third objection: The tenure of the planters, &c., remains just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preserve them. The King of England is still their sovereign and supreme lord; both charters require the law of the respective provinces should be conformable to the law of England, as near as could be. Consider to what this objection goes: in lower instances, in the case of manors and honors in *England, which have [981] different customs and by-laws frequently, yet, though different, the boundaries of these manors may be settled in suits between the lords of these manors, without making the tenants parties; or may be settled by agreement, which this Court will decree, without making the tenants parties, though in case of fraud, collusion, or prejudice to the tenants, they will not be bound; but, notwithstanding, it is binding on the parties, and to be established as to them. Suppose two bordering manors had been granted out in tail in recompense of services, the reversion in fee to the Crown; in a suit between the lords concerning the boundaries, it is not necessary to make the king or tenants parties to this suit. Indeed, the Crown would not be bound by that agreement or decree; but it is still binding between the parties. But in this case the same final answer occurs that does under the other objection, viz., that if there is no fraud or collusion, it must be presumed to be the true limits, being made between the parties in an adversary interest, each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose either party insisted there was such a breach of the proviso here, as incurred the penalty, and brought debt in B. R. for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done), the Court must have relieved against the penalty, on performance of the articles;

judging on the terms of the relief, and dispensing with the point of time, the Court could not have avoided it. Then how does this case differ? For it will not be pretended the King in Council would have had plea in that case; it must have come into the King's Courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

First, it is true, the Court never decrees specifically without a consideration: but this is not without consideration; *for [*982] though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet, is a mutual consideration on each side, and in all cases make a consideration to support a suit in this Court for performance of the agreement for settling the boundaries.¹

The objection of the time for performance being lapsed may be answered; for it is the business of this Court to relieve against lapse of time in performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance, as it plainly does not here.

Next these articles are not like submission to arbitration. In those cases, generally the time is conditional so as determination be made by such a day; here the line and circle are agreed on by distinct, independent covenants, and that they shall form the boundaries of these tracts of land; this, therefore, is a particular, certain, specific contract of the parties, that there shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial, to run the line, &c., according to the agreement, and set the marks. Therefore, it is not like an award, but is an agreement, which this Court will see pursued.

As to any imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the particulars of that evidence; but it appears, the agreement was originally proposed by the defendant himself; he himself produced the map or plan afterward annexed to the articles; he himself reduced the heads of it into writing, and was very well assisted in making it: and further, that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, viz., the defect of evidence on the part of the defendant, which amounts to stronger negative evidence than if it was by witnesses; for it was in his own power to have shown it, if otherwise. Then, am I to presume he was imposed on, in a plan, too, sent to himself by his own [*933] agents? As to the plan itself, *it was in his own power: with regard to the original of these minutes of the agreement, wrote by himself, though ordered by the Court to be produced, they are not produced; which negative evidence supports

¹ And see *Stapilton v. Stapilton*, and note, ante, p. *824.

the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

I admit, that, though no imposition or fraud, yet a plain mistake contrary to the intent, would be a ground not to decree specific performance. But consider the evidence thereof: the defendant and his ancestors were conversant in this dispute about fifty years before this agreement was entered into, and had all opportunities; therefore, no ignorance, want of information, or mistake, are to be presumed; and in cases of this kind, after an agreement, and plain mistake contrary to intent of parties not shown, it is not necessary for the Court to resort to the original right of the parties; it is sufficient if doubtful. To consider the points in dispute; and first, upon the defendant's charter, in which it is insisted the whole 40th degree of north latitude is included, and if so, that it is not to be limited by any recital in the preamble. There is great foundation to say the computations of latitude at the time of the grant vary much from what they are at present; and that they were set much lower anciently than what they are now, as appears by Mr. Smith's book, which is of reputation; but I do not rely on that, for the fact is certainly so. But whatever that was, does it take it in by the description? It comes to the question, whether the *usque ad* is inclusive or exclusive; therefore, however described, the same question remains. But there is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 40th degree, viz., the recital of it; for the plaintiffs say, the information, given to the Crown by Lord Baltimore, was, that this part was land uncultivated and possessed by barbarians; whereas, it was not so, but possessed by Dutch and Swedes; and, therefore, the king was deceived in his grant. There is considerable evidence that Dutch and Swedes were settled on the east part of that country; but *this is said to be no deceit on the Crown; for, though some stragglers were settled there, yet, if not recognized [*934] by the Crown, that is not a settlement. I am of a different opinion; for, in these countries it has always been taken, that that European country which has first set up marks of possession has gained the right, though not formed into a regular colony; and that is very reasonable on the arguments on which they proceeded. Then, will not that affect the grant? If the fact was so, that would be as great deceit on the Crown, in notion of law, as any other matter arising from the information of the party; because such grants tend to involve this Crown in wars and disputes with other nations; nor can there be a greater deceit than a misrepresentation tending to such a consequence, which would be a ground to repeal the letters patent by *scire facias*. Next, consider the dispute on Penn's charter, which grants to him all that tract of land in America, from twelve miles distance from Newcastle to the 43d degree of north latitude, &c., under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon that charter it is clear,

by the proof, that the true situation of Cape Henlopen is as it is marked in the plan, and not where Cape Cornelius is, as the defendant insists, which would leave out great part of what was intended to be included in the grant; and there is strong evidence of seizin and possession by Penn, of that spot of Cape Henlopen, and all acts of ownership. But the result of all the evidence, taking it in the most favorable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. Senex, who was a good geographer, says, that the degrees of latitude cannot be computed with the exactness of two or three miles; and another geographer says, that, with the best instruments, it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles, which is near the whole extent between the two capes. It is, therefore, doubtful, and the most proper case for an agreement, which, being entered [*935] into, the parties could not resort *back to the original rights between them; for, if so, no agreements can stand; whereas, an agreement entered into fairly and without surprise ought to be encouraged by a Court of justice.

The objection of uncertainty arises principally on the question concerning the circle of twelve miles to be drawn about Newcastle; it was insisted on in the answer, and greatly relied on in America, but it is the clearest part of the cause. As to the centre, it is said that Newcastle is a long town; and therefore, it not being fixed by the articles, it is impossible that the Court can decree it; but there is no difficulty in it: the centre of a circle must be a mathematical point (otherwise it is indefinite), and no town can be so. I take all these sort of expressions and such agreements to imply a negative: to be a circle at such a distance from Newcastle, and no part to be further. Then it must be no further distant from any part of Newcastle. Thus, to fix a centre, the middle of Newcastle, as near as can be computed, must be found, and a circle describing round that town, which is the fairest way, for otherwise it might be fourteen miles in some parts of it, if it is a long town. Then what must be the extent of the circle? It is given at the bar, though not in the answer. It cannot be twelve miles distant from Newcastle, unless it has a semi-diameter of twelve miles; but there is one argument decisive, without entering into nice mathematical questions: the line to be the dividing line, and to be drawn north from Henlopen, was either to be a tangent or intersecting from that circle; and if the radius was to be of two miles only, it would neither touch nor intersect it, but go wide. There is no difference as to the place or running of the line from south to north, though there is as to the cape from which it is to commence.

As to the seventh head of this objection, it is truly said, that agreements must be decreed entire, or not at all. As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment. I will lay aside the question of estoppel, which is a nice consideration; for

the Duke of York, being *then in nature of a common [*936] person, was in a condition to be estopped by a proper instrument. In 1683 the Duke of York takes a new grant from the Crown, and, having granted before, was bound to make further assurance; for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York, therefore, while a subject, was to be considered as a trustee; why not afterward as a royal trustee? I will not decree that in this Court, nor is it necessary, but it is a notion established in Courts of revenue by modern decisions, that the king may be a royal trustee; and if the person from whom the king takes by descent was a trustee, there may be grounds in equity to support that; and if King James II, after coming to the Crown, was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for the plaintiffs if they have an equitable estate. Then, consider this in point of possession of the Penns, the proof of which is very clear: they have been permitted to appoint governors of these lower counties, which have been approved by the Crown, according to the statute of King William. Indeed, all the acts of possession are with a *salvo jure* to the Crown; but the evidence for the defendant amounts to this: not of a real possession or enjoyment, but of attempts to take possession, sometimes by force, sometimes by inciting people to come there; otherwise, why would Lord Baltimore grant here for half what he granted in other places? Which shows plainly it was an invitation to get settlers there under their title. Now I am of opinion that full and actual possession is sufficient title to maintain a suit for settling boundaries; a strict title is never entered into in cases of this kind, neither ought it. But what ends this point of want of title to convey, is, that no part of the lower counties is left to be conveyed by the plaintiffs to the defendant; so that, nothing being to pass by the plaintiffs, it is not material whether they have title to convey or not. But now, in cases of this kind, of two great territories held of the Crown, I will say, once for all, that long possession and enjoyment, peopling and cultivating countries, is one *of the [*937] best evidences of title to lands, or districts of lands, in America that can be; and so have I thought in all cases since I have served the Crown; for the great beneficial advantages arising to the Crown from settling, &c., is, that the navigation and the commerce of this country is thereby improved. Those persons, therefore, who make these settlements, ought to be protected in the possession, as far as law and equity can; and both these proprietors appear to have great merit with regard to the Crown and the public; for these two provinces have been improved in private families to a great degree, to the advantage of their mother country; this regards the three lower counties, the strength of which is vastly on the side of the plaintiffs.

As to the Court's not enforcing the execution of their judgment, if they could not at all, I agree it would be vain to make a

decree; and that the Court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree in the cause; for the strict primary decree in this Court, as a Court of equity, is in personam, long before it was settled whether this Court could issue to put into possession in a suit of lands in England, which was first begun and settled in the time of James I, but ever since done by injunction or writ of *assistant* to the sheriff; but the Court cannot to this day, as to lands in Ireland or the plantations. In Lord King's time, in the case of *Richardson v. Hamilton*, Attorney-General of Pennsylvania, which was a suit of land and a house in the town of Philadelphia, the Court made a decree, though it could not be enforced in rem. In the case of *Lord Anglesey*, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this Court. And, indeed, in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks, by the order in 1735, as if that was in view, liberty being thereby given to resort to that Board.

[*938] *This opens a way to that part of the case relating to the Crown. The Attorney-General acts a very impartial part; and I shall express, in the fullest words, that this decree is entirely without prejudice to any prerogative, right, or interest in the Crown. I will go further, that, as I do not know how far that interest of the Crown may be, I will reserve liberty for either party to apply to this Court, if by any act or right of the Crown execution of this shall be obstructed; for the Court is at liberty to suspend its decree, if a difficulty to perform it is shown; and I will reserve further directions as between the parties, as to that matter, so de novo arising. Judgments have been at law with a salvo jure of the Crown; as in *Rastal & Coke's Entries*, in the title of Intrusion and Quo Warranto, which, particularly in the cases of lands relating to intrusion, is very analogous to the present.

I am of opinion, therefore, to decree a specific performance of this agreement, without prejudice to any right, &c., of the Crown.

Next, as to the point of costs; for which must be considered what passed in America and in England. As to what passed antecedent to granting the commission, it is very fair on both sides; all the objection arising from that is the defence against the performance, and that there are no grounds for the defence from fraud, imposition, or mistake, which are made the heads for it. But in America the defendant's commissioners behaved with great chicane in the points they insisted on; as, the want of a centre of a circle, and the extent of that circle, viz., whether a diameter of two or of twelve miles, the endeavoring to take advantage of one of the plaintiffs' commissioners coming too

late, to make the plaintiffs incur the penalty. It is plain from the articles, both sides should be answerable for default of their commissioners; the penalty shows the intent, though I own this is not that case; but I do not go on that. The defendant has been misled by his commissioners and agents in America, to make their objections his defence, which brings it nearer to himself; and though he would not at all have thought of it as from himself (so *that I impute nothing in the least dishonorable [*939] to him), yet I must take it as his own act, and then should not do complete justice if I did not give the plaintiffs the costs of this suit to this time, to be taxed, reserving subsequent costs.

His Lordship, having directed that the plaintiffs and defendant should quietly hold, according to the articles, altered that, for it would be improper to have a decree in this Court for quiet enjoyment of lands in America, which would occasion continual applications to this Court for contempts, &c., and that it ought to be the proper jurisdiction.¹

Mr. Solicitor-General in his argument cited the *Massachusetts Bay Company* against *The King*, in 1746, in the council, as to settling boundaries, where, on petition by the plaintiffs to rehear, the committee reported that there was no instance of rehearing on an appeal, which would be mischievous unless on some very particular circumstances, as new discovery or fraud concealed; and therefore the petition was rejected.

In the important case of *Penn v. Lord Baltimore*, Lord Hardwicke recognized and acted upon the principle now so firmly established, that equity, as it acts primarily in personam, and not merely in rem, may, where a person, against whom relief is sought, is within the jurisdiction, make a decree, upon the ground of a contract, or any equity subsisting between the parties, respecting property situated out of the jurisdiction. See also *Scott v. Nesbitt*, 14 Ves. 438; and *Maunder v. Lloyd*, 2 J. & H. 718. Where a bill filed by one of the parties in England to wind up a partnership in Hayti was entertained: and see *Hendrick v. Wood*, 9 W. R. 794; *Rainy v. Ellis*, 26 L. T. Rep. (N. S.) 602.

In the old case of *The Earl of Athol v. Earl of Derby*, 1 Ch. Ca. 220, a contract respecting the Isle of Man, though out of the jurisdiction, was enforced by the Court of Chancery in England. So, in *Archer v. Preston*, cited 1 Vern. 77; 1 Eq. Ca. Ab. 133, pl. 3, there was a contract concerning lands in Ireland; and the *defendant, coming into England, a bill was filed against him, and a ne exeat regno granted. And [*940] in *Toller v. Carteret*, 2 Vern. 495, where a bill was filed by the mortgagee for

¹ See the decree, Balt's Supplement to Ves. sen. 194.

foreclosure of the Island of Sark, the defendant pleaded to the jurisdiction of the Court, that the Island of Sark was part of the Duchy of Normandy, and had laws of its own, and was not under the jurisdiction of the Court of Chancery; but the Lord Keeper, Sir Nathan Wright, overruled the plea, observing, "that the Court of Chancery had jurisdiction, the defendant being served with process here, and equitas agit in personam, which is an answer to the objection."

So, where there are trusts affecting lands situated in a foreign country, if the trustee is resident in England, they will be enforced: *Earl of Kildare v. Eustace*, 1 Vern. 419, 422; 1 Eq. Ca. Ab. 133, pl. 4.

And a tenant in common of lands in Ireland, resident here, was held liable to an account for waste committed, upon a bill filed by another tenant in common: *Carteret v. Petty*, 2 Swanst. 323, n. See *S. C.*, nom. *Cartwright v. Pettus*, 2 Ch. Ca. 214.

In *Lord Cranstown v. Johnston*, 3 Ves. 170, a creditor, having fraudulently obtained a judgment in one of the West Indian islands (St. Christopher's) against his debtor, then absent from the island, and sold his debtor's real estate there, and become the purchaser thereof, upon a bill being filed in England, the sale was set aside by Sir R. P. Arden, M. R. "Upon the whole," he observed, "it comes to this: that, by a proceeding in the island, an absentee's estate may be brought to sale, and for whatever interest he has, without any particular upon which they are to bid. The question is, whether any Court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued, very sensibly, that it is strange for this Court to say it is void by the laws of the island, or for want of notice. I admit, I am bound to say, that, according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such a use to be made of the law of that island, or any other country. It is sold, not to satisfy the debt, but in order to get the estate (which the law of that country never could intend) for a price much inadequate to the real value, and to pay himself more than the debt for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the Courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign [*941] *country as upon lands here. Bills are often filed upon lands in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here: *Archer v. Preston*, *Lord Arglasse v. Muschamp*, *Lord Kildare v. Eustace*, 1 Eq. Ca. Abr. 133; 1 Vern. 75, 135, 419. Those cases clearly show, that, with regard to any contract made, or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England. Lord Hard-

wicke lays down the same doctrine in *Foster v. Vassall*, 3 Atk. 589. Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings, as in a Court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws, to proceed behind the back of the debtor upon constructive notice, which could not operate to the only point to which a constructive notice ought: that there might be actual notice without willful default: that he has gained an advantage which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this:—this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice.” See *S. C.*, 5 Ves. 277; and *Jackson v. Petrie*, 10 Ves. 164.

It might be thought, from the language occasionally used by equity Judges, that the jurisdiction in personam affecting lands abroad, would be exercised in those cases only where, although out of the jurisdiction of the Court, they were situated within the colonies or empire. See *Foster v. Vassall*, 3 Atk. 589. But as the Court does not affect to control the Courts of other countries, there does not exist in practice, nor, indeed, upon principle, any reason for such distinction. See *Angus v. Angus*, West’s Rep. t. Hardw. 23, where a bill having been filed relative to lands in Scotland, for discovery of rents and profits, and deeds, and fraud being alleged, Lord Hardwicke overruled a plea not averring that the parties were resident out of the jurisdiction, observing, that the Court acted upon the *person*, as to the fraud and discovery, and that it would have been a good bill, as to fraud and discovery, if the lands had been in *France*, if *the person were resident in England*, for the jurisdiction of the Court, as to frauds, was upon the conscience of the party.

Where the lands are out of the jurisdiction, although they be *within the colonies, the Court cannot affect them, directly or otherwise, than by proceedings in personam. Thus, in *Roberdeau* [*942] *v. Rous*, 1 Atk. 543, where a demurrer was put into a bill brought for the delivery of the possession of a moiety of lands in St. Christopher’s, and likewise for an account of the rents and profits, although Lord Hardwicke held that the bill would lie for the account, he said, that the Court had no jurisdiction to put persons in possession in a place where they had their own methods on such occasions, to which the party might have recourse; and that lands in the plantations were no more under the jurisdiction of this Court than lands in Scotland, for it only agit in personam. So, in *Angus v. Angus*, West’s Rep. t. Hardw. 23, upon a bill being filed for discovery, and for the possession of lands in Scotland, although Lord Hardwicke, as fraud was alleged in the bill, overruled the plea, not stating the defendant to be out of the jurisdiction, yet he said, “I am in doubt as to parts of the bill for relief; for I cannot give the

plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the Court. However, at present, the plea must be overruled without prejudice to the defendant's insisting, by way of answer, on the same matter, against any decree or order being made relating to the possession of the lands in Scotland, as he shall be advised." See *Innes v. Mitchell*, 3 Jur. N. S. 756; *Cood v. Cood*, 33 Beav. 314.

So, a partition of lands in Ireland will not be decreed in England; as to which, Lord Nottingham is reported to have said, in *Cartwright v. Pettus*, 2 Ch. Ca. 214, "he could not here proceed, for he could not award a commission into Ireland. And the bill for a partition was in the nature of a writ of partition at the common law, which lieth not for lands in Ireland;" see *S. C.*, nom. *Carteret v. Petty*, 2 Swanst. 323, n.; see also and consider, *Houlditch v. Lord Donegal*, 8 Bligh. N. S. 301, 345; *Ex parte Pollard*, Mont. & C. 239, reversing *S. C.* 3 Mont. & Ayr. 340; *Waterhouse v. Stansfield*, 9 Hare, 234; 10 Hare, 254; *Martin v. Martin*, 2 Russ. & My. 507; *Nelson v. Bridport*, 8 Beav. 547.

Nor will a Court of equity direct an issue to try the validity of a will, of lands out of the jurisdiction. This was decided in *Pike v. Hoare*, 2 Eden, 182, where the testator made his will in England, devising land in Pennsylvania. Although there were other reasons for refusing the issue, Lord Northington said, that he built his opinion materially upon the fact of the lands lying in Pennsylvania. "A will," said his Lordship, "of [*943] lands lying in any of the colonies is not triable in *Westminster Hall. If it were, it would be introductive of great confusion, and be very detrimental to the colonies. We have colonies and factories in the four quarters of the world, and each colony and factory have distinct laws of their own. Judges in Westminster Hall are not acquainted with the laws of the several colonies and factories: they are local." In *Penn v. Lord Baltimore* (1 Ves. 444), Lord Hardwicke made the distinction, and said it was the *contract* that gave the Court jurisdiction in that case, the principles of equity being the same in all places. "What weighs strongly with me is, that no issue was ever directed to try a will of lands in Ireland. It was attempted in *Lord Robert Manners'* case, but given up; and that was as strong a case as this. Mr. Calwell, the testator, lived and died in England, never was but once in Ireland to see his estate, and his will was made in London." See also *Boyse v. Colclough*, 1 K. & J. 124; *Norris v. Chambers*, 29 Beav. 246; 9 W. R. (L. C.) 259.

In the principal case, Lord Hardwicke disclaims any original jurisdiction of the Court as to the direct question of the boundaries, and puts it expressly upon the articles entered into between the parties. See, however, *Tulloch v. Hartley*, 1 Y. & C. C. C. 114.

Upon the same principle, where a charity is to be established out of England, as in Scotland, the Court, not having jurisdiction to administer the fund, will pay the money to the persons whom the testator has selected

as the instruments of his benevolence: *The Provost of Edinburg v. Aubery*, Amb. 236; *Attorney-General v. Lepine*, 2 Swanst. 181; *Minet v. Vulliamy*, 1 Russ. 113. n.; *Emery v. Hill*, Id. 112; *Attorney-General v. Sturge*, 19 Beav. 597.

Where real property in a colony is vested in the Queen, not by prerogative, but under an Act of the provincial legislature, for the purposes of the province, and subject to any future directions which may be given by the provincial legislature, the Queen, for the purpose of any claims to such lands made under the provincial statutes, is not to be regarded as within the jurisdiction of the English Court of Chancery, nor does the Petition of Right Act, 1860 (23 & 24 Vict. c. 34), give such jurisdiction: see *Re Holmes*, 2 J. & H. 527: there, by a canal Act of the provincial legislature of Canada, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance; and it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners. By a third Provincial Act the lands were revested in the Queen, for the purposes of the colony, and subject to future colonial legislation. A petition *of right being presented, by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, [*944] but not used, a demurrer was allowed by Sir W. Page Wood, V. C., on the ground that the Court had no jurisdiction. "I have assumed," said his Honor, "that there is a trust to reconvey to the suppliants, and that their rights are not merely legal, and that a Court of equity will execute a trust of the kind with reference to land in a foreign country; but in order that this may be so, it is requisite that the trustee should be present in this country, and subject to the operation of such decree as the Court may make. Now it is said that the Queen is present here, and therefore amenable (by virtue of the recent Act) to the jurisdiction of this Court. But it would be at least as correct to say, that, as the holder of Canadian land for the public purposes of Canada, the Queen should be considered as present in Canada and out of the jurisdiction of this Court."

In some cases of doubtful authority, a power was assumed, which certainly would not now be exercised, of granting sequestrations against the estates of defendants situated in Ireland: *Arglasse v. Muschamp*, 1 Vern. 75, and *Sir John Fryer v. Bernard*, 2 P. Wms. 261. But the reasons given by Lord Macclesfield in the latter case, as observed by Lord Brougham in *Lord Portarlington v. Soulby*, 3 My. & K. 109, plainly show, that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the Courts of this country over those in Ireland; and, indeed, he supports his order by expressly referring to the right then claimed by the King's Bench in England to reverse the judgments of the King's Bench in Ireland—a pretension which has long ago been abandoned, and has, indeed, been discontinued by parliamentary interposition.

Although it is difficult to reconcile all the cases upon the subject, the principle upon which the Court proceeds and the limits to its jurisdiction have been well laid down by a learned writer, viz., that, "the claim to affect foreign lands through the person of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party's personal obedience: if it went beyond that, the assumption would not only be presumptuous but ineffectual:" Westlake's *Private Internat. Law*, p. 58.

As to restraining a person from proceeding in Courts out of the jurisdiction, which, as incident to its jurisdiction in personam, the Court of Chancery has power to do, see ante, p. *631, and *The Carron Iron Company v. Maclaren*, 5 Ho. Lo. Ca. 416.

[*945] It may be here observed that *the 7th Rule of the 10th of the Consolidated Orders, made in almost the same terms as the 33d Order of May, 1845, provides that where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that a copy of the bill under the statute 15 & 16 Vict. c. 86, s. 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant, in such place or country or within such limits as the Court thinks fit to direct."

It has been decided, after many conflicting decisions, that this order is not in excess of the statutory jurisdiction under which the orders were made, and that the operation of the rule is not confined to suits concerning lands, or stock, or shares, within the statutes, 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82: see *Drummond v. Drummond*, 2 L. R. Eq. 335; 2 L. R. Ch. App. 32, reversing *Cookney v. Anderson*, 1 De G. Jo. & Sm. 365, affirming the decision of Sir John Romilly, M. R. (reported 31 Beav. 452); *Foley v. Maillardet*, 1 De G. Jo. & Sm. 389, reversing the decision of Sir John Stuart, V. C. (reported 12 W. R. (V. C. S.) 335); *Samuel v. Rogers*, 1 De G. Jo. & Sm. 396. See, also, *Whitmore v. Ryan*, 4 Hare, 612; *Steel v. Stuart*, 1 Hem. & M. 793; *Finlay v. Barton*, 1 I. R. Eq. 61; *Canny v. Fox*, 4 I. R. Eq. 410.

Although parties out of the jurisdiction may, under this order, be served abroad, this will not enable the Court to give any relief which it could not give before its promulgation (*Cookney v. Anderson*, 31 Beav. 452, 468; *Muunder v. Lloyd*, 2 J. & H. 718). The power, however, of the Court under this order to direct service abroad, ought to be exercised with great circumspection (4 Hare, 618). And see *Innes v. Mitchell*, 4 Drew. 57; 1 De G. & Jo. 423; *Meiklan v. Campbell*, 24 Beav. 100; *Maclean v. Dawson*, 27 Beav. 25; 4 De G. & Jo. 150.

An administration summons, where the estate consists of stock and shares in England, is a *suit* within the meaning of the statute 4 & 5 Will. 4, c. 82, which the Court has given leave to serve upon defendants abroad:

Cohen v. Alcan, 1 De G. Jo. & Sm. 398, overruling *Lester v. Bond*, 1 Dr. & Sm. 392.

As to the jurisdiction of the Court of Chancery of the County Palatine of Lancaster in cases where part of the subject-matter of the suit consists of lands locally situate out of the jurisdiction, see *Wynne v. Hughes*, 26 Beav. 377; 28 L. J. N. S. (Ch.) 485.

No principle of equity jurisprudence is more firmly established than that relief will not be refused merely because the subject-matter of the controversy is out of the jurisdiction, if the cause is, in other respects, a proper one for the application of such relief; for chancery, acting in *personam* and not in *rem*, holds the conscience of the parties bound without regard to the situs of the property; *Carrington v. Brent*, 1 McLean, 167; affirmed *nom. Caldwell v. Carrington*, 9 Peters, 86; *Watkins v. Holman*, 16 Id. 25; *Dickinson v. Hoomes*, 8 Grattan, 353; *White v. White*, 7 Gill & Johnson, 208; *Guild v. Guild*, 16 Alabama, 121; *Great Falls Co. v. Worster*, 3 Foster, 462; *Moore v. Hood*, 9 Richardson, Eq. 311; *Mead v. Merritt*, 2 Paige, Ch. 402; *Hawley v. James*, 7 Id. 213; *DeKlyn v. Watkins*, 3 Sandford, Ch. 185; *Bailey v. Ryder*, 10 New York, 363; *Wood v. Warner*, 2 McCarter, Ch. 81; *Ross v. Railroad Co.*, 53 Georgia, 514. Hence, in a suit for specific performance against a defendant within the jurisdiction, and duly served with process, it is no defence that the lands to be affected by the decree are situate in another State or country (*Sutphen v. Fowler*, 9 Paige, 280; *The Episcopal Church*

v. Wiley, 2 Hill, Ch. 584; *Shattuck v. Cassidy*, 3 Edwards, 152; *Newton v. Bronson*, 13 New York, 587; *Farley v. Shippen*, Wythe, Ch. Cas. 135; *Guerrant v. Fowler*, 1 Hen. & Munford, 4; *Penn v. Hayward*, 14 Ohio St. 302; *Hearst v. Kuydenhall*, 16 Texas, 327; *Miller v. Rusk*, 17 Id. 170; *Pingree v. Coffin*, 12 Gray, 304; *Davis v. Parker*, 14 Allen, 94; *Brown v. Desmond*, 100 Mass. 267), as the incapacity to enforce the decree in *rem* constitutes no objection to the right to entertain the suit; 1 Story's Eq. Juris. § 744.

The extent to which this principle is carried is illustrated by the case of *Cleveland v. Burrill*, 25 Barbour, 532, where a contract relating to lands lying without the jurisdiction of the Court, and which was not only executed, but was to have been performed, where the lands were situate, was specifically enforced at the suit of the vendor, who was himself a non-resident. "It is strongly insisted," it was said in delivering the opinion, "that this Court, cannot compel the defendant specifically to perform such a contract, and that no precedent can be found where specific performance has been decreed under such circumstances. * * It is probably true, as he asserts, that no case is reported in which the

foreign vendor has pursued the vendee to his own domicile, and made him perform a foreign contract for lands situate abroad. There are, however, many expressions of opinion throughout the books in favor of the maintenance of such an action. One of them may be found in *Ward v. Arredondo* (Hopkins, 223), where the chancellor supposes a case precisely like the present, and says that if the foreign vendors were seeking to enforce payment from the vendee, they might do so; that the vendee 'is here, and is subject to a decree, and perfect justice might be done.' "It is admitted, on the part of the defendant, that many adjudged cases, and many elementary writers of authority, lay down principles broad enough to cover this case, when they say that a court of equity may decree the specific performance of a contract for the sale of lands in a foreign state, and may compel a conveyance of the land where the person of the defendant is within the reach of its process. (See 2 Story's Eq. Jur. §§ 743, 744, etc.; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, Id. 606; *Sutphen v. Fowler*, 9 Id. 280; *Massie v. Watts*, 6 Cranch, 148; *DeKlyn v. Watkins*, 3 Sandford, Ch. 185; *Newton v. Bronson*, 3 Kernan, 587.) But it is alleged, that, however broadly the principle to be deduced from the cases may be laid down, it must be limited to cases where the bill is filed by a vendee, and the vendor, who is required to convey, is within the jurisdiction. I see no reason, however, for thus restricting the application of this principle. On the

contrary, the jurisdiction of this Court over a case like the present seems to me so clear and unquestionable, that the authorities are scarcely needed to support it. And the absence of adjudications is rather to be attributed to the fact that such a position is too unsound to have been before taken. * * * That the contract sought to be enforced was made in a foreign jurisdiction, is also immaterial. It binds the defendant, wherever he may be. His duty to fulfill it is the same everywhere. He cannot relieve his conscience of the obligation which his contract has imposed upon it, merely by departing from the territory within which it was made. Even if the lands contracted to be conveyed to him are to be considered as the real subject-matter of the action, the fact that they are situated abroad cannot deprive this Court of its jurisdiction. If the defendant could, as is admitted, be required to convey lands situate abroad, he may be required (if that is necessary) to receive a deed for lands thus situate. In other words, the plaintiff may be compelled to tender him such a deed. Such a deed has been executed, and is now in the hands of the Court, ready for delivery to the defendant, as soon as he shall entitle himself to it by performance."

So, where the subject-matter of the contract is under the control of the Court, specific performance has been decreed against a vendor residing in another State, but served with process while temporarily within the jurisdiction; *Matteson v. Scofield*, 27 Wisc. 671; and see *Rourke v. McLaughlin*, 38 California, 196.

In Pennsylvania, it is provided by statute that service upon non-resident defendants may be made with the same effect as if process had been served within the jurisdiction, whenever the suit concerns lands or tenements, or any charge thereon, situate within the control of the court, or when one or more of the principal defendants has previously been duly served; Act of April 6th, 1859, § 1, P. L. 387; Purdon, 598, pl. 51; *Eby's Appeal*, 20 P. F. Smith, 311; *Coleman's Appeal*, 25 Id. 441.

The general principle that the performance of equitable obligations will be enforced without regard to the situation of the property to which they relate, is not, however, confined to specific performance, but extends equally to all cases requiring its application, where full relief can be administered by the decree. Thus, in *Massie v. Watts*, 6 Cranch, 148, a suit was instituted in the Circuit Court of Kentucky to compel a conveyance by the defendant of the legal title to land in Ohio, on the ground that he had notice, when it was purchased, of the prior equity of the complainant, and the defence taken was that the land lay beyond the jurisdiction of the court, and within the State of Ohio. This defence was overruled by the court below, and afterwards, on appeal, by the Supreme Court, which held that as the facts set forth in the bill showed that the defendant was equitably bound to convey the land, equity would enforce the fulfillment of this obligation without regard to the place where the land was situated.

"When the defendant is liable," said Marshall, C. J., "either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. * * * The court is of opinion that in case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." So, in *Vaughan v. Barclay*, 6 Wharton, 392, a trustee was directed to convey his outstanding legal title to lands in other States; and in *Ward v. Arredondo*, Hopkins, 213, the doctrine that rights growing out of contract are not confined to any special locality was applied under circumstances somewhat peculiar, and where both the parties to the contract, and the property to which it related, were beyond the reach of the court. The defendants, who resided at Havana, had agreed to sell land to the complainants, who were residents of New York, and had actually sent a conveyance of the property, which was returned for some informality in its execution. The mistake was corrected, and the deed placed in the hands of the defendants' agent in New York, but with directions not to deliver it to the

complainants unless on the payment of a sum of money in addition to that stipulated for in the original contract. Under these circumstances, the court sustained a bill for an injunction to prevent the agent from returning the deed to the defendants, and to compel him to deliver it to the plaintiffs in execution of the contract. The same principle was enforced, under somewhat peculiar circumstances, in *Dickinson v. Hoomes*, 8 Grattan, 353, and an heir compelled to make satisfaction out of the real assets which had come to him by descent from his ancestor, for the breach of a covenant of warranty given by the latter during his life, although the lands which gave rise to the obligation, and out of which it was to be fulfilled, were situated in another State, and consequently without the jurisdiction of the court by which the decree was made; see Rawle on Covenants for Title, 510, 542, n., 4th ed. So, too, in *Mitchell v. Bunch*, 2 Paige, 606, the question was elaborately considered, and it was held that when a debtor fraudulently concealed his assets, consisting of lands in another State, equity would compel their discovery and application to the payment of his debts, and would, further, prevent his departure by a *ne exeat*, until the discovery was made and the decree complied with.

In the later case of *Gardner v. Ogden*, 22 New York, 327, the clerk of a broker employed by the plaintiff to negotiate the sale of certain lands in Illinois, having become the purchaser thereof, was, upon a bill filed in New York, declared to be a trus-

tee for the plaintiff (*ante* vol. 1, p. 93), and, after an exhaustive review of the authorities, ordered to reconvey the lands to the latter. "The Supreme Court at general term," said Davies, J., "in its opinion, says: 'The action should have been prosecuted before some tribunal having cognizance of the subject-matter. The premises being in another State, an action for the recovery cannot be successfully prosecuted in this Court.' In this view of the authority of the Supreme Court to entertain this action, we think the learned Court below fell into a grave error. It is true that, by section 123 of the Code, actions for the recovery of real property must be tried in the county in which the subject of the action is situated; the Supreme Court of this State, as a court of equity, could not, therefore, take jurisdiction of an action for the recovery of lands situated in another State, where the proceedings were *in rem*; but where it has jurisdiction of the proper parties, it may, by its judgment or decree, compel them to do equity in relation to lands located without its jurisdiction. The court in such a case acts *in personam*. We regard this as so well settled by authority, that it cannot longer be seriously questioned. A review of the authorities in England and this country will, we think, place this matter beyond all doubt. In *Archer v. Preston*, in which case, if in any, the jurisdiction was local, the matter there being not only for land that lay in Ireland, but of a title under the act of settlement there, yet, the defend-

ant coming into England, a bill was exhibited against him there, and a *ne exeat regno* granted, and he put to answer a contract made for those lands. This case is cited by Lord Chancellor Nottingham in *Count Arglasse v. Muschamp* (1 Vern. 75), and by Lord Keeper North in *S. C.* (1 Vern. 135). *Arglasse v. Muschamp* was a case in which the plaintiff exhibited his bill to be relieved against an annuity or rent-charge made upon lands in Ireland, on the ground that the same was obtained by fraud. The defendant pleaded to the jurisdiction of the court that the lands lying in Ireland, the matter was properly examinable in the Court of Chancery there, and that that court in England ought not to interpose. The Lord Chancellor said: 'This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they really tell you that the authority of the court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so would wholly elude the jurisdiction of this court.' But he adds, 'they certainly forget the case of *Archer and Preston*, (*supra*); and the plea was overruled, and the defendant ordered to pay costs for endeavoring

to oust the court of its jurisdiction. This was in Michaelmas term, 1682. Lord Nottingham died in December of that year, and was succeeded by Lord Chief Justice North as Lord Keeper. In the succeeding term (Hilary, 1682), a petition was presented to the Lord Keeper by the defendant for a rehearing of his plea to the jurisdiction of the court; but it was not allowed, the Lord Keeper citing only *Preston and Archer's case*. In the case of *Earl of Kildare v. Eustace* (1 Vern. 404), the plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared, and had not objected to the jurisdiction of the court, and the case coming on to be heard, the Lord Chancellor, Jeffries (in Michaelmas term, 1686), objected that the court could not hold pleas of lands in Ireland. The plaintiff's counsel insisted that he was entitled to relief in that court by reason that both plaintiff and defendant were then in England, and that a court of equity does only *agere in personam*; and the counsel instanced the precedent of *Arglasse v. Muschamp* (*supra*) and *Arglasse v. Pitt* (1 Vern. 238), and *Archer's case*, and insisted there would be a failure of justice if the action was not sustained. But the Lord Chancellor overruled the plaintiff's counsel, and said, in the cases of *Lord Arglasse* the fraudulent contracts were made here in England, and thereupon pronounced a rule for dismissing the bill; but, upon the importunity of the plaintiff's counsel, gave them a week's time to search for precedents. The same case again

came up on the 3d of December following, when the Lord Chancellor and the judges then attended with precedents, and Sir John Holt argued for the plaintiff the preliminary point only, to wit, whether the court had jurisdiction, and might hold pleas of the lands which lay in Ireland. The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate whether the court might not decree the trust of lands in Ireland, the trustee living here. After a long debate, the judges, concurring with his lordship that the court had a proper jurisdiction in that case, made a decree for the plaintiffs. *Toller v. Carteret* (2 Vern. 494) was heard before Lord Keeper Cowper in May, 1705. The defendant, Carteret, was the owner of the Isle of Sark, and made a mortgage thereon to one Willows, the plaintiff's intestate, for five hundred years, for 500*l*. A bill was filed in the Court of Chancery in England that the defendant might redeem or be foreclosed. The defendant pleaded to the jurisdiction of the court that the Island of Sark was part of the Duchy of Normandy, and had laws of its own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the Court of Chancery. The Lord Keeper overruled the plea, because the grant was of the whole island; and, secondly, that the Court of Chancery had also jurisdiction, the defendant being served with the process here, *et æquitas agit in personam*. The case of *Lord Baltimore v. William Penn* (1 Ves., Sr., 444)

is worthy of attentive consideration. This was a bill filed in chancery for a specific performance of articles settling the boundaries of the colonies of Maryland and Pennsylvania, made and executed between the respective proprietors thereof. Two objections to the jurisdiction of the court were taken: First, that the court had not, and ought not to take jurisdiction, for that the same was in the King and Council; second, that the agreement ought not to be carried into execution by the court, as it affected the estates, rights and privileges of the planters, etc., within the district, and the laws by which they live. The case seems to have been ably argued and maturely considered; for Lord Hardwicke says, in the commencement of his opinion, that he had directed the cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, its great consequence and importance, and the great labor and ability on both sides. He fully sustains the jurisdiction of the Court of Chancery, and, at page 447, says: 'The conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts in *personam*, the court may properly decree it as an agreement, if a foundation for it.' In answer to the arguments that the court had no means to enforce its decree, he says: 'If they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree in *rem* in the present case; but that is not an objection

against making a decree in the cause, for the strict primary decree in this court, as a court of equity, is *in personam*.' * * * To the same point may be cited the cases of *Earl of Derby v. Duke of Athol* (1 Ves., Sr., 202), *Lord Cranstown v. Johnson* (3 Ves., Jr., 170), and *Lord Portarlington v. Souby* (3 Mylne & K. 104). The case of *Massie v. Watts* (6 Cranch, 148) is quite in point [*ante*, p. 1825].

"In *McDowell v. Read* (3 Louis. Annual R., 391), the Supreme Court of that State held that when a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person to do justice relative to a subject-matter beyond its jurisdiction, though lands be affected by the decree. The case of *Mussina v. Alling* (11 La. An. 568) has been cited as holding a contrary doctrine. I think the leading opinion in this case, upon this point, proceeds upon the assumption that the courts of that State do not possess the chancery powers vested in the Court of Chancery in England. The judge who delivered the opinion in that case says that the people of Louisiana have always resisted the foreign modes of procedure, and especially the peculiar doctrines and forms of chancery; that, although the courts of that State have equity and common law jurisdiction, it does not follow that all the prerogatives claimed by courts of common law and Courts of Chancery, and all their artificial rules and peculiar dogmas, should be usurped by the courts of Louisiana. The learned judge seemed to think that if a contrary doc-

trine were adopted, the courts of New Orleans might be occupied 'with investigation of land titles all around the world.' In *Farley v. Shippen* (1 Wythe's R., 254), the Court of Chancery in Virginia held that it had jurisdiction to enforce a trust in relation to lands lying in North Carolina, the defendants being amenable to its process. To the same effect is the case of *Guerrant v. Fowler* (1 Hen. & M. 5). So, also, *Hughes v. Hall* (5 Munf. 431).

"The current of decision in this State, upholding the jurisdiction of our courts upon this question, has been uniform. I am unable to find that any of the learned judges of our courts, who have examined the question and expressed an opinion upon it, have given it hesitatingly or doubtfully, except in the present case. I think all the cases in the State speak a uniform language, and give out no uncertain sound. The earliest case is that of *Dale v. Roosevelt* (5 John. Ch. R. 174), where Chancellor Kent, in 1821, granted an injunction to restrain any suit upon an agreement relating to lands in the State of Ohio. The jurisdiction of the court was distinctly affirmed by Chancellor Sandford, in *Ward v. Arredondo* (Hop. R. 213). In that case, the land was in the State of Florida, and the parties in this State, and the bill was filed to cancel a deed and restrain an agent of the grantor from parting with it. I am unaware that the authority of this case has ever been questioned in this State; on the contrary, it has been frequently affirmed. (*Mead*

v. *Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, 2 Id. 606; *Sutphen v. Fowler*, 9 Id. 280; *Shattuck v. Cassidy*, 3 Edw. 152; *DeKlyn v. Watkins*, 3 Sand. Ch. R. 185; *Newton v. Bronson*, 3 Kern. 587.) In this last case, this court says that the doctrine established is that the Court of Chancery, having jurisdiction of the person of the defendant, will, by its process of injunction and attachment, compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction in which it is situated. This court also held, in that case, that the present Supreme Court possesses the jurisdiction formerly exercised by the Court of Chancery. It also disposes of the application of section 123 of the Code to a case like that under consideration. As sustaining the same general doctrine in all these cases, I will only refer to an additional case, that of *D'Ivernois v. Leabitt*, (23 Barb. 63). These cases must be held to establish the jurisdiction of the Supreme Court, in the present case, on an impregnable basis, and that the court, having jurisdiction of the party in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title to them in the State of Illinois."

It will be observed that in the foregoing cases the jurisdiction attached on the ground of the defendant's fraud or failure to perform some equitable obligation, irrespect-

ively of any question of title, and the decree was capable of being enforced against the person of the defendant. And although equity has no jurisdiction over naked questions of title to real estate, yet it will not refuse to determine a controversy which, in other respects, is within its jurisdiction, because it incidentally adjudicates upon the title to lands without its control. But these cases must not be confused with another and totally different class, wherein the validity of rights claimed under a disputed title to lands in other States becomes the primary question, and the decree depends upon the construction given. Here the relief will be refused unless under very peculiar circumstances, for to hold otherwise would be to try an ejectment through the medium of a Court of Chancery, governed by rules possibly differing from those in force where the land is situate, and whose decree would be utterly ineffective as to the subject-matter of the controversy. Thus, in *Blunt v. Blunt*, 1 Hawks, 365, the Court of Chancery of North Carolina declined to compel an executor residing there to execute a power of sale over lands in Tennessee, when the construction of the power was doubtful, because the decree, if made, would not be conclusive, and the title passed by the sale might be declared invalid by the tribunals of the latter State: and to the same effect is *White v. White*, 7 Gill & Johnson, 208. So, in a recent case, *Davis v. Headley*, 7 C. E. Green, 115, where the Circuit Court of Kentucky having decreed that a conveyance of cer-

tain property in New Jersey should be rescinded, the possession restored, and the defendant enjoined from asserting the conveyance, a bill was filed in New Jersey to enforce the decree, and it was held that the Court of Kentucky had exceeded its jurisdiction, and consequently the bill was dismissed. "It is," said Chancellor Zabriskie in delivering the opinion, "a well-settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations (and thus part of the *jus gentium*), that immovable property, known to the common law as real estate, is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it: Story's Conflict of Laws, § 591. I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property when situate in another country or beyond the jurisdiction of the sovereign or court making the statute or decree. Courts of equity in England and America, by a long series of decisions, from that of Lord Hardwicke in the case of *Penn v. Lord Baltimore* (1 Ves. 444) to this time, have decreed the performance of contracts relating to lands without their jurisdiction. But in these cases it is admitted, as it was by Lord Hardwicke, that these decrees could not affect the land, but could only be enforced when the court had jurisdiction of the person of the defendant, and thus compel him actually to execute the conveyance. In such cases it is the conveyance,

not the decree, that has the effect. These decisions will be found collected in the notes, in the English and American editions, to *Penn v. Lord Baltimore*, in 3 Leading Cases in Equity, 787. * * * A recovery in the courts of Kentucky in a real action to try the title of lands in New Jersey, or in an ejectment for the possession, would be a perfect nullity; no action could be brought upon it here to obtain execution of it. It would be simply void. A decree to deliver possession of lands in New Jersey might be enforced by the courts of Kentucky; if in possession of the person of the defendant, he could be imprisoned, or even subjected to *peine fort et dure* until he actually delivered it. But such judgment would not be enforced by the courts of this State; it would be giving the jurisdiction, as to the right to real estate, to the courts of Kentucky, and leave to the courts of this State only the ministerial duty of executing these decrees; and the title to real estate in New Jersey could be tried in any State in which the owner chanced to travel, if suit was brought against him there; and a judgment in Texas that land in New Jersey of an intestate dying in 1860 vested in his eldest son exclusively would have to be executed here. * * * A judgment in New Jersey could not change the title to lands in New York. Nor could a recovery in the Monmouth Circuit in ejectment, or any other action determined upon the title, affect the title to lands in Essex, or be enforced by an action brought in the county in which the

lands are situate. It would be void, as the judgment of a court not having jurisdiction of the subject-matter."

Nearly the same ground was taken in *Morris v. Remington*, 1 Parsons, Eq. 387, where it was held that chancery would not entertain a bill affecting land beyond its jurisdiction, unless the relief sought could be administered by a decree in *personam*, without going further and acting directly upon the land. And it was consequently decided that a suit could not be sustained in a court of equity of one county to abate a nuisance impairing the value of the complainant's land in another, because full and final relief could not be afforded without ordering the abatement of the nuisance, and issuing a writ to carry the order into effect.

The result of the cases as a whole, would seem to be that, as the right of real property is essentially local and can only be enforced at law by a recourse to the local tribunals, equity will follow the law, and refuse to assume a power which might further the purposes of justice in particular instances, but would ultimately disturb the comity which ought to exist between the courts of different nations, by bringing the decisions of foreign tribunals into conflict

with those of the *locus rei sitæ*; *The Northern Indiana R. R. Co. v. The Michigan Central R. R. Co.*, 15 Howard, 233; *Watts v. Waddle*, 6 Peters, 389, 400; Story's Eq. Juris. § 744, a; Story on the Conflict of Laws, §§ 463, 543. But rights growing out of trust or contract, or founded upon a fraudulent violation of the principles of equity as between man and man, are purely personal, and will consequently be upheld and enforced both by law and equity whenever jurisdiction has been acquired over the parties, without regard to the nature or situation of the property in which the controversy has its origin, and even when the relief sought consists in a decree for the conveyance of land which lies beyond the control of the court, and can only be reached through the exercise of its powers over the person.

The power of chancery to restrain a defendant from instituting legal proceedings, obviously extends to the prohibition of suits beyond its jurisdiction, in order to prevent an evasive recourse to the tribunals of other States or territories; *Pearce v. Olney*, 20 Conn. 544; *Dehon v. Foster*, 4 Allen, 545. The doctrines relating to this branch of the subject have been fully considered, *ante*, notes to *The Earl of Oxford's Case*, 1316-1318, 1396-1401.

POWER COUPLED WITH TRUST.

*HARDING v. GLYN.

[*946]

JUNE 7, 1739.

REPORTED 1 ATK. 400. 1

POWER IN THE NATURE OF A TRUST.]—*H.*, by will, gives a leasehold house and furniture, goods, and chattels therein, and also plate, jewels, &c., to his wife; but did desire her, at or before her death, to give the same unto and among such of his own relations as she should think most deserving and approve of. The wife, by her will, gave the leasehold house to *S.*, who was the son of one of the next of kin, and after giving several legacies, bequeathed the residue of her personal estate to the defendant *G.* and two other persons, but neither gave, at or before her death, the goods in the house, or the jewels, to her husband's relations. It was held, that the wife was intended to take beneficially only during her life; that the appointment to *S.*, being a relation of the testator's, though not one of his next of kin, was a good execution of the power; and that so much of the goods and jewels not disposed of by the wife, according to the power given to her by her husband, in case they remained in specie, or the value thereof, ought to be divided equally among such of the relations of the testator as were his next of kin at the time of the death of his wife.

NICHOLAS HARDING, in 1701, made his will, and thereby gave "to Elizabeth, his wife, all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but *did desire her*, at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and among such of his own relations as she should think most deserving and approve of;" [*947] and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell,² in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and, after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given, at or before her

¹ S. C., 5 Ves. jun. 501, stated from Reg. Lib. 1738, A.

² The bequest to Swindell was held good, although he was not one of the next of kin of the testator, and would not, therefore, have taken anything in the absence of the bequest; but, being a son of one of the next of kin, he was a relation, and, therefore, within the power when exercised by the testatrix. See *Brown v. Higgs*, 5 Ves. 501; 8 Ves. 572.

death, the goods in the said house, or without having disposed of any of her husband's jewels to his relations.¹

The plaintiffs, insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she had not done, brought their bill in order that they might be distributed among his relations, according to the rule of distribution of intestates' effects.

THE HON. JOHN VERNEY, M. R.—The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life. There are no technical words in a will; but the manifest intent of the testator is to take place; and the words "willing" or desiring" have been frequently construed to amount to a trust (*Eales v. England*²); and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, [*948] and operates as a trust *in the wife, by way of power of naming and apportioning; and her non-performance of the power shall not make the devise void, but the power shall devolve on the Court; and though this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the Court to go by; and, therefore, I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other the personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains *in specie*, or the value thereof, be delivered to the next of kin of the said testator, Nicholas Harding, to be divided equally among them, to take place from the time of the death of the said Elizabeth Harding.

"As a general rule," observes Lord Langdale, M. R., in an important case, "it has been laid down, that, when property is given absolutely to any person, and the same person is by the giver, who has power to com-

¹ It appears that the testatrix, by her will, bequeathed the plate to Caleb Harding, and it was declared by the decree that it was a good bequest, as being pursuant to the power in her husband's will. See statement from the Reg. Lib., 5 Ves. 501.

² Prec. Ch. 200; 2 Vern. 466.

mand, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish, shall be held to create a trust.

"First, if the words are so used that, upon the whole, they ought to be construed as imperative.

"Secondly, if the subject of the recommendation or wish be certain; and,

"Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

"If a testator gives 1000*l.* to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum, or any certain part of it, to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

"So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give it to his own *relations, or such of his own relations as he shall think [*949] most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are, nevertheless, so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases.

"On the other hand, if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus, the words, 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of bequest being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told, that the question 'never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent, must be considered:' *Meggison v. Moore* (2 Ves. jun. 632, 633). And 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and quantum

of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended:’ *Morrice v. Bishop of Durham* (10 Ves. 536); or, as Lord Eldon expresses it in another case (*Wright v. Atkyns*, T. & R. 159), ‘where a trust is to be raised, characterized by certainty, the difficulty of doing it is an argument which goes to a certain extent toward inducing the Court *to say it is not sufficiently clear what the testator intended:’” *Knight v. Knight*, 3 Beav. 172; *S. C.*, 11 C. & F. 513.

The three requisites, however, mentioned by Lord Langdale, must co-exist. See *Briggs v. Penny*, 3 Mac. & G. 554; *Moriarty v. Martin*, 3 Ir. Ch. Rep. 31. See the explanation, *Bernard v. Minshull*, Johns. 276.

First, *The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative.*—As laid down in the principal case, no technical words are necessary, but the testator’s intent is to take place; and his words, “willing or desiring” that the person upon whom he has conferred property should make a disposition of it in favor of certain objects, will be construed as imperative, and amount to a trust (*Eales v. England*, Proc. Ch. 200; 2 Vern. 466); so, if he “request” (*Eade v. Eade*, 5 Madd. 118), “wish and request” (*Foley v. Parry*, 5 Sim. 138; 2 My. & K. 138; *Godfrey v. Godfrey*, 11 W. R. (V. C. W.) 554), “wish and desire” (*Liddard v. Liddard*, 28 Beav. 266); express it to be his “last wish” (*Hinxman v. Poynder*, 5 Sim. 546); his “dying request” (*Pierson v. Garnet*, 2 Bro. C. C. 38, 226); or “recommend” (*Tibbitts v. Tibbitts*, 19 Ves. 656; Jac. 317; *Horwood v. West*, 1 S. & S. 387; *Malim v. Keighley*, 2 Ves. jun. 333, 539; *Ford v. Fowler*, 3 Beav. 146; but see *Ounliffe v. Ounliffe*, Amb. 686, and the comments upon it in *Pierson v. Garnet*, 2 Bro. C. C. 46; *Malim v. Keighley*, 2 Ves. jun. 532; *Pushman v. Filliter*, 3 Ves. 9); “entreat” (*Prevost v. Clarke*, 2 Madd. 458); “not doubting” (*Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378); “under the firm conviction” (*Barnes v. Grant*, 26 L. J. N. S. (Ch.) 92); “have fullest confidence” (*Wright v. Atkyns*, 17 Ves. 255; 19 Ves. 299; *G. Coop.* 111; 1 T. & R. 143; *Palmer v. Simmonds*, 2 Drew. 221; *Gully v. Crego*, 24 Beav. 185; *Shovelton v. Shovelton*, 32 Beav. 143); “heartily beseech” (*Meredith v. Heneage*, 1 Sim. 553); “authorize and empower” (*Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192); “hope” (*Harland v. Trigg*, 1 Bro. C. C. 142; *Paul v. Compton*, 8 Ves. 375); “full assurance and confident hope” (*Macnab v. Whitbread*, 17 Beav. 299); “absolutely trusting” (*Irvine v. Sullivan*, 8 L. R. Eq. 673); “well know” (*Bardswell v. Bardswell*, 9 Sim. 323; *Briggs v. Penny*, 3 Mac. & G. 546, 554); “or of course he will give” (*Robinson v. Smith*, 6

Madd. 194); "in consideration he has promised to give" (*Clifton v. Lombe*, Amb. 519).

The context may, however, show that words of hope, or request, or recommendation, were *not intended to interfere with the absolute discretion of the legatee: *Huskisson v. Bridge*, 4 De G. & Sm. [*951] 245; *Williams v. Williams*, 1 Sim. N. S. 358, 370; *Webb v. Woods*, 2 Sim. N. S. 267; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1; *Scott v. Key*, 35 Beav. 291; *Shepherd v. Nottidge*, 2 J. & H. 766; *Eaton v. Watts*, 4 L. R. Eq. 151; *McCormick v. Grogan*, 1 I. R. Eq. 313; *Greene v. Greene*, 3 I. R. Eq. 90, 629.

The application of the rule by which words of recommendation are construed as imperative is often attended with considerable difficulty, and perhaps ought not, consistently with sound principles of interpretation, to have been ever established. "The first case," observes Sir Anthony Hart, V. C., "that construed words of recommendation into a command made a will for the testator; for every one knows the distinction between them. The current of decisions of late years has been against converting the legatee into a trustee:" *Sale v. Moore*, 1 Sim. 504.

Secondly, *The subject-matter of the recommendation or wish must be certain.*—Thus, in *Buggins v. Yates*, 9 Mod. 122, where a testator, who, having devised real property to his wife, to be sold for payment of his debts and legacies, in aid of his personal estate, declared that he *did not doubt but his wife would be kind to his children*, it was insisted, that this constituted a trust of the personal estate; "but the Court was of opinion, that these words gave a right to no child in particular, or a right to any particular part of the estate, but that the clause was void for uncertainty."

In *Sale v. Moore*, 1 Sim. 534, the testator gave and bequeathed to his wife all his worldly substance of what kind or nature soever, or wheresoever, upon trust for the following purposes:—1st, for payment of debts and funeral expenses, and of 100*l.* to a charitable institution, and 50*l.* a year to his sister for life. He then adds, "My brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them anything in this my will, as I could not do it without taking from my wife's property, who is more in need of it. The remainder of what I shall die possessed of, after the payment of the aforesaid debts and legacies, I leave to my dear wife, *not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her.*" It was held by Sir Anthony Hart, V. C., that there was no trust for the next of kin, but that the wife took the residue absolutely. "Supposing," said *his Honor, "that the words in this case would create a trust, those words are coupled with some degree of uncertainty. Who are the [*952]

objects of the trust? Did the testator mean relations at his own death or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain. There is no ground for taking away from the widow what the testator has not taken from her but vested in her absolutely. The case of *Dawson v. Clark* (15 Ves. 409) is a strong authority to show that the Court ought not to take away an absolute gift. He gives her 'all his worldly substance of what nature or kind soever and wheresoever, upon trust for the following purposes.' He must, therefore, be intended to have all the purposes in his contemplation. He then says, 'My brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them anything in this my will.' Is not this a conclusive indication that, in the preceding part of the will, he had pointed out every trust that he intended should fix upon the property? He then proceeds: 'As I could not do it without taking from my wife's property, who is more in need of it.' Why does he not take it from her? He might have made her a tenant for life only. But he says that he takes nothing from her. Where, then, is the ground upon which a trust could attach? He goes on: 'The remainder of what I shall die possessed of,' &c. Now, the word 'consider' is a relative term. How is she to consider them as he would have done? How is the Court to find out how he would have considered his relations?" And see *Hoy v. Master*, 6 Sim. 568.

So, in an absolute devise or bequest to a person, "well knowing that he will remember" certain objects (*Bardwell v. Bardwell*, 9 Sim. 319), "do justice to," or "deal justly and properly to and by them" (*Le Maître v. Bannister*, Prec. Ch. by Finch, 200, n. 1; *Pope v. Pope*, 10 Sim. 1), will not be construed as a trust, because no particular property is pointed out as the object of it. And see *Flint v. Hughes*, 6 Beav. 342; *Macnab v. Whitebread*, 17 Beav. 299; *Winch v. Brutton*, 14 Sim. 379; *Reeves v. Baker*, 18 Beav. 372; *Fox v. Fox*, 27 Beav. 301; *Greene v. Greene*, 3 L. R. Eq. 629.

Although there are words of recommendation in a will, they will not be construed as imperative, if an intention appear in any part of the will to give to the devisee a right or power to spend the property; for the Court, in its acuteness to extract the meaning, conceives it to be inconsistent with *the intention to create an imperative trust, that the [*953] party should have the right or power to dispose of the property at his pleasure, and by using that privilege to any extent, leave nothing, or more or less, to remain the subject of the trust: *Meredith v. Heneage*, 1 Sim. 556; and see *Curtis v. Ripon*, 5 Madd. 434; there the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God and love to the children committed to her care, make such use of it as should be for her own and

their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." Sir J. Leach, V. C., held the wife absolutely entitled to the property, there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital, either for the Church or the poor; and that the plain intention of the testator was to leave the children dependent on the wife.

So, where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left" at his death, or "what he shall die seized or possessed of" (*Wynne v. Hawkins*, 1 Bro. C. C. 179; *Sprange v. Barnard*, 2 Bro. C. C. 585; *Bland v. Bland*, 2 Cox, 349; *Pushman v. Filliter*, 3 Ves. 7; *Wilson v. Major*, 11 Ves. 205; *Attorney-General v. Hall*, Fitzg. 314; *Lechmere v. Lavie*, 2 My. & K. 197; *Pope v. Pope*, 10 Sim. 1; *Green v. Marsden*, 1 Drew. 646, 651), or what "he may have saved" out of an estate given for life (*Couman v. Harrison*, 10 Hare, 234), or "the bulk of his said residuary estate" (*Palmer v. Simmonds*, 2 Drew. 221), the subject will be considered as uncertain. See and consider, *Constable v. Bull*, 3 De G. & Sm. 411.

In the case of *Re Pedrotti's Will*, 27 Beav. 583, a testator bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income was not sufficient, she shall be at liberty to go to the principal," and he gave the residue to his brothers. The residue only produced 30*l.* a year, and the widow claimed the whole capital. It was held by Sir John Romilly, M. R., that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life.

In *Eade v. Eade* (5 Madd. 118), the testator bequeathed the residue of his personal property to his wife, requesting that she would at her death leave 200*l.* to each of the Miss Nortons, and leave the remainder of her property to his nephews, George and William Eade, in such proportions as she thought proper. It was held by *Sir John Leach, V. C., that the Miss Nortons were entitled to the 200*l.* each, but that no [*954] trust was created for the nephews. "A request or recommendation," observed his Honor, "will raise a trust, if the objects and the property are described with such certainty that the Court can execute it. The defendants, the Miss Nortons, are plainly entitled to the legacies of 200*l.* each; and if the testator had requested his wife at her death to leave the remainder of his property to George and William Eade, there would have been a clear trust in their favor, because the remainder of the testator's property could have been ascertained. I cannot say, that, by the remainder of her property at her death, he meant the remainder of his property. It must be understood to mean such property as she happened to possess at her death, from whatever source derived. This testator having therefore, in effect, left his wife at liberty to deal with the remainder of his estate as

she pleased, his request as to the *uncertain* property of which she might be possessed at her death, cannot create a trust."

In *Finden v. Stephens* (2 Ph. 142), the testator expressed it as his wish and desire that a certain person should be employed as agent, receiver, and manager of his estates whenever his trustees should have occasion for the services of a person in that capacity ; it was held by Lord Cottenham, C., that no trust was created which such person could enforce. Among other objections to the bill filed by him, his Lordship remarked, there was the following : " The plaintiff has not, and does not pretend to have, any present interest, but claims only to be employed as and when the trustees may have occasion for an agent, manager, or receiver ; but *words of recommendation are never construed as trusts, unless the subject be certain.*" See, also, *Shaw v. Lawless*, 5 C. & F. 129 ; but see *Williams v. Corbett*, 8 Sim. 349.

But it may be implied, from other parts of the will, controlling a recommendation to leave merely what property under the will the legatee was possessed of at his death, that the whole property at the testator's death was intended ; and, in that case, the subject will be certain. Thus, in *Horwood v. West*, 1 S. & S. 387, the testator gave to his wife all his personal estate, *relying* that if she should marry again, she would secure *whatever she should possess under his will* for her separate use ; and he recommended her to give, by her will, *what she should die possessed of* under his will to certain persons, whom he named ; it was held by Sir John Leach, V. C., that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named. " It is true," said *his Honor, " that, in terms, his recommendation is, that she [*955] shall, by her last will and testament, give and bequeath what she shall die possessed of under and by virtue of that his will, in manner therein stated ; and if these words were uncontrolled by any other part of the will, it would be to be implied that he had in his view only what she should happen to have left at her death, and not all that he had given to her. But in a prior part of the will he directs, that, upon a second marriage, whenever that may happen, the whole of the property which he gives to her, and not such part only as may have been then undisposed of by her, shall be secured to her separate use. A second marriage was at all times possible until her death ; and whenever a second marriage happened, the whole of his property was to be secured ; and a power to dispose of any part of the property absolutely, at any time during her life, is not to be reconciled to that provision, when he recommends her to give, in the manner stated, what she should die possessed of under his will. I must, therefore, consider that he had in view the whole property which she should possess under his will ; and that the expression is equivalent to a recommendation to give the whole property which she should so possess."

Thirdly, *The objects or persons intended to have the benefit of the recom-*

mentation or wish must be certain.—In *Reid v. Atkinson*, 5 I. R. Eq. 373, a testator left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were. It was held by the Court of Appeal in Ireland, reversing the decision of the Vice-Chancellor (reported 5 I. R. Eq. 162), that the wife took the real and personal property absolutely, inasmuch as the terms of the gift did not amount to a precatory trust, and even if it had done so, there were no objects of the trust mentioned in the will. In *Harland v. Trigg* (1 Bro. C. C. 141), where a testator gave leaseholds to his “brother forever, *hoping* he will continue them in the *family*,” Lord Thurlow, C., held that no trust was created. “I take,” said his Lordship, “the rule of law to be this, that two things must concur to constitute these devises, the terms and the object. *Hoping* is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct *objects, the law has connected the whole together, and held the words [*956] sufficient to raise a trust; but then the *objects must be distinct*: where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy.”

In a subsequent and much-discussed case, the question arose, what was to be the construction of the word “family” where *freeholds* were devised to a person and her heirs forever, in the *fullest confidence* that after her decease she would devise the property to the testator’s *family*; but it was unnecessary to decide whether a trust was created, and for whom. See *Wright v. Atkins*, 17 Ves. 255; 1 V. & B. 313; 19 Ves. 299; G. Coop. 111, 125; T. & R. 162. With reference to this case, Sir Edward Sugden observes, “It was treated as clear, that the words were sufficient to raise a trust if the objects were clearly ascertained. The result of the investigation seems to show that it will be difficult to maintain that the will clearly points out objects in whose favor the trust can be enforced. At all events, it cannot now be held, consistently with the opinions already expressed and acted upon by the House, that the trust was for the testator’s heir-at-law at his death, and that the widow was a bare trustee, and had no power of appointment or of selection:” Sugd. Prop. 388. See also and consider *Green v. Marsden*, 1 Drew. 646; *Williams v. Williams*, 1 Sim. N. S. 358; *Gregory v. Smith*, 9 Hare, 708; *In re Terry’s Will*, 19 Beav. 580; *Bernard v. Minshull*, Johns. 276.

In *Meredith v. Heneage*, (1 Sim. 542), where the testator gave real and

personal estates to his wife, in full confidence she would distinguish the *heirs* of his late father by devising the whole of his estate, together and entire, to such of his father's *heirs* as she might think best deserved her preference, the Lord Chief Baron, though his opinion was formed mainly upon another point, thought the objects were not certain, whether the testator had pointed out the heirs-at-law of his father, as the objects to take the personal as well as the real estate, or the heirs and next of kin, or the next of kin only.

In *Sale v. Moore* (1 Sim. 534), where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his *near relations* as he would have done if he had survived her, the Vice-Chancellor held the objects to be uncertain. "Did the testator," he asked "mean relations at his own death, or at his wife's death? Did he mean that she [*957] should have the liberty of *executing the trust the day after his death?"

Where, however, the power is to be exercised by the donee by will, or at his death, or, as in the principal case, "at or before his death," the objects will be considered to be those who answer a particular description at the death of the donee, and there will be no uncertainty: *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *Atkyns v. Wright*, 17 Ves. 255; 19 Ves. 299; G. Coop. 111; 1 T. & R. 162; *Meredith v. Heneage*, 1 Sim. 558; *Knight v. Knight*, 3 Beav. 173; 11 C. & F. 513.

In *Griffiths v. Evan* (5 Beav. 241), A. devised an estate to B. in tail; and for want of issue of her body, "he empowered and authorized" her to settle and dispose of the estate to such persons as she thought fit, by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family." B. appointed to her husband for life, with remainders over. It was held by Lord Langdale, M. R., that the appointment was void, the expression "nearest family" being equivalent to heirs, and that the co-heirs of the testator were entitled.

The tendency of the later decisions, as has been before observed, is against construing precatory or recommendatory words as trusts. If, therefore, the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, no trust will be created: see *Bull v. Vardy*, 1 Ves. jun. 270; *Meggison v. Moore*, 2 Ves. jun. 630; *Knight v. Knight*, 3 Beav. 148; 11 C. & F. 513. Thus, the words "free and unfettered," accompanying the strongest expressions of request, were held to prevent the words of request from being imperative: *Meredith v. Heneage*, 1 Sim. 542; 10 Price, 230; *Hoy v. Master*, 6 Sim. 568. So, where there was a gift of stock to a person, and there was added, parenthetically (to enable him to assist such children of my deceased brother as he may find deserving of encouragement), it was held an absolute be-

quest, and that no trust was created for the children: *Benson v. Wittam*, 5 Sim. 22; *Wright v. Atkins*, T. & R. 157, 163.

In *Shaw v. Lawless* (5 C. & F. 129), a testator devised certain real estates to trustees, for the use of W. Shaw for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of 100*l.* to B. E. Lawless, as a token of esteem. The will then contained this clause:—"And it is my particular desire, that *my said executors, while acting in the management of all or any of my affairs under this my will, as also [958 my friend W. Shaw, when he shall enter into the receipt and perception of my said rents of K. V. and K., shall *continue* the said B. E. Lawless in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues or such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of the said estates fully to my satisfaction." It was held by the House of Lords, reversing the decision of Sir Edward Sugden, reported L. & G. t. Sugd. 154, who had reversed the decision of his predecessor, Lord Plunkett, and in affirmance, therefore, of his decree, that these words did not create a trust in favor of B. E. Lawless. Lord Cottenham, C., with whose opinion Lord Brougham's concided, observed, that the question was whether the words amounted to a trust, or only to an expression of opinion and advice; that during the life of the testator, Lawless was his agent; but then, he was agent only during the testator's pleasure; and by the terms of the will, the testator desired that he should *continue* in the agency. Was that desire to be considered a command? If he was to *continue* to act as agent, the natural presumption was, that he was to continue on the same terms as during the life of the testator. If so, that was during the pleasure of the holder of the estate, and that negatived the presumption of an estate or interest vested in Lawless. That Shaw was tenant for life, and had the legal estate, but if Lawless' title was what it had been argued to be, he had an equitable charge on the legal estate of Shaw; and as he was to have the usual fees of 5*l.* per cent., the result would be, that Lawless would not only be an equitable incumbrancer to that amount, but would have a right to manage and direct the estate, and would have full power over the conduct of the property. If so, the testator must have intended that Shaw, to whom he gave the estate for life, should not have the direction of his own estate; for the two powers of direction and management are inconsistent with each other. The testator, on this view of the case, must be taken to have intended that the legal devisee for life should not have the management, but that the equitable incumbrancer should have the control and management of the property. But the trustees of the will were, during a considerable part of the time, to have not only the management of the estate which the testa-

tor devised, but were authorized and directed to lay out part *of
 [*959] the personalty, the residue, in the purchase of other lands. If Lawless was the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he had a clear interest in the residue, for he might take one-twentieth part of the residue, he might file a bill to control the application of the residue, and claim to be absolutely interested in what he was entitled to receive, namely, the one-twentieth part. That, when it was seen to what absurd extent that construction of the will necessarily led, no one could hesitate in coming to the conclusion that it was at least very doubtful how far this could possibly have been the intention of the testator. That it was true, that all the Court requires is, that the subject and object should be defined and certain. Then, what was the subject in the present case? It was the right to be employed in the receipt of the rents, and the agency and management of the lands of another person, upon the usual fees. What was the necessary effect of this alleged right? It went to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves. Then this question arose:—Suppose that he parted with the estate, would it, in the hands of a purchaser, be subject to the same liability to this claim of agency on the part of Lawless? Was it the desire or the wish of the testator that it should be so?—or did he merely wish that his devisee should employ a man whose conduct had given satisfaction to himself?

The rule said by Lord Cottenham to have been laid down by the House of Lords in *Shaw v. Lawless* is this, that though recommendation may, in some cases, amount to a direction and create a trust, yet that, being a flexible term, if such a construction of it be inconsistent with any positive provision in the will, it is to be considered as a recommendation, and nothing more: *Finden v. Stephens*, 2 Ph. 142; *Knott v. Cottee*, 2 Ph. 192; *Johnston v. Rowlands*, 2 De G. & S. 356.

In *Knight v. Knight*, 3 Beav. 148, the testator being entitled to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee, as right heir of the settlor, as to part under a settlement made by his grandfather, and as to other part under the will of his grandfather, suffered a recovery and acquired the fee simple. He afterward made his will, by which he devised all his estates, real and personal, to his brother, Thomas Andrew Knight, if living at his decease, and if not, to his son; and in case he should die before the testator, to his eldest son, or next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator had inherited

*those estates his industry had acquired. He constituted the per-
 [*960] son who should inherit his said estates his sole executor and trustee, to carry the same and everything therein duly into execution, “confiding in the approved honor and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he had made out of so large a property, according

to the plain and obvious meaning of his words." He then gave some small legacies, and proceeded thus: "I trust to the liberality of my successors to reward any other my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." Thomas Andrew Knight survived the testator. It was held by Lord Langdale, M. R., that Thomas Andrew Knight took absolutely, observing, after an elaborate examination of the authorities, that, "on the whole he was under the necessity of saying, that, for the creation of a trust, which ought to be characterized by certainty, there was not sufficient clearness to make it certain that the words of trusts were intended to be imperative; or to make it certain what was precisely the subject intended to be affected; or to make it certain what were the interests to be enjoyed by the objects."

Upon appeal to the House of Lords, the decision of Lord Langdale was affirmed, Lord Chancellor Lyndhurst coming to the conclusion, upon the whole of the will, that the testator had no intention of creating a trust; and, moreover, that it was doubtful to what property the recommendatory words applied—whether it was to be confined to the estates the testator took from his grandfather, or whether personal as well as real property was to be included; and he considered the circumstance, that an indefinite portion of the personal property was to be disposed of according to the liberality of his successors, raised another difficulty in the way of considering this as an imperative trust. Lord Cottenham came to the conclusion that the judgment ought to be affirmed, because, assuming that the property was sufficiently described, and which way it should go, there was sufficient upon the face of the will, according to the rule laid down by Lord Alvanley in *Malim v. Keighley*, 2 Ves. jun. 335, to show that the testator did not intend to take away from the devisee the discretion of defeating the devise he expressed. See *Knight v. Boughton*, 11 C. & F. 513: *Scott v. Key*, 35 Beav. 291.

The Court will not imply a gift to a class, where there is an express gift over, in default of appointment, to or among that class: *Davidson v. Proctor*, 14 Jur. 31. And see *Walsh v. Acton*, 4 Ves. 171; [*961] *Bird v. Wood*, 2 S. & S. 400; *Goldring v. Inwood*, 3 Giff. 139, 143.

Clear words of gift to a devisee for his own benefit, free from control, will not be cut down by subsequent words, which may operate as an expression of desire, without disturbing the previous devise: *Meredith v. Heneage*, 10 Price, 306; 1 Sim. 588; Sugd. Prop. 391. See, also, *Brook v. Brook*, 3 Sm. & Giff. 280.

In *White v. Briggs*, 15 Sim. 33, the testator gave his consumable articles, linen, china, &c., entirely to his wife's use, and added, that the same, together with all his jewels, trinkets, clocks, watches, and ornaments, might be finally appropriated as she pleased, with the sum of 4000*l.* in money, but which sum he recommended her to divide in shares, which he specified,

among persons whom he named. Sir L Shadwell, V. C., said, that, in *Heneage v. Meredith*, the objects of the recommendation were uncertain; but here, both the objects and the subjects were certain, and he therefore thought a trust was created. However, Lord Lyndhurst reversed the decree, upon the ground that the words, to be "finally appropriated as she pleased," applied to the 4000*l.* as well as to the jewels, &c., and therefore the case was to be governed by *Meredith v. Heneage*: Sudg. Prop. 400.

Where there is an absolute gift by will, followed by words sounding like a power, with a gift over if it be not exercised, there the Court gives effect to the absolute gift as such, and the gift over is held inconsistent with that absolute gift, and is therefore void. *Per* Sir W. Page Wood, V. C., *In re Mortlock's Trust*, 3 K. & J. 456, 457. And see *In re Yalden*, 1 De G. Mac. & G 53; *Brook v. Brook*, 3 Sm. & G. 280; *Howorth v. Dewell*, 29 Beav. 18; *Scott v. Key*, 35 Beav. 291; *Lambe v. Eames*, 10 L. R. Eq. 267.

Where a trust has been created in favor of certain objects, by words of recommendation, such part of the property as is not wanted for the purposes of the trust will belong to the person upon whom the property has been conferred, subject to the trust, no resulting trust arising for the next of kin or heir-at-law; see *Wood v. Cox*, 2 My. & Cr. 684, overruling the judgment of Lord Langdale, M. R., reported 1 Kee. 317; and see ante, pp. *724, *725.

So in *Irvine v. Sullivan*, 8 L. R. Eq. 673: the testator, after a devise of all his property to three trustees (whom he afterward appointed executors) upon trust to sell, directed that, "the moneys arising from the said sale, and otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the [*962] expenses of carrying out the *trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same, to E. D. Irvine, widow, absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator had, shortly before the date of his will, expressed to E. D. Irvine, to whom he had been for some time engaged to be married, his wish that she would, out of the property he should leave her, make gifts to certain persons. E. D. Irvine, after leaving the testator, wrote down his wishes, but the paper was not submitted to or signed by him. It was held by Sir W. M. James, V. C., that E. D. Irvine took the testator's estate beneficially, subject only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4*l.* per cent. from the expiration of one year from the testator's death: see also *Shelley v. Shelley*, 6 L. R. Eq. 540.

It is most important to observe, that, although vagueness in the object will unquestionably furnish reasons for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently

certain and definite to be valid and effectual, and it is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Thus, in *Briggs v. Penny*, 3 Mac. & G. 546, the testatrix, after giving, among other legacies, a sum of 3000*l.* to Sarah Penny, and a like sum of 3000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said Sarah Penny, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by Lord Truro, C., affirming the decision of Sir J. L. Knight Bruce, V. C. (reported 3 De G. & Sm. 525), that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his Lordship, "on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the Court has held that the uncertainty of the object has afforded evidence that no trust was intended. . . . I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires.' And the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs or desires, or intentions, appears to me to amount to a declaration that *Miss Penny was to hold [*963] the property for that purpose, or in other words, to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared; but still in such a case it is clear a trust was intended, and that is sufficient to exclude the legatee from a beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to donate the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. In this case, however, we are not left to spell out a trust from the residuary clause alone; the fact that, besides a legacy of 3000*l.*, another legacy is expressly given to Miss Penny, 'in addition, for the trouble she will have in acting as executrix,' clearly shows that she was not intended to take the residue beneficially; because, if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all the bequests, there could be no object in taking out of that residue, of which she was to have the whole, 3000*l.* for her trouble: the fact of the legacy not only strongly confirms, but is only consistent with,

the hypothesis that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself, or the proved codicils, for though the bequests are numerous, not one of them involves any amount of trouble; whereas the views and wishes of the testatrix, to which she alluded, might be such that the carrying them into effect might involve the executrix in very difficult trusts." See also *Langley v. Thomas*, 6 De G. Mac. & G. 645; *Bernard v. Minshull*, Johns. 276.

Powers in the nature of Trusts.—Hitherto, those cases arising upon words of recommendation have been considered, by which a trust simply has been held to be created. There is, however, another class of cases within which the principal case falls, and is a leading authority, of a similar nature, where powers are given to persons, accompanied with such words of recommendation in favor of certain objects, as to render
964] them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favor of the objects will not turn to their prejudice, since the Court will, to a certain extent, take upon itself the duties of the donees. See *Gower v. Mainwaring*, 2 Ves. 87; *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Gude v. Worthington*, 3 De G. & Sm. 389; *Reid v. Reid*, 25 Beav. 469; *Isod v. Isod*, 32 Beav. 242; *Re Caplin's Will*, 34 L. J. N. S. (Ch.) 578.

It is perfectly clear that where there is a mere power of disposing, and that power is not executed, the Court cannot execute it. Per Lord Eldon, *Brown v. Higgs*, 8 Ves. 570.

It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. Per Lord Eldon, in *Brown v. Higgs*, 8 Ves. 570; and see *Attorney-General v. Lady Downing*, Wilm. 1 Amb. 550; *Attorney-General v. Hickman*, 2 Eq. Ca. Ab. 193; *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Mosely v. Mosely*, Rept. t. Finch, 53; *Wainwright v. Waterman*, 1 Ves. jun. 311; *Gude v. Worthington*, 3 De G. & Sm. 389.

But there is not only a mere trust and a mere power, but there is also known to the Court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of *Harding v. Glyn* (1 Atk. 469) proceeded. Per Lord Eldon, 8 Ves. 570.

The doctrine laid down in the principal case was approved of and acted upon in the leading case of *Brown v. Higgs*, which was twice heard before Lord Alvanley, as reported in 4 Ves. 708, and 5 Ves. 495, and before Lord Eldon, upon appeal, as reported in 8 Ves. 561, and affirmed in the

House of Lords (see 5 My. & Cr. 92). In that case, the testator bequeathed a leasehold estate to John Brown, upon trust, subject to certain charges, to employ the remainder of the rent to such children of his nephew, Samuel Brown, as "John Brown shall think most deserving, and that will make the best use of it, or to the children of his nephew, William Augustus Brown, if any such there are or shall be. John Brown died in the lifetime of the testator, and William Augustus Brown had no children. It was held by Lord Alvanley that the children of Samuel Brown were entitled, in equal shares, to the leasehold estate. "The question," said his Lordship, upon the rehearing (5 *Ves. 500), "is, whether this sentence in the will, upon which the question arises, is to be [*965] considered as merely giving John Brown a power, if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether, upon the true construction, it is anything more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him, in trust for those children, at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his non-exercise of that power, or the circumstances of his being incapable of exercising it, will not prevent the objects of the testator's bounty from taking in some manner, though the power of distribution, on account of the death of the testator, cannot be exercised." See *Meller v. Stanley*, 2 De G. Jo. & Sm. 183, 191; *Carthew v. Enraght*, 26 L. T. Rep. N. S. 834; *Re Jeffery's Trusts*, 26 L. T. Rep. N. S. 821.

The case of *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, is certainly very difficult to reconcile with *Harding v. Glyn*, or with *Brown v. Higgs*. "But the question," Lord Eldon has observed, "is not whether one case is to be reconciled with others, but whether all the cases have gone upon a principle which professes to save whole *Harding v. Glyn*. Lord Hardwicke, in *The Duke of Marlborough v. Lord Godolphin*, does not say that, where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this Court would not act; but he collected, from the scope and object of the disposition in that case, taken altogether, the opinion that it was a case in which the person having a power to dispose of the sum of 30,000*l.* had a mere power, not clothed with any duty requiring her to execute it; and, therefore, as to what was not disposed of, the Court could not interfere:" *Brown v. Higgs*, 8 Ves. 576.

In *Burrough v. Philcox*, 5 My. & Cr. 72, a testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed;" and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared, that, in case his two children should both die without leaving lawful issue, the same should be disposed of as after men-

tioned: that is to say, the survivor of his two children should have power to dispose by will of his real and personal estate "among my nephews and nieces or their children, either all to one of them, or to as many of them as *my surviving child shall think proper." It was held [*966] by Lord Cottenham, that a trust was created in favor of the testator's nephews and nieces, and their children, subject to a power of selection and distribution in his surviving child. "When there appears," observes his Lordship, "a general intention in favor of a class, and a particular intention in favor of individuals of a class, to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises, as stated by Lord Eldon, in *Brown v. Higgs* (8 Ves. 574), of the power being so given as to make it the duty of the donee to execute it; and, in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit. . . . In this case, the intention is not to be found only in the power given to select and distribute; for the testator has directed his trustees to hold the property until the contingency has happened, and, as to the land, that it shall not be alienated in the meantime; and has himself declared, that, in the events which have happened, the property should be disposed of as after mentioned. This is imperative, and is conclusive as to the intention that the subsequent gift should take effect; but the only disposition after mentioned is the provision for the nephews and nieces, and their children, subject to the selection and distribution of the survivor of his son and daughter.

"Much argument was urged at the bar, upon the ground that the donee of the power had no estate in the property under the will beyond a life interest. In my view of the case this is quite immaterial. It is not, certainly, one of those cases in which property is given, with expressions added as to the disposal of it, which are held to fix a trust upon the gift, but the whole is given to trustees; and the question is, whether there be found in the will a sufficient declaration of who, in the events which have happened, are to be the cestuis que trust; and if that be sufficiently expressed, it is immaterial whether the donee of the power be also a trustee, or whether the trust be vested in others.

"In *Birch v. Wade* (3 V. & B. 198), the property was given in trust, and the donee of the power was only tenant for life.

"In this case, upon the authority of *Brown v. Higgs*, I think myself justified in giving effect to the intention, which appears to me to be sufficiently apparent upon the will, of giving the property to the nephews and nieces, and their children, subject to the selection and distribution of the [*967] *survivor of the son and daughter, and that they all constitute the class to take all the property as to which no such selection and distribution has been made."

The mode in which the Court will execute a power in the nature of a trust, depends upon terms of the instrument by which the property is settled.

If in such instrument a rule is laid down for the guidance of the trustees which they have not acted upon, then the Court will act upon it, exercising the same judgment as the trustees might have done. Thus, in *Gower v. Mainwaring*, 2 Ves. 87, J. Mainwaring executed a trust deed, by which the trustees were to give the residue of his real and personal estate among his "friends and relations," where they should see most necessity, and as they should see most equitable and just. Two of the trustees being dead, and the third refusing to act, Lord Hardwicke, C., held that the word "friends" meant "relations," within the Statute of Distributions, and it was referred to the Master to inquire and consider how it might be most equitably and justly divided. "What differs this," said Lord Hardwicke, "from the cases mentioned, is this, that there is a rule laid down for the trust. Wherever there is a trust or power (for this is a mixture of both), whether arising on a legal estate, or reserved to be exercised by trustees barely according to their discretion, I do not know the Court can put themselves in the place of those trustees to exercise that discretion. Where trustees have power to distribute *generally, without any object pointed out or rule laid down*, the Court interposes not, unless in case of charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down* (and the word 'friends' is synonymous to 'relations,' otherwise it is absurd). *The trustees are to judge on the necessity and occasions of the family, the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees*, and when informed by evidence of the necessity can judge what is equitable and just on this necessity:" and see *Hewett v. Hewett*, 2 Eden, 332; *Anon.* 1 P. Wms. 327; *Widmore v. Woodroffe*, Amb. 636; *Brunsdon v. Woolredge*, Amb. 507; *Attorney-General v. Buckland*, 1 Ves. 231, Amb. 71, cited; *Green v. Howard*, 1 Bro. C. C. 33; *Mahon v. Savage*, 1 Scho. & Lef. 111; *Maberley v. Turton*, 14 Ves. 499; *In re Phene's Trust*, 5 L. R. Eq. 347; *Butler v. Gray*, 5 L. R. Ch. App. 26, 31.

Where, however, no rule has been laid down in the instrument creating the power as to the mode in which it is to be executed, the Court, acting upon the maxim that equality is equity, will make an equal [*968] division among the persons who are objects of the power in the nature of a trust. Thus, in *Doyley v. The Attorney-General*, 2 Eq. Ca. Ab. 194; 4 Vin. Ab. 485, 486, the testator gave property in trust for certain purposes, and subject thereto the trustees and the survivor of them, and the heirs and executors of such survivor, were to dispose of it to such of his relations on his mother's side who were most deserving, and in such manner as they think fit, and for such charitable uses and purposes as

they should also think most proper and convenient. The power having devolved on the Court, Sir Joseph Jekyll, M. R., directed that one-half of the property should go to the testator's relations on the mother's side, and the other half to charitable uses. He said the known rule that equality is equity was the best measure to go by. That he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer one to the other, but that all should come in without distinction.

In *Salisbury v. Denton*, 3 K. & J. 529, a testator by will gave a fund to be at the disposal of his widow by her will, "therewith to apply a part" for a charity, "the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each were to take. It was held by Sir W. Page Wood, V. C., that the bequest was not void for uncertainty, but that the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the Statute of Distributions. See also *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 632; *Gough v. Bult*, 16 Sim. 45, 231; *Longmore v. Broom*, 7 Ves. 124; *Penny v. Turner*, 2 Phill. 493; *Fordyce v. Bridges*, Ib., 497; *Re White's Trusts*, Johns. 656; *Little v. Neil*, 10 W. R. (V. C. K.) 592; but see *Down v. Worrall*, 1 My. & K. 561, and the remarks thereon of Sir W. Page Wood, V. C., in *Salisbury v. Denton*, 3 K. & J. 538.

A distinction may be here noticed between two classes of cases—the first, where there is a gift to a class with a subsequent power of appointment among the class; the second, where there is no gift to the class except in or by means of the power. With regard to the first class of cases the general principle seems to be this: If the instrument itself gives the property to a class, but gives power to donee to appoint in what shares, and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in *default of appointment. Thus, in *Lambert* [*969] *v. Thwaites*, 2 Law Rep. Eq. 151, by a post-nuptial settlement, certain freehold property was conveyed to trustees upon trust to pay the rent to W. and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds among all and every the children of W. in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without executing the appointment. It was held by Sir R. T. Kindersley, V. C., that the property was vested in all the children liable to be divested by the execution of the power; and the power not having been executed, the representatives of the deceased child were entitled to his share. See also *Davy v. Hooper*, 2

Vern. 665; *Madoc v. Jackson*, 2 Bro. C. C. 588; *Hockley v. Mawbey*, 1 Ves. jun. 143; *Jones v. Torin*, 6 Sim. 255.

If in such a case the power had been exercised in favor of the surviving children, they only would have taken. This was decided in *Woodcock v. Rennock*, 4 Beav. 190; 1 Ph. 72; but Lord Langdale, M. R., in that case seems erroneously to have expressed an opinion that where a power in such a case is to be exercised by will, those of the class only who are living at the death of the donee of the power are entitled to take in default of appointment. See also *Winn v. Fenwick*, 11 Beav. 438. But see the remarks upon these cases in *Lambert v. Thwaites*, 2 Law Rep. Eq. 158; *Freeland v. Pearson*, 3 Law Rep. Eq. 658.

With regard to the second class of cases before alluded to, it may be laid down that if the instrument does not contain a gift of the property to any class, but only a power to the donee to give it as he may think fit, among members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it. Thus, in *Walsh v. Wallinger*, 2 Russ. & My. 78, a testator bequeathed the residue of his estate to his wife for her own use and benefit, "*trusting that she would at her decease give and bequeath the same to the children in such a manner as she should appoint.*" Now, in this case, there was no gift in express terms to the children by the testator, nor was there any direction that they were to take in default of appointment; and, therefore, it could only be inferred from the power itself who were to take in default of appointment; and inasmuch as the power was only to be exercised by will, and, therefore, could only be exercised in favor of those children *who should be living at the testator's death, the conclusion almost necessarily was that the intention of the testator was that those only who survived the wife should take, and so it was decided. See also *Kennedy v. Kingston*, 2 J. & W. 431. [*970]

With regard to the mode in which the Court of Chancery will execute a power in favor of "relations," the result of the decisions is that the Court, as a convenient rule of construction, will adopt the Statute of Distributions as the means of determining who are comprehended under the term "relations;" but although this is the case, it is clear that a donee with a power of selection may go beyond the rule adopted by the Court, and exercise it in favor of relations of the donor who are not within the degree of next of kin: *Supple v. Lowson*, Amb. 729; *Spring v. Biles*, 1 T. Rep. 435, n.; *Oruwys v. Colman*, 9 Ves. 324; *Mahon v. Savage*, 1 S. & L. 111; *Forbes v. Ball*, 3 Mer. 437; *Grant v. Lynam*, 4 Russ. 292, overruling *Brunsdon v. Woolredge*, Amb. 507; 1 Dick. 380; *Salisbury v. Denton*, 3 K. & J. 529.

The same rule has been applied with respect to personal estate, where the words "relations" or "friends" (*Re Caplin's Will*, 34 L. J. N. S. Ch.

578), or where the word "family" has been used in place of "relations:" *Cruwys v. Colman*, 9 Ves. 319; *Grant v. Lynam*, 4 Russ 297.

Where, however, the donee has merely a power of *distribution*, and not a power of *selection*—if, for instance, he has a power to appoint among relations, and not among such of them as he thinks fit, or words of that effect—an appointment to relations not being next of kin would be void: *Pope v. Whitcombe*, 3 Mer. 689; and see *Clapton v. Bulmer*, 10 Sim. 426; 5 My. & Cr. 108.

And if the power of selection is confined to a particular class, the donee cannot go beyond it. Thus, a gift to the testator's "nearest relations," as A. may appoint, will only authorize an appointment to next of kin under the Statute of Distributions: *Goodinge v. Goodinge*, 1 Ves. 231; *Edge v. Salisbury*, Amb. 70.

In case of charities in favor of "poor relations" (*White v. White*, 7 Ves. 423; *Attorney-General v. Price*, 17 Ves. 371; *Mahon v. Savage*, 1 S. & L. 111), or where the testator has himself furnished some test by which relations extending beyond the Statute of Distribution may be discovered (*Bennett v. Honeywood*, Amb. 708), the Court of Chancery will not confine itself, as in ordinary cases, to relation within the Statute of Distributions.

On the death of the donee of a power imperative as a trust, without having made an appointment, the question arises, in whose favor will the

[*971] Court execute the power—whether in favor of *persons composing a certain class at the death of the donor, or at the death of the donee of the power. It seems, however, to be clear, that when, as in the principal case, the donee of such a power has a *life* interest in the subject of the power, which he might execute in favor of "relations," on his death, without having done so, the Court will execute it, not in favor of those who are next of kin at the death of the donor, but of those composing that class at the death of the donee: see *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194, pl. 15; *Witts v. Bodington*, 3 Bro. C. C. 95; *Cruwys v. Colman*, 9 Ves. 319, 325; *Birch v. Wade*, 3 V. & B. 95; *Winn v. Fenwick*, 11 Beav. 438; *Tiffin v. Longman*, 15 Beav. 275; *Finch v. Hollingsworth*, 21 Beav. 112; *Re Caplin's Will*, 34 L. J. N. S. Ch. 578; see vide *Hands v. Hands*, 1 T. R. 437, n. cited; *Grievson v. Kirsopp*, 2 Keen, 653; *Re White's Trusts*, Johns. 656.

But where the distribution or selection is not suspended by the existence of any preceding estate for life, those who are to take are such as answered the description of next of kin of the testator at his death: *Cole v. Wade*, 16 Ves. 27; and see *Brown v. Higgs*, 4 Ves. 708; *Longmore v. Broome*, 7 Ves. 124; and the same persons will take when the donee of the power having a life interest dies in the lifetime of the testator: *Penny v. Turner*, 2 Ph. 493; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

Another question may arise in the exercise of such a power by the Court, viz., what share persons who, by representation under the statute,

would only be entitled per stirpes, will take? It seems that they will take per capita; upon this principle, that the Court merely adopts the statute for the sake of convenience, in finding out the persons intended by a term which would otherwise be void for uncertainty; and when found out, they take, not under the statute, but under the will as joint tenants: see *Walter v. Maunde*, 19 Ves. 427, 428; and see *Pope v. Whitcombe*, 3 Mer. 689; *Hinckley v. Maclarens*, 1 M. & K. 27; *Withy v. Mangles*, 4 Beav. 358; 10 C. & F. 215; *Re White's Trusts*, Johns. 656; *Halton v. Foster*, 3 L. R. Ch. App. 507.

Although the subject be not capable of division, or one object out of a class is to be selected by the trustee, the Court will, if possible, execute the power, on the default of the trustee: *Richardson v. Chapman*, 7 Bro. P. C. 318, Toml. edit.; *Moseley v. Moseley*, Rep. t. Finch, 53; *Brown v. Higgs*, 5 Ves. 504.

In *Cruwys v. Colman*, 9 Ves. 319, the testatrix bequeathed to her sister B., for life, declaring that it was her *absolute desire* that she bequeath to those of her own family what she has power to dispose of, *provided they behaved well *to her, with decency and affection*. B., by her will, declared she meant to make no disposition of her sister's [*972] property. Sir William Grant, M. R., held that, as all that B. said was, that she did not intend to execute the power, the trust remained unexecuted, and was consequently to be executed by the Court in favor of the next of kin of B. But his Honor said, that a difficulty might have arisen if B. had declared her own relations had behaved ill to her, and therefore she had resolved not to give them any part of the property. The question then would have been, whether she was not constituted sole judge of the propriety of the behavior of her family, and whether it was not an intestacy in the testatrix, the condition failing.

It may here be remarked, that, although a devisee may be bound to devise an estate according to the confidence reposed in him, or in default of appointment it will go to the object designated by the testator, yet, in respect of enjoyment, all the rights and incidents of property—for instance, the right of felling timber—will remain in the devisee during his life to the extent of the estate vested in him. Thus, in *Wright v. Atkyns* (17 Ves. 255), a testator gave all his leasehold, freehold, and copyhold estates, of whatever tenure or tenures, unto his mother, Charlotte Atkyns, and her heirs forever, *in the fullest confidence, that, after her decease, she would devise the property to his family*; and he charged the premises with the payment of his debts, and gave to her all his personal estate, and appointed her his executrix. The testator, who died possessed of no leaseholds, left his nephew his heir-at-law. Sir William Grant, M. R., held that there was no uncertainty, but that it was a trust for the testator's heir, and that therefore Mrs. Atkyns was to be considered as tenant for life of the estate. Lord Eldon afterward granted an injunction restraining her from cutting down trees, or committing waste: 1 V. & B. 313;

19 Ves. 299; G. Coop. 111, 125. Upon an appeal to the House of Lords, the decree was reversed, so far as it declared Mrs. Atkyns only tenant for life, without prejudice to any question which might arise touching the construction of the testator's will on the death of Charlotte Atkyns; and the order for the injunction, so far as it was founded on the declaration that Mrs. Atkyns was only tenant for life, was reversed, and Mrs. Atkyns was to apply to the Court of Chancery, as she might be advised, touching such injunction, or any other ground. There being no remaining incumbance on the estate, Lord Eldon dissolved the injunction, upon the application of Mrs. Atkyns: Sugd. Prop. 382. The person who was the testator's heir at his death having died, a bill was filed by his devisees and *the heiress-at-law of the original testator, not praying any [*973] declaration of rights, but praying an account of timber sold, and an injunction. Lord Eldon gave Mrs. Atkyns power to cut timber in a husbandlike manner, giving an account, and paying the money into Court. See T. & R. 143. This order being considered to be in opposition to the principle upon which the House of Lords reversed the decree, a second appeal was made to the House in the same session, and the decision of Lord Eldon was reversed, the judgment of the House of Lords declaring, that, according to the true construction of the testator's will, the intention of the testator must be taken to have been to give to the appellant a right to cut the timber for her own use. See Sugd. Prop. 384.

Control of the Court over the Exercise of Powers.—A Court of equity has not in general, in the absence of mala fides on the part of the donee, any jurisdiction to interfere with, or compel him to execute a mere discretionary power: *Brown v. Higgs*, 5 Ves. 501; 8 Ves. 570; *Pink v. De Thuissey*, 2 Madd. 157; *French v. Davidson*, 3. Madd. 396; *Walker v. Walker*, 5 Madd. 424; *Down v. Worrall*, 1 My. & K. 561; *Meredith v. Heneage*, 1 Sim. 554; *Costabadie v. Costabadie*, 6 Hare, 410; *Kekewich v. Marker*, 3 Mac. & G. 311; *In re Wilkes' Charity*, Ib. 440; *White v. Grane*, 18 Beav. 571; *Hart v. Tribe*, 19 Beav. 149; 32 Beav. 279; *Bonser v. Kinnear*, 2 Giff. 195.

Where a testator proposes to recommend any person to the favorable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favor of such person, or to express a wish without conferring a right. In the former case a clear and definite trust should be created, and in the latter, words negating such a construction of the testator's words should be used. Equivocal language in these cases has given rise to much litigation: 2 Jarm. on Wills, App. 686 2d Ed.

The doctrine that a trust recognized by a court of chancery may be created by words denoting a wish, hope, or expectation that a bequest shall be appropriated to the use of a third person or expended for his support, has been upheld in several instances in this country, on the broad ground that the interpretation of a will depends on the intention of the testator, and that when his purpose is plain it should not be allowed to fail because the means which he has employed are not consistent or direct; *Carson v. Carson*, 1 Iredell, Eq. 329; *Little v. Bennett*, 5 Jones, Eq. 156; *Erickson v. Willard*, 1 New Hamp. 217; *Lucas v. Lockhart*, 10 Smedes & Marsh. 466; *Harrison v. Harrison*, 2 Grattan, 1; *Ward v. Peloubet*, 2 Stockton, Ch. 305; *Hunter v. Sternbridge*, 12 Georgia, 192.

The question arose in *Ward v. Peloubet*, 2 Stockton, Ch. 305, out of the following bequest: "Secondly, I give and bequeath unto my beloved wife, Susan Ward, all my property, both real and personal, to be disposed of in such manner as she may think proper for the benefit of the family: it is my wish that my youngest daughters, Mary and Caroline, shall have an education equal to my daughter Phebe; and my two sons, Sydenham and John, to be educated and fully prepared to enter college, or the study of a profession; but, provided either of them should not choose to have such an education, the one who does not, to be made equal in property to the expense of educating the other, in which case, the mother is to be judge, or in case of her decease, my

executors, whom I shall appoint. After the children arrive at age, I leave it discretionary with Susan, my loving wife, what donations to make them out of the property; and in case of her decease, or marriage, to be left with the executors, whom I shall hereafter name; but in every respect, I wish them made as near equal as can be. Lastly, I hereby appoint my loving wife, Susan Ward, my brother, Joseph P. Ward, and my brother-in-law, John Sydenham, executors," etc. And it was held that although the words which authorized the wife to dispose of the property in such manner as she might think proper for the benefit of the family, might, if they stood alone, have given her an absolute power of disposition; yet, as the testator went on to express a wish, which the residue of the clause showed was his will, that the property should be expended in the education of his children and be divided equally among them on the death or marriage of his wife, effect should be given to his intention by interpreting the bequest as a trust, and denying the right of the widow to alienate the property or to bestow it on one of the children to the exclusion of the others.

In *Lucas v. Lockhart*, 10 Smedes & Marshall, 466, the first clause of the will gave all the testator's real and personal property to his wife, during widowhood, and the fourth contained the following provision: "During my wife's widowhood, she is to have the entire use, profits and control of my estate, and to her discretion do I entrust the education and

maintenance of my children, during that time; but in case of her death, or marriage, before the time appointed for division, as aforesaid, then it is my desire, that my children be all supported, and that the girls under sixteen, and the boys under eighteen, be as well educated, out of the annual profits of my estate, as they will allow up to the time of division; the profits to be first applied to their support; and in case of a deficiency, then to educate all the children embraced in the last clause; the balance to be applied in educating the younger in preference to the older children." The court said, that to convert words of wish or recommendation into a trust, they must be sufficiently clear and certain to show not only what the testator meant to bequeath but the persons in whose favor the bequest was to take effect, but held that both these conditions were satisfied by the terms of the will, and that the property having been left for the benefit of the children could not be taken in execution for the mother's debts.

In *Harrison v. Harrison*, 2 Grattan, 1, the provisions of the will were as follows: "In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution among our dear children as she may think proper: my whole estate, real and personal, are left in fee simple to her; only requesting her to make an equal distribution among our heirs; and desiring her to do for some of my faithful servants whatever she may think will most conduce to their welfare, without regard to the in-

terest of my heirs;" and these words were considered to confer a beneficial interest on the widow for life, and a remainder in fee to the children, with a power on her part to accelerate the period at which the remainder would vest in possession by making advancements to them, and to sell all or any part of the estate to pay debts or for the purpose of rendering the property more available for use or distribution. "By one clause of the will," said Baldwin, J., "the testator leaves to his wife all his worldly goods, doubtless meaning all his estate, real and personal; but in the same clause the purpose expressed is, 'to sell or keep for distribution among our dear children.' This was surely a declaration of trust in their favor. And though by the next clause the devise to her is of all his estate, real and personal, in fee simple, yet it is accompanied with a request, 'to make an equal distribution among our heirs.' The only foundation of the widow's claim to absolute and unqualified ownership, is the language of discretion in the first-mentioned clause, and of request in the second. But the words of discretion in the first, 'as she may think proper,' have reference to the executing, and not the defeating of the trust; and the words of request in the second, 'only requesting her to make an equal distribution among our heirs,' serve but to show that her ownership was limited merely for the purposes of the trust, and that the testator desired the distribution required by the trust should be equal. The second clause is an explanatory repetition of the first.

and in no wise does it impair the trust, or enlarge the ownership of the widow to the detriment thereof. The two taken together, show it was the testator's intention that his wife should succeed him to a qualified ownership of his estate; and that their common offspring should be the joint and equal 'heirs' or distributees of both; with a parental discretion in her to accelerate, in the whole, or in part, the periods of enjoyment by the children respectively."

A similar decision was made in *Tolson v. Tolson*, 10 Gill & J. 159. So in *Cole v. Litfield*, 35 Maine, 439, the will directed that the income of the estate should be appropriated to the use of the testator's wife, for her own support and that of his children; "the said children to receive a good English education, and be liberally but economically supported;" and that, if there were surplus, it should be invested and used to make good any deficiency which might subsequently occur; or if not needed for that purpose accumulated and divided equally among the children when of age. These provisions were interpreted as a trust which entitled the wife to receive the whole income, subject nevertheless to the duty of applying it in conformity with the wishes of the testator and under the control and supervision of the Court. And to the same effect are *Carson v. Carson*, 1 Iredell, Eq. 329; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340.

The same view was also taken by the Supreme Court of Pennsylvania, when the question first came before

them for adjudication; "and a devise to a widow, of the use, benefit, and profits of the testator's real estate for life, and his personal estate of every description, absolutely," "having full confidence that she will leave the surplus to be divided justly among my children," held to render it incumbent on her to keep the principal intact for the use of the children;" *Coates' Appeal*, 2 Barr, 129; see *Pennock's Estate*, 8 Harris, 268.

The tendency of the more recent decisions, however, is in the opposite direction, and that a gift or legacy which is so worded as to confer a beneficial interest will not be charged with a trust by language which is not so clear and explicit as to leave no doubt of the testator's purpose, nor unless it is plain that the latter meant to impose a legal obligation and not merely to appeal to the conscience, generosity, or kind feelings of the legatee; *Whipple v. Adams*, 1 Metcalf, 445; *Thompson v. McKisick*, 3 Humphreys, 631; *Ellis v. Ellis*, 15 Alabama, 29; *Van Amee v. Jackson*, 35 Vermont, 173; *Rhett v. Mason*, 18 Grattan, 541; *Negroes Chase v. Plummer*, 17 Maryland, 166; *Van Dwyne v. Van Dwyne*, 1 McCarter, 397; *Alston v. Lea*, 6 Jones, Eq. 27; *Pennock's Estate*, 8 Harris, 268; *Burt v. Herron*, 16 P. F. Smith, 400; *Paisley's Appeal*, 20 Id. 153.

The doctrines on this subject depend so materially upon the varying forms of expression used in each particular case, that it is obviously impossible to lay down any general formulæ. When the language employed amounts to a direct gift, but

little difficulty can arise; *Burt v. Herron*, 16 P. F. Smith, 400; *Whiting v. Whiting*, 4 Gray, 240; *McRee v. Means*, 34 Alabama, 349. But where precatory words are simply used, two things are essential to create a trust—one that the words of recommendation or desire should be sufficiently explicit to repel the inference that the legatee is to have the right of property which arises from the bequest to him; the other that the interest of the *cestui que trusts* shall be indicated or defined with sufficient clearness to enable a chancellor to establish it by a decree; *Robinson v. Allen*, 11 Grattan, 785; *Cook v. Ellington*, 6 Jones Eq. 372. A request that a legatee will provide for a third person out of the fund is entirely consistent with his having the power of disposition which is incident to ownership, and the consequent right to say whether he will give, and how much. Aside from this it is a settled rule of construction, that when the primary object of the testator, as disclosed by the will, is irreconcilable with a secondary purpose appearing in the same instrument, the latter shall be postponed as being presumably one which he deemed less important. The inclination of the American authorities accordingly, is that precatory words are to be taken in their natural sense as expressing the testator's wish, and leaving the legatee free to determine whether it shall be carried into effect; *Burnson v. King*, 2 Hill, Ch. 483, 490; *Skrine v. Walker*, 3 Richardson, Eq. 262; *Ellis v. Ellis*, 15 Alabama, 296; *Thompson v. M'Kisick*,

3 Humphrey, 631; *Crump v. Read*, 6 Grattan, 372; *Pennock's Estate*, 8 Harris, 268; *Burt v. Herron*, 16 P. F. Smith, 400; *Paisley's Appeal*, 20 Id. 153.

In *Ellis v. Ellis*, a bequest of the testator's real and personal estate to his wife, "recommending her at the same time to make some small allowance, at her convenience, to each of my brothers and sisters, say to each one thousand dollars," was held to confer the right of property absolutely on her.

In *Thompson v. M'Kisick*, the testator bequeathed his slaves to his daughter, with the following proviso: "It is my will and desire that she have the benefit of the said negroes, either by keeping them in specie or selling them and having the proceeds of the said sales, and the negroes and their increase, or the proceeds of them, to be hers forever, to be disposed of as she may think proper among her children and grandchildren, by will or otherwise;" and it was held that there was no trust that could be judicially enforced. Chilton said, "These authorities, with many others which might be cited, show the tendency of modern decisions in England, not to extend this doctrine of implied trust from precatory words, but to go back as far as may be consistent with the current of their previous adjudications, to what I humbly conceive to be the true rule of interpretation; that is, to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particu-

lar case. Thus the court will execute the will of the testator, and not by a forced technical construction of his words make a will for him. Applying this rule of interpretation to the case before us, we have no hesitation in pronouncing, that the will of Mr. Ellis does not create a trust in favor of the complainant. He recommends to his wife, to whom the will says he gives his entire estate, to make some small advance, at her convenience, to each of his brothers and sisters, say, to each, one thousand dollars. Now, it does seem to me that an ingenuous mind, in search of truth, being required to ascertain the intention of the testator, giving to the language employed its ordinary sense, would at once conclude that the testator never intended the thousand dollar payments to each of the complainants as an imperative command. If he intended it as a command, why did he not use appropriate language? why not directly bequeath to them the money which he merely recommends his wife to give? If he designed to fix absolutely the amount to be paid, why use the term, 'a small allowance?' If such allowance was not intended discretionary with the wife, why make its payment depend upon 'her convenience?'

So in *Van Amee v. Jackson*, 35 Vermont, 173, a similar decision was made, where a testator devised his entire property to his wife "in the belief that she would make such a distribution of it among and between their children as would be just and equal, after keeping and using such parts thereof as she

might want during her lifetime, according to the respective claims of the children, as she might judge would be just and proper, and in accordance with what she knew to be his wish and desire in respect to the distribution of his property among his children," and the will then continued, "It is my wish that my said wife shall at all such times as she shall deem it advisable, and after using all the property she may wish for her own comfort and support, provide for the distribution of all my property to our children in a manner that shall be just and equal between them, having regard to such as may have received property from my property, and other circumstances which should have an influence in the distribution of the property which I shall have at my decease."

So, too, in *Van Duyne v. Van Duyne*, 1 McCarter, Ch. 397, the devise was to the testator's son and daughter equally, "their heirs and assigns forever, hoping and believing they will do justice hereafter to my grandson to the amount of one-half of the said homestead farm," and it was held that no trust arose in favor of the grandson. "There is, I think," said Green, Ch., "a very obvious distinction which does not seem to be clearly recognized in the books, between the creation of a trust and the regulation of a subsisting trust, or the disposal of the trust fund. It would seem to require much stronger and clearer terms in the one case than in the other. The executor is a trustee of the estate of the testator. The will of the testator is the law of the

trust and the guide of the trustee. If, therefore, the trustee desires or wishes, or confidently expects that his executor will pay one thousand dollars to his son on his attaining the age of twenty-one, it is certainly no forced construction to regard the language as imperative and as designed to be compulsory. It is but a direction by the creator of the trust to the trustee as to the mode in which the trust fund shall be appropriated [see *Ingram v. Fraley*, 29 Georgia, 558]. But where the testator, by his will, disposes of part of his estate to another absolutely untrammelled by any condition, unaffected by any express trust, but accompanied by a hope or a confidence that he will dispose of the whole or a portion of it in a specified way, it seems very remarkable that the mere wish or hope should cancel the gift; should convert the beneficiary into a mere trustee; should not only be the law of the trust and regulate the disposal of the fund, but should create the trust. For this is the extent of some of the authorities. However absolute may be the gift, the mere hope expressed by the testator at once converts the donee into a trustee for the benefit of another, and regulates the disposal of the fund. And this, too, by a legal inference in the very face of the natural and obvious import of the language of the testator; and strange as it may seem, that inference resting on the assumption that it accords with the intention of the testator. For all the cases agree that here, as elsewhere, the manifest intention of the testator is

to be regarded, and unless he intended that the words should be imperative, they are not so. Unless it was intended to create a trust, none is created. * * * A strong disposition has been manifested by the courts to limit rather than extend the doctrine of raising trusts upon words of recommendation, and so far as the authorities will allow, to give the words their natural and ordinary effect, unless it be clear that they are intended to be used in a peremptory sense."

The authorities in Connecticut are to the same effect. In *Gilbert v. Chapin*, 19 Conn. 342, a devise of all the testator's estate, real and personal, to his wife and her heirs forever, recommending her "to give the same to my children at such time, and in such manner, as she shall think best," was held to vest the estate absolutely in her, free from any trust in favor of the children. The same view was taken in *Harper v. Phelps*, 21 Conn. 259, and a bequest of an annuity of two thousand dollars, out of the income of the testator's estate, to his niece, Mrs. Phelps, during her life, "for the support of herself, and of the nephews and nieces whom she now has under her care, and of such other persons as she may from time to time wish and request to be members of her family," held to vest the absolute dominion over the fund in the legatee. "The language of the testator," said Ellsworth, J., in delivering the opinion of the Court, "whatever else may be said of it, imposes no legal obligation on Mrs. Phelps, in the use or distribution of the annuity. He expresses, perhaps,

the motive or cause of the gift ; but he does not put a condition upon it, and place her under a legal responsibility to others. The disposition of the annuity belongs to that class of cases, where it is the intention of the testator to leave the whole subject of disposition, as a pure matter of discretion, to the judgment and pleasure of the party enjoying his special confidence ; and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control and govern it ; or, in the language of Church, C. J., in *Gilbert v. Chapin*, 19 Conn. R. 348, 'no trust will be raised by expressions in a will importing recommendation, hope, confidence, desire, etc., unless there be certainty as to the parties who are to take ; nor if a discretion, whether to act or not, be left with a devisee, or so-called trustee.' It is a principle of equity well established by numerous cases, that to raise a trust, it must be ascertained what proportion each beneficiary is to take ; *Bardwell v. Bardwell*, 9 Sim. 320 ; *Pope v. Pope*, 10 Id. 1 ; *Curtis v. Rippon*, 1 Madd. 434 ; *Knight v. Knight*, 3 Beavan, 148 ; 1 Jarm. on Wills, 338. Now, who will assert, that in this article in Mr. St. John's will, the beneficiaries, or their proportions, except Mrs. Phelps', are definitely ascertained and fixed ; or that any practicable rule for ascertaining either is given ; she may invite into the family whom she pleases, relatives or strangers ; but this election is too indefinite as a rule of property, and as such, must therefore be held void

and inoperative. * * Wherever the objects of the supposed recommendatory trusts are not certain or definite, or wherever the property to which it is to be attached is not certain or definite ; or wherever a clear discretion and choice to act, or not to act, is given ; or wherever the prior dispositions import absolute and uncontrollable ownership, in all such cases, courts of equity will not create a trust from words of this character ; 2 Story, Eq. §§ 1069, 1070 ; 3 Beavan, 148 ; *Gilbert v. Chapin*, 19 Conn. R. 342 ; and cases there cited."

To the same effect is *Rhett v. Mason*, 18 Grattan, 541, and *Paisley's Appeal*, 20 P. F. Smith, 153, where a devise to the testator's widow of "the rents and profits of all my property during her natural life, for her support and the support and education of my children, under the direction of my executors," was held not to render either the widow or executors trustees for the benefit of the children.

The case of *Gilbert v. Chapin*, was cited and followed in *Lewis v. Darden*, 5 Florida, 51, where the question arose out of a bequest of the testator's real and personal estate to his daughter during her life, and after her death to be equally distributed among her children, followed by a declaration that "it was his will and desire that if any child wished to receive his portion of the estate as a loan it should be paid over to him and be subject to his control and disposition, until the estate was settled, when it should be repaid and distributed in the same manner as the residue ;" and

the Court was of the opinion that the primary purpose that the daughter should have a life estate being clear and unequivocal, was not controlled by the expression of a wish that the property should be loaned to her children, which might end in placing the whole of the fund beyond her control, and compelling her to depend for her support on the interest, which might or might not be paid punctually.

In *Pennock's Estate*, 8 Harris 268, the Supreme Court of Pennsylvania arrived at a similar conclusion, overruling the judgments which had been pronounced when the same will was previously before them for adjudication (see *Coates' Appeal*, 2 Barr, 129; *McKonkey's Appeal*, 1 Harris, 253) and held that "words in a will expressive of desire, recommendation, and confidence are not words of technical, but of common parlance, and are not, *primâ facie*, sufficient to convert a devise or bequest into a trust, but such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion."

The doctrine of this case has been frequently recognized in that State, and no effect given to precatory words unless it affirmatively appear that they were intended to be imperative; *Kinter v. Jenks*, 7 Wright, 445; *Presbyterian Church v. Dishon*, 2 P. F. Smith, 219; *Burt v. Heron*, 16 Id., 400.

The line was well drawn in the somewhat recent case of *Warner v.*

Bates, 98 Mass. 274, where a devise of income to the husband of the testatrix for life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children such protection, comfort and support as they or either of them may stand in need of," was considered to subject the income to a trust enforceable by the court. "We see no sufficient ground," said Bigelow, C. J., "for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts in England and in most of the United States, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject-matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of the trust will clearly subserve the intent. It may sometimes be difficult to gather that in-

tent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee; the just and reasonable interpretation is, that a trust is created which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended."

Although a power will not be interpreted as a trust, it may be con-

ferred as a means of carrying a trust into effect, and will then be executed by a court of equity in the event of the refusal or default of the trustee. The law has been so held in a number of instances in England which were cited and followed in *Withers v. Yeadon*, 1 Richardson, Eq. 324; and a devise of all the testator's estate for life, to his son, "upon the trust and confidence that he should and would give, devise and appoint the said estate by deed or will, unto all or any of his children, in such proportions, and for such uses, estates and interests as he should think proper," interpreted as a trust which equity would enforce if the power was not executed by the trustee. - And the same doctrine was recognized in *Hoey v. Kenny*, 25 Barbour, 396; *Lockwood v. Stradler*, 1 Del. Ch. Rep. 298; *Chase v. Plummer*, 17 Maryland, 165, 178; *Collins v. Carlisle*, 7 B. Munroe, 13; *Faulkner v. Davis*, 18 Grattan, 651; *Miller v. Freech*, 8 Barr, 417, 424; *Holt v. Hogan*, 5 Jones, Eq. 82; *Little v. Bennett*, Id. 156; *Oruse v. McKee*, 2 Head, 1; *Rogers v. Rogers*, Id. 660; *Gibbs v. Marsh*, 2 Metcalf, 243; *Greenough v. Welles*, 10 Cushing, 243.

It was held conversely, in *Levitt v. Beirne*, 21 Conn. 1, that although such a discretionary power is valid, the court will not assume the control which has been vested in the trustee, or direct in what way he shall execute the power. "What," said Waite, J., in delivering the opinion of the court, "are the provisions of the will in this case? The testator, after giving

several legacies, directs the balance of his property to be divided equally among his children, subject to the following provisions and conditions. Those relating to his daughter's share are briefly these: all the property given to her is for the exclusive use of her and her children, free from any debts or control of her husband; and to secure the same to their unimpaired enjoyment, he gives the same in trust, to his sons, George P. Beirne, and Oliver Beirne, with full authority to apply the property as to them shall seem best, for their exclusive benefit, during the life of the daughter, and after her death, to divide the same equally among her children. Now, in the opinion of a majority of this court, the trustees, by the terms of the will, are clothed not only with the legal title to the property, but the power to apply it, as to them shall seem best; or, in other words, according to their discretion. They must, indeed, apply it for the benefit of the daughter and her children; and were they to appropriate it to any other use, a court of chancery might then interfere, because they would then transcend their authority. But so long as they continue to use the funds for the benefit of their sister and her children, it is for them to apply them according to their judgment.

"Suppose she should be of opinion, that a particular mode of investment would be best for her and her family, and the trustees should be of an entirely different opinion,

and therefore refuse a compliance with her request, whose judgment is to govern? hers or theirs? This question is to be determined, not by inquiring whose judgment is the best, but which has the power of deciding. It seems to us, that the language of the will leaves no possible doubt upon the subject. They have full authority to apply the property as to them shall seem best, and not as may seem best to her. Suppose the trustees had carefully examined the facts in relation to the purchase of the furniture, and had come to the conclusion, perfectly satisfactory to their minds, that such purchase was not best for their sister and her children, and therefore should refuse their approbation of the purchase, can a court of equity review their decision, and reverse it, if they find it to be wrong? We think the court has no such power."

These decisions show that a trust may be so worded as to empower the trustee to determine when, how, and in what proportions the fund shall be appropriated to the use of the *cestui que* trusts, and that, although a court of equity will not control the exercise of his discretion (*Portsmouth v. Shackford*, 46 New Hamp. 423; *Eldredge v. Heard*, 106 Mass. 579), it will not suffer him to defeat the testator's purpose by a refusal to execute the power. In other words, the non-execution of a power is not aided by a chancellor; see Vol. 1, p. 379; but a trust will not be allowed to fail through the supineness of the trustee.

*REES v. BERRINGTON.

[*974]

APRIL 28, 1795.

REPORTED 3 VES. JUN. 540.

RELEASE OF SURETY BY THE CREDITOR GIVING TIME TO DEBTOR.]
—*Obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives further time; the surety is discharged.*

THOMAS, Daniel, and Richard Blachford carried on business as lacemen, in partnership, till the death of Thomas.

On taking the accounts, a balance of 2972*l.* 3*s.* 5*d.* appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas; to secure which sum, and 466*l.* 13*s.* 4*d.* (agreed to be secured to Robert Pope Blachford, as Thomas' share of the debts due to the partnership), a joint and several bond, dated September 30th, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest, by installments, upon the 31st of December, 1789, and the 31st of December, 1790.

In the beginning of September, 1790, Robert Pope Blachford died.

Upon the 27th of September, 1790, the whole of the money and interest secured by the bond remaining unpaid, James M'Kenzie, under the authority and on behalf of the executors of Robert Pope Blachford, came to an arrangement with Daniel and Richard Blachford, concerning the money due on the bond and the interest, and, for the first installment due on the bond, took their promissory notes, payable on the 21st of April, 21st of July, *and 21st of October, 1791, and the 21st of January and 21st of April, 1792; and, for the second installment to become due upon the bond, took three other promissory notes, payable on the 21st of July and 21st of October, 1792, and the 21st of January, 1793. [*975]

Daniel and Richard Blachford, at different times on and before the 18th of October, 1792, paid to the executors of Robert Pope Blachford, or to M'Kenzie, on their behalf, the first three of the first set of notes, and the interest due upon them; and about the 20th of October, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22d, 1792, and payable on the 25th of May, 25th of June, 25th of September, and 25th of December, 1793.

About the 7th of December, 1792, a commission of bankruptcy issued against Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved, under that commission, a debt of 2327*l.* 14*s.* 11*d.*, by virtue of the bond and the four notes dated October 22d, 1792.

Rees was captain of an East India ship, and left England in April, 1788; returned in August, 1789; sailed again in April, 1791, and returned in July, 1792. In August, 1792, he had in his hands the sum of 3000*l.*, received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford, respecting their transactions with Daniel and Richard, he, in November, 1792, paid over that sum to the Blachfords.

After the bankruptcy the executors brought an action against Rees for 2400*l.*, as remaining due on the bond; upon which he filed a bill for an injunction.

Solicitor-General and Mr. Hollist, for the plaintiff.—*Ship v. Huey*, 3 Atk. 91; *Nisbet v. Smith*, 2 Bro. C. C. 579, and many early cases, support this bill. This plaintiff could have indemnified himself by the money he had in his hands in 1792. A surety [*976] is bound as such for the *debt and risk described in the instrument, in case the principal does not pay. The creditor has no right to increase the risk without consent of the surety, and therefore cannot vary the original contract, for that varies the risk. If the holder of a bill of exchange gives time to the acceptor, the indorser is discharged, because he is simply a surety. The principle is the same upon policies of insurance, in cases of deviation, however slight: *Wescot upon Insurance*, 178.

LORD CHANCELLOR LOUGHBOROUGH.¹—It is perfectly settled: and even where it is demonstrable that the alteration was perfectly immaterial, as in the case of an African ship that was to sail from Lancaster with so many men; in fact, she took part of her men at Beaumaris.

Mr. Graham, for the defendants.—It is not received as a general principle, that the obligee in a bond is bound to call for the money on the very day; it seldom happens that the obligor thinks of paying at the day, or that the obligee puts the bond directly in suit. The rule, as to the indorser of a bill of exchange, arises from the course of trade, which requires it. A surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. The circumstance of his remedy in this Court marks the difference between the cases. Still more different is the case of insurance from the general course of trade, that, undertaking to indemnify against any loss in one particular voyage, must be strictly adhered to. Here is nothing like a fraudulent intention to throw the burthen on the plaintiff. It is too much to say he is to be discharged, because they did suspend the action a short time; and it is too much to assume, either that the indulgence was with his concurrence, or that he was guilty of negligence, as he was in England a considerable part of the time, and might have called on them to put

¹Afterward Earl of Rosslyn.

the bond in suit; and then he would have discovered that they had bound themselves not to do so. In *Nisbet v. Smith*,¹ no ulterior time was given against the express directions of the surety; upon which Lord Thurlow relied. **Heath v. Percival*, 1 P. Wms. 682, is a stronger case. There Percival might [*977] be considered only as surety in a bond, and the time of payment was varied.

LORD CHANCELLOR LOUGHBOROUGH.—Percival never could be a surety, whether that case was right or wrong. He should have taken up his bond if he went out of the trade.

The form of the security forces these cases into equity; but take it out of that form, and suppose, in this instance, that the plaintiff was a surety by a proper bond at law as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety; but if he could establish that at law, the principle at law is, that he has an interest in the condition; and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals, but establish the fact that he is surety; he is surety to a definite, not an indefinite engagement.

Here, upon the second installment, the defendants have extended the time before that installment became due; if the time is extended after it becomes due, that makes a difference at law, for then the bond has been once forfeited.

It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two periods; one has elapsed. The obligee thinks fit totally to change the nature of the security and the credit; he takes notes, gives a further time of payment, and repeats the same thing at the second installment, which was not then due; and, doing this, he does this material injury to the surety: he has a right, the day after the bond is due, to come here and insist upon its *being put in suit; the obligee has suspended that till [*978] the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation in conscience and honesty; and, it is not too much to say, of that obligation in point of law.

I cannot try the cause by inquiring what mischief it might

¹ 2 Bro. C. C. 579.

have done; for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it, for the case would be the same if those circumstances had not come out clearly in evidence.

This produces no inconvenience to any one; for it only amounts to this, that *there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.*

The authorities fully warrant me in this, though I should have granted the injunction even without that strong authority before Lord Thurlow,¹ which is rather less favorable for the surety. There, the creditor being called upon, did put the bond in suit.

[*979] If he had *proceeded, the consequence would have been only that he would have had the person in custody; it would have been no payment, thinking, that, by leaving the debtor at large, and taking a judgment against him which affected all his property, he pursued a better mode; using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison; but he did it without consulting the surety, and, therefore, Lord Thurlow held, and very rightly, that the surety was discharged.

The transaction in this case was much more mischievous; after circumstances of communication that showed great embarrassment, great difficulty, and great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who, in the interval, had given up the fund, which, probably, was the inducement to him to be the security.

Without entering into a review of those cases in which a surety may be discharged from his liability by the appropriation of payments made by the principal to the creditor, or by the creditor, or which would be made by the law, it is proposed in this note to consider the subject discussed in

¹ *Nisbet v. Smith*, 2 Bro. C. C. 579.

the principal case, viz., what acts, on the part of the creditor, will have the effect of discharging a person from his liability as surety.

In examining the cases upon this subject, it must be kept in mind that the intimate nature of the relation between the parties to the contract of suretyship requires that perfect good faith should be adhered to by them. Wherever, therefore, with the knowledge or assent of the creditor, there is any misrepresentation to, or even concealment from the surety, with regard to any material fact, which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities. Suppose, for instance, with the assent or knowledge of the creditor, there is a misrepresentation to a person who becomes surety on a promissory note, for say the *sum of £2600, that £800 due by the debtor on a former account had been paid, whereas it was deducted from the £2600, so [*980] that the debtor only got £1800, the surety will be released from his liability on the promissory note. *Stone v. Compton*, 5 Bing. (N. C.) 142; 6 Scott, 846. Again, suppose that a servant had committed defalcations in his master's service, and had agreed to repay them at the rate of £3 a month, and that the master had concealed this fact from a person who afterward gave him a continuing guarantee for the honesty of the servant, this would amount to a fraud on the surety, which would relieve him from all liability on the contract: *Phillips v. Fozall*, 20 W. R. (Q. B.) 900, 901. So where it was agreed between the vendors and vendee of goods that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed by a third person as surety, but the bargain between the parties was not communicated to him, it was held that the transaction was a fraud on the surety, and that the guarantee was consequently void: *Pidcock v. Bishop*, 3 B. & C. 605. So a concealment by the creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount of which the surety was ignorant, has been held to be evidence to go to the jury of such fraud on the surety as would discharge him from liability: *Lee v. Jones*, 14 C. B. N. S. 386; 17 C. B. N. S. 507; 13 W. R. (C. P.) 318; 34 L. J. (C. P.) 131. See also *Allan v. Houlden*, 6 Beav. 148; *Cecil v. Plaistow*, 1 Anst. 202; *Middleton v. Lord Onslow*, 1 P. Wms. 768; *Pidcock v. Bishop*, 3 B. & C. 605; S. C., 5 Dow. & Ry. 505; *Peel v. Tatlock*, 1 Bos. & P. 419; *Jackson v. Duchaire*, 3 T. R. 551; *Smith v. Bank of Scotland*, 1 Dow, 272; *Fishmongers' Company v. Malby*, 1 Dow, 294, cited; *Espey v. Lake*, 10 Hare, 280; *Willis v. Willis*, 17 Sim. 218; *Squire v. Whitton*, 1 H. L. Cas. 333; *Owen v. Homan*, 3 Mac. & G. 378; 4 H. L. Cas. 997. See and consider *Walker v. Hardman*, 4 C. & F. 258; *Railton v. Matthews*, 10 C. & F. 934; *Hamilton v. Watson*, 12 C. & F. 109; *North British Insurance Company v. Lloyd*, 10 Exch. 523; *Pledge v. Buss*, Johns. 663; *Cooper v. Joel*, 1 De G. F. & Jo. 240.

It depends on the nature of the transaction in each case, whether the fact disclosed is such that it is impliedly represented not to exist: *Lee v. Jones*, 13 W. R. (C. P.) 318; 34 L. J. (C. P.) 131; *Phillips v. Fozall*, 20 W. R. (Q. B.) 901.

The creditor, however, is not, it seems, bound, without any inquiry on [*981] the part of the surety, to acquaint him with every circumstance* affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case: *Wythes v. Labouchere*, 3 De G. & Jo. 593; and see *Hamilton v. Watson*, 12 C. & F. 118; *North British Insurance Co. v. Lloyd*, 10 Exch. 523; *Lee v. Jones*, 14 C. B. N. S. 322, 386; 13 W. R. (Exch. C.) 318; 17 C. B. N. S. 482.

But if, in the contract, between the principal debtor and the creditor, there is a departure from that which the surety stipulated for and contemplated when he entered into the obligation, the surety will be released. Thus, in *Bonser v. Cox*, 4 Beav. 379, John Cox agreed to become a surety for Richard Cox, in a joint and several bond to the firm of Cox & Morrell, upon having a counter-bond from the firm of Cox & Davies, to indemnify him. The bond to Cox & Morrell, however, was executed by John Cox only, Cox & Morrell having neglected to obtain the signature of Richard Cox. The counter-bond, however, was given by Cox & Davies to John Cox. It was held by Lord Langdale, M. R., that John Cox the surety was released, in consequence of Richard Cox not having executed the bond. "I think it cannot," said his Lordship, "upon any principles on which this court acts, be doubted that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to inquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, 'I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be your surety upon any other terms.' The surety in this case has a right to say, 'The arrangement was, that Mr. Richard Cox, as well as myself, should be held bound by bond to the creditor. That arrangement never was carried into effect.' The circumstance of Mr. Richard Cox being held by bond to the surety, does not appear to be material in this case." This decision, on appeal, was affirmed by Lord Cottenham. See 4 Beav. 383, and *Rice v. Gordon*, 11 Beav. 265; 14 Beav. 508; *The General Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550;

Watts v. Shuttleworth, *5 H. & N. 235; 7 H. & N. 353; *Blest v. Brown*, 3 Giff. 450; 8 Jur. N. S. 187; 10 W. R. L. C. 569; *Montefiore v. Lloyd*, 12 W. R. C. P. 83. Sed vide *Cumberlege v. Lawson*, 1 C. B. N. S. 709. [*982]

Upon the same principle, where the creditor had prepared a deed, so as to show on the face of it that it was intended to contain a joint and several covenant by two co-sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other surety; and had not informed the surety who had executed it of this fact; but, on the contrary, had afterward written to him as "one of the sureties," the principal debtor having become insolvent, it was held by Sir W. Page Wood, V. C., that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant; *Evans v. Bremridge*, 2 K. & J. 174, affirmed on appeal; 8 De G. Mac. & G. 101.

So, where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once, instead of giving the draft, it was held by Lord Langdale, M. R., that the agreement had been varied; and the surety was therefore discharged. His Lordship, referring to *Bacon v. Chesney*, 1 Stark. 192, observed, "that a man may have reason to believe that a person in pecuniary difficulty may effectually redeem his affairs if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particular debt at the end of that time, and yet would not become surety unless such time were fully assured to the principal debtor. These are circumstances which a person advancing money on the security, and claiming the benefit of the suretyship, has not any right to alter. It is not enough that he voluntarily forbears to demand payment during the time for which the surety had stipulated; the surety did not intend to rely on his forbearance; but rested on an agreement or condition, that the principal debtor should have the time assured to him, and should thereby have an assured and not a precarious freedom during that time. His conduct for his own protection might be materially affected by the difference. And if that stipulated time be not given, and no arrangement of the surety to waive it is shown, the situation of the surety is improperly altered, and he is released: *Bonser v. Cox*, 6 Beav. 110. This case, on appeal, was affirmed by Lord Cottenham; see 6 Beav. 118. And see *S. C.*, 4 Beav. 383.

Where, however, a surety who has executed a bond in the belief, *derived from the form of the bond, that it would be executed by the principal debtor also, he will not be released from his obligation on the ground that the principal debtor has never executed it, if the principal debtor has executed an instrument on which the surety may sue him and become a specialty creditor of his. See *Cooper v. Evans*, 4 L. R. Eq. 45: there the defendants, Messrs. Evans, were coal owners, and in

March, 1864, one J. C. Partington became their agent for the sale of coal, and entered into an agreement under seal with them for the faithful discharge of his duties. On the 15th of March, 1864, the agent of the defendants called upon Cooper to execute a bond of 1000*l.* as co-surety with C. H. Partington for the due fulfillment of the agreement by J. C. Partington. Cooper executed the bond, which was in the form of a joint and several bond by J. C. Partington and two sureties, upon the belief (derived from the form of the bond which was prepared by the defendants) that J. C. Partington would also execute it. He did not do so, but Cooper's co-surety did. J. C. Partington having committed a breach of his agreement, the Messrs. Evans having obtained a verdict in an action against Cooper, he thereupon filed a bill to restrain execution on the judgment. It was held, however, by Lord Romilly, M. R., that he was not entitled to any relief in equity. "The plaintiff," said his Lordship, "relies on *B nser v. Cox* (4 Beav. 379; 8 Jur. 387), and *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 100; but I think both these cases are distinguishable. In both there were to be sureties; it was agreed that both the sureties should execute the security, and one of them did not. Thereupon the other said, 'I intended to rely on my ability to sue my co-surety for one-half of the debt, but instead of that I have been made liable for the whole;' and it was held, both by Lord Langdale and Sir W. Page Wood, that this discharged the surety. But that is not the case here, for both the sureties have executed; but one of them says, that, in addition, it was intended that J. C. Partington should execute the bond, whereas he has not executed it, and it is alleged that the plaintiff is thus prevented from becoming a specialty creditor of J. C. Partington. But J. C. Partington has entered into an agreement under seal with the Messrs. Evans, and, upon properly indemnifying them, the plaintiff will be able, in their names, to sue J. C. Partington upon this agreement, and to become a specialty creditor of his just as much as if he had executed this bond. But besides this, it is laid down in a long series of cases, that the doctrines relating to principal and surety are the same at law as in equity. That *was so laid down by the Vice-Chancellor in [*984] *Mackintosh v. Wyatt* (3 Hare, 562), and there is a clear distinction between the cases which were cited to me on behalf of the plaintiff and the present. Here the very case which the plaintiff now sets up in equity has been raised at law, and it has been held that the plaintiff is properly liable."

Not only at the time of entering into the contract, but in all subsequent transactions, the creditor is bound to act with perfect good faith toward the surety, and a departure from it will have the effect of releasing him. Upon this principle, although mere delay in not suing the debtor, when the debt becomes due, will not discharge the surety (*Wright v. Simpson*, 6 Ves. 734; *Heath v. Hay*, 1 Y. & J. 434), if the creditor, as in the principal case, enters into any binding contract, the effect of which will be to give

further time to the debtor, without consulting the surety, the surety will be thereupon discharged, and it is immaterial that the further time is given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety. This is clearly laid down by Lord Loughborough in the principal case, and by Lord Eldon, in the important case of *Samuell v. Howarth*, 3 Mer. 272. There A. guaranteed the payment of any goods to be supplied by B. to C. between the 2d of April, 1814, and the 2d of April, 1815. C. having accepted bills for the amount of the goods delivered, B. permitted him to renew them when payable, without any communication to A. on the subject of such renewal. It was held by Lord Eldon, that, although no period of credit was specified, it could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and that A. was discharged from his guarantee by virtue of the rule, that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety. "The rule," observed Lord Eldon, is this, "that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract* between the creditor and the principal—not where the creditor is merely inactive. And in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy, against the principal, or not, and because he, in fact, cannot have the *same* remedy against the principal as he would have had under the original contract. . . . It has been truly stated, that the renewal of these bills might have been for the benefit of the surety; but the *law has said, that the surety shall be the judge of that, and that he alone has the right to determine [*985] whether it is or is not for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." See also *Skip v. Huey*, 9 Mod. 438; 3 Atk. 91; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Clarke v. Henty*, 3 Y. & C. Exch. Ca. 187; *Oakley v. Pasheller*, 10 Bligh, N. S. 548; 4 C. & F. 207; *English v. Darley*, 2 Bos. & P. 61; *S. C.*, 3 Esp. 44; *Eyre v. Bartrop*, 3 Madd. 221; *Cross v. Sprigg*, 6 Hare, 233; 2 Hall & T. 233; 2 Mac. & G. 113; and see *Hawkshaw v. Parkins*, 2 Swanst. 539; *Richard Burke's Case*, cited 2 Bos. & P. 62; *Davies v. Stainbank*, 6 De G. Mac & G. 679; *Pooley v. Harradine*, 7 Ell. & B. 431; *Bailey v. Edwards*, 4 B. & Sm. 761; *Greenhough v. M'Clelland*, 2 Ell. & Ell. 424, 429; *Oakley v. Pasheller*, 4 C. & F. 207; 10 Bligh, 548; *Oriental Financial Corporation v. Overend, Gurney & Co.*, 7 L. L. Ch. App. 142.

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract, and although after notice of the retirement the retiring part-

ner is in a sense a surety, he will not be discharged from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract. Thus, in *Oakford v. The European and American Steam Shipping Company (Limited)*, 1 Hem. & Mill. 182, continuing partners under a contract, which among other things gave the firm the power of appointing an arbitrator in case of dispute, entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract. It was held by Sir W. Page Wood, V. C., that this was not such a variation of the original contract as to discharge the retired partner.

With regard to the question, how far the custom of trade will justify further indulgence, when the guarantee is not expressly limited in point of time, see *Combe v. Wolfe*, 8 Bing. 156; *Holl v. Hadley*, 5 Bing. 54; *Allan v. Kenning*, 9 Bing. 618; *Howell v. Jones*, 1 Cr., M., & R. 97. And see *Simpson v. Manley*, 2 C. & J. 12; *Holland v. Teed*, 7 Hare, 50.

Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, that will in effect be giving time to the debtor, and will discharge the surety, since a Court of equity would restrain proceedings on the *bond until the expiration of time for which the [*986] creditor had received interest on the bond: *White v. Blake*, 1 Y. & C. Exch. Ca. 420.

An agreement with the debtor to give him further time, in order to discharge a surety, must be one that is binding upon the creditor. A mere voluntary promise to give further time, not acted upon, and which cannot be enforced, as it makes no alteration in the rights or position of the parties, will not have that effect (*Philpot v. Briant*, 4 Bing. 717; *S. C.*, 1 M. & P. 754; *Brickwood v. Anniss*, 5 Taunt. 614; *S. C.*, 1 Marsh, 250; *Tucker v. Laing*, 2 K. & J. 745; and see *Clarke v. Wilson*, 3 M. & W. 208; *Heath v. Key*, 1 Y. & J. 434; and the remarks of Lord Lyndhurst in *Blake v. White*, 1 Y. & C. Exch. Ca. 420; *Moss v. Hall*, 5 Exch. 46; *Strong v. Foster*, 17 C. B. 201; *Bell v. Banks*, 3 M. & G. 258; 3 Scott, N. R., 497); and although the creditor enter into a *binding* contract to give further time to the debtor, yet if it be with a stranger, and not with the debtor, the surety will not be thereby discharged: *Frazer v. Jordan*, 8 ELL. & BL. 303.

Nor will an agreement to give time have that effect if it is conditional upon the performance of an act which the debtor neglects to perform: *Badnal v. Samuel*, 3 Price, 521; *Vernon v. Turley*, 1 M. & W. 316; *Price v. Edmunds*, 10 B. & C. 578.

The reason why giving further time to a debtor releases the surety is this, that the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have

the same remedy against the principal as he would have had under the original contract: *Samuell v. Howarth*, 3 Mer. 278, per Lord Eldon, C.; and see *The Bank of Ireland v. Beresford*, 6 Dow, 238; *Bailey v. Edwards*, 4 B. & S. 771.

And upon the principle, that the creditor, having taken out execution against the debtor, is a trustee of it for all parties interested, if, without the knowledge of the sureties, he withdraws the execution, he thereby discharges the sureties: *Mayhew v. Crickett*, 2 Swanst. 185, 190. And see *Smith v. Knox*, 3 Esp. 47; *Williams v. Price*, 1 S. & S. 581; *English v. Darley*, 2 Bos. & P. 61; 3 Esp. 49. So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce upon a notice by the surety, it was held that the surety was thereby discharged: *Watson v. Allcock*, 1 Sm. & Giff. 319; 4 De G., Mac., & G. 242.

It seems that a surety will not be discharged by giving time if *the remedies of the surety are not diminished or affected, and especially if they are accelerated. Thus, *Hulme v. Coles*, 2 Sim. [*987] 12, where a creditor took from the debtor a cognovit in an action he had brought against him, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course, Sir A. Hart, V. C., held, that the surety was not thereby discharged, observing that the principle of discharging a surety by the giving of time by the creditor was a refluxment of a Court of equity, and he would not refine upon it; that, by the arrangement complained of, this was not given, but the remedy was accelerated. And see *Prendergast v. Devey*, 6 Madd. 124; *Stevenson v. Roche*, 9 B. & C. 707; *Price v. Edmunds*, 10 B. & C. 578; *Whitfield v. Hodges*, 1 M. & W. 679; *Jay v. Warren*, 1 C. & P. 532.

Upon the same principle, the acceptance of money from the debtor by the creditor, who thought at the time he accepted the same it was a good and valid payment, will not, upon its turning out afterward to be invalid, discharge the surety. See *Petty v. Cooke*, 6 L. R. (Q. B.) 790: there the payee of a promissory note, made by principal and surety, accepted the amount thereof from the principal, in good faith, and without notice that the payment was a fraudulent preference. The principal, afterward, entered into a composition deed for the benefit of his creditors. The trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to the trustees. In an action by the payee against the surety, it was held by the Court of Queen's Bench that the payment did not operate as a satisfaction of the debt; and that the acceptance of the money from the principal by the payee was not an act done against the faith of the contract with the surety so as to discharge the surety. "I think it impossible," said Blackburn, J., "to read the principle laid down by Lord Eldon in *Samuell v. Howarth* (3 Mer. 272, ante,

p. *986) without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear, that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by Courts of Equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor, the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted the money which [*988] he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety; he therefore did no act injurious to the surety, and the surety is not discharged. I think *Pritchard v. Hitchcock* (6 M. & G. 151) is precisely in point." See, also, *Newington v. Levy*, 5 L. R. C. P. 607, 612.

The surety will not be discharged if time be given to principal debtor by his consent or subsequent approval: *Tyson v. Cox*, T. & R. 395; *Mayhew v. Crickett*, 2 Swanst. 185; *Clark v. Devlin*, 3 Bos. & P. 363; *Cowper v. Smith*, 4 M. & W. 519; *Duffy v. Orr*, 5 Bligh, N. S. 620; *The Union Bank of Manchester (Limited) v. Beech*, 13 W. R. (Ex.) 922.

It seems, however, where the creditor has obtained a decree against the surety, that no subsequent dealings giving time to the debtor will have the effect of releasing the surety. See *Jenkins v. Robertson*, 2 Drew. 351. In that case there was a direction by a decree in a suit to administer the estate of the surety, for payment of a bond debt to the creditor. After the decree the creditor brought an action against the principal debtor, and took a judgment, for payment by installments without the assent of, or communication with, the representatives of the surety. It was held by Sir R. T. Kindersley, V. C., that the estate of the surety was not thereby discharged. "I do not," said his Honor, "in any degree doubt that, as a general rule, the creditor, by giving time to the principal debtor, discharges the surety; but that is not this case. This is a case in which there is a creditor who has, by the decree in the suit, established his right against the surety. If he had brought an action against the principal debtor before the decree, and taken, as has been done here, a judgment by arrangement, giving time, no doubt the surety would be discharged. But the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is no longer as surety, but under the decree."

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserve his right to proceed against the surety; because, as Lord Eldon has observed, "the principal cannot raise the objection upon his right to time as against the surety, as there is the contract

of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal : " 18 Ves. 26. And see *Ex parte Glendinning*, *Buck, 517; *Smith v. Winter*, 4 M. & W. 545; *Ex parte Carstairs*, Buck, 560; *Ex parte Gifford*, 6 [*989] Ves. 805; *Duffy v. Orr*, 5 Bligh, N. S. 620; *Owen v. Hoſman*, 4 H. L. Cas. 997, 1038; and the question whether or not the surety has been informed of the arrangement is immaterial: *Webb v. Hewitt*, 3 K. & J. 438; *Boaler v. Mayor*, 13 W. (C. P.) 775.

A necessary consequence of a reservation of a creditor's remedies against a surety is a continuance of the surety's right to be indemnified by the principal debtor, and this right will not be abandoned, unless a contract to abandon it be proved: *Close v. Close*, 4 De G. Mac. & G. 176.

Parol evidence is, it seems, admissible to prove a reservation of the creditor's rights against the surety. See *Wyke v. Rogers*, 1 De G. Mac. & G. 408; there the plaintiff entered into a bond as a surety for S. Evans. Subsequently the defendant Rogers, the creditor, took from S. Evans a promissory note for the amount due, payable in two months, but was unable to recover anything on a judgment obtained against S. Evans, in consequence of his insolvency. Rogers having commenced an action against the plaintiff on the bond, he thereupon filed a bill to restrain proceedings in the action on the ground that he was discharged from liability by the giving of the promissory note. The defendant, by his answer, stated that at the time the promissory note was given, it was distinctly understood and agreed that it was not to be considered as payment of the balance due on the bond, and as substituted for the bond, but that the bond was to be considered as a security. On the hearing, an inquiry was directed in respect of the circumstances under which the promissory note had been given. The Master reported that, though there was not any written or distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond. It was held by Lord St. Leonards, C., affirming the decision of Sir J. L. K. Bruce, V. C., that there was no ground for the interference of a Court of Equity. "All the cases," said his Lordship, "prove that where an instrument is taken, which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the surety are preserved. In the present case an action was brought on the bond, to which the defendant (the plaintiff here) had no defence; he therefore comes into equity for relief. This Court, however, cannot interfere against a legal obligation, unless an equitable case is made out; and it must therefore be shown that the transaction in question released the plaintiff from the obligation. No such case has been attempted to be made out, and I give no *opinion upon it, because it is perfectly clear in law that an agreement that a trans- [*990] action which would of itself operate to release the surety shall not have

that effect, may be proved by parol evidence. It was said at one time, in the course of the argument, that parol evidence could not be admitted to impeach the promissory note. This, however, was not the purpose for which the evidence was sought to be introduced; it was only to prevent the collateral operation of that note by showing that it *was not intended* to prevent proceeding on the bond, and thus release the surety. . . . The finding of the Master is plain; it is in effect that there was a general dealing and a general understanding (which in point of law amounts to a stipulation) that prevented the promissory note in equity from having the effect of discharging the surety. What, then, a judge of this Court has to decide is, whether or not there was in truth such an agreement as the defendant contends for: the evidence shows that there was; and the Master's report appears to me to be right."

But if time be given by deed, the reservation of the right to go against the surety should appear there also, as parol evidence is not admissible to prove it, since the effect of it would be to vary a written instrument: *Ex parte Glendinning*, Buck 517; and, moreover, the reservation must be made in clear and unambiguous terms: *Boulbee v. Stubbs*, 18 Ves. 20. But see *Ex parte Harvey In re Blakely*, 1 De G. Mac. & G. (Bank.) 359, 377, 378; *Atkins v. Revell*, 1 De G. & Jo. 360.

The principle upon which the surety is discharged by the creditor giving time to the debtor is also applicable where the creditor enters into any new arrangement with the debtor, without the concurrence of the surety, which will have the effect of altering the situation of the surety. Thus, in *Eyre v. Bartrop*, 3 Madd. 221, the plaintiff joined with his brother in the grant of a redeemable annuity, *as a surety* for the payment of the same quarterly. The annuity was secured by the demise of real property of the plaintiff's brother, and by a bond and judgment of the plaintiff and his brother. The brother afterward, by deeds, to which the plaintiff was not a party, and without his concurrence, entered into a new arrangement with the assignee of the annuity, whereby it was agreed that he should not sue for the annuity for five years from the date of the deed, or until the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. Sir J. Leach held that the surety was wholly discharged, and was not entitled merely to be exonerated from liability to the arrears of the annuity during the five years, and refused a motion to *dissolve an injunction [*991] restraining the assignee of the annuity from proceeding to execution upon the judgment. His Honor observed, that it could not be denied, that if, by any arrangement between the creditor and the debtor, the situation of the surety was altered, he was thereby discharged; but it was said, that the situation of the surety was only partially altered during the five years, and that, in respect of the subsequent payments, it remained the same. He was, however, of the opinion, that the deeds executed without the concurrence of the plaintiff, and the change in the

terms of the redemption, had either directly, or by their own consequences, wholly altered the situation of the surety, and that he was thereby wholly discharged.

In *Calvert v. The London Dock Company*, 2 Kee, 638, Streather, a contractor, undertook to perform certain works for a Company; and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held by Lord Langdale, M. R., that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three-fourths of the work done having, without the consent of the surety, been made by the Company to the contractor before the completion of the whole work. "The effect," said his Lordship, "of the stipulation was at the same time to urge Streather to perform the work, and to leave in the hands of the Company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties. What the Company did was, perhaps, calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the Company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered, that the sureties must be considered to be discharged from their suretyship." *Ex parte Rushforth*, 10 Ves. 409; *Paley v. Field*, 2 Ves. 435; see also *Archer v. Hudson*, 7 Beav. 551; *Campbell v. French*, 6 T. R. 200, overruling *French v. Campbell*, 2 H. Black. 163; *Archer v. Hall*, 4 Bing. 464; *Evans v. Whyte*, 5 Bing. 485; *S. C.*, Moo. & M. 468; *Whitcher v. Hall*, 5 B. & C. 269; *S. C.*, 8 D. & R. 22; *Bacon v. Chesney*, 1 Stark. 192; *Wright v. Sandars*, 3 Jur. N. S. 504; *Small v. Currie*, 2 Drew. 102; 5 De G. Mac. & G. 141.

*It has, moreover, been laid down in a recent case, by Lord Hatherley, L. C., that the holder of a security who agrees with [992] the principal debtor to give time to the surety, by so doing discharges the surety. See *Oriental Financial Corporation v. Overend, Gurney & Co.*, 7 L. R. Ch. App. 142; 41 L. J. (L. C.) 332. "If," said his Lordship, "the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an agreement not to sue the surety. The position of the surety is changed, because it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal."

So, likewise, where there is a bond of suretyship for the fidelity of an officer, and by the act of the parties, or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond will be avoided: *Bonar v. Macdonald*, 3 H. L. Cas 226; *Pybus v. Gibb*, 6 Ell. & B. 902; and see *North Western Railway Company v. Whinray*, 10 Exch. 77; *Kitson v. Julian*, 4 Ell. & Bl. 854; *Bartlett v. The Attorney-General*, Parker, 277. And see *Lord Arlington v. Merricke*, 2 Saund. 403; *Bank of Scotland v. Christie*, 8 C. & F. 214; *The Guardians of the Portsea Island Union v. Whillier*, 6 Jur. N. S. 887; *The Guardians of the Malling Union v. Graham*, 5 L. R. C. P. 201. Secus, where neither the office nor its duties are substantially altered, although they may have been increased (*Skillet v. Fletcher*, 1 L. R. C. P. 217; 2 L. R. C. P. 469); and a mere alteration in the salary or mode of remuneration will not discharge the sureties: *Frank v. Edwards*, 8 Ex. 214; 22 L. J. (Ex.) 42.

The bond, however, by which the sureties are bound may be drawn in language sufficiently extensive to continue their liability, notwithstanding there may be a material alteration of the duties of the person for whom they have become sureties. See *Oswald v. Mayor of Berwick-upon-Tweed*, 5 H. L. Cas. 856; 3 Ell. & Bl. 653; 1 Ell. & B. 295; *Mayor of Dartmouth v. Silly*, 7 Ell. & Bl. 97; and see *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G. Mac. & G. 497.

Where, however, the creditor, dealing with the principal debtor, has the concurrence of the surety, the latter cannot claim to be discharged upon the ground that his position is altered by such dealing: * *Woodcock v. Oxford and Worcester Railway Company*, 1 Drew. 521, 530. [*993]

A guarantee for a possible pecuniary liability, such as for discounting bills, whether continuous or given for a particular period, although not revoked by the death of the surety (*Bradbury v. Morgan*, 1 H. & C. 249), is revocable by him at any time before a liability has been incurred by the person whom he agreed to guarantee: *Offord v. Davies*, 12 C. B. (N. S.) 748.

A person, however, who by a continuous guarantee becomes surety for the honesty of a servant cannot ordinarily, during the continuance of the service, discharge himself, either at law or in equity, by merely giving notice that he will no longer be liable: *Calvert v. Gordon*, 3 M. & R. 124; *Gordon v. Calvert*, 4 Russ. 581; *Hassall v. Long*, 2 M. & S. 363, 370.

Where, however, such a guarantee is given, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if, instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the

servant during the subsequent service. See *Phillips v. Foxall*, 20 W. R. (Q. B.) 900; there the defendant, by a guarantee, undertook to be responsible up to 50*l.* for the honesty of J. S. during his continuance in the plaintiff's employ. During the employ J. S. made defalcations, which the plaintiff discovered on the 20th of November, but without notice to the defendant condoned the offence, and continued J. S. in his employ, J. S. having again made defalcations. It was held by the Court of Queen's Bench, on demurrer to an equitable plea to a declaration on the guarantee, that the defendant was discharged from liability for the defalcations subsequent to the 20th of November. "If," said Quain, J., "it is correct, as we think it is, on the authorities, to say that such concealment as is here pleaded, if it had been practiced at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuous guarantee a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety, unless his assent has been obtained after knowledge of the dishonesty that his guarantee should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligation is, that *it is only reasonable to suppose that [994] such a fact, if known to him, must necessarily have influenced his judgment as to whether he would have entered into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered into the contemplation that, after the servant's dishonesty in the service had been discovered, the guarantee should continue to apply to his future conduct when the master chose for his own purpose to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the same representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination. If the guarantee at its inception was founded, as suggested by Lord Eldon, in *Smith v. The Bank of Scotland* (1 Dow, 272), on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss arising from any future dishonesty. 'It is the clearest and most evident equity,' says Lord Loughborough, in *Rees v. Berrington*, 2 Ves. jun. 540, 'not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound

and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.' Thus in the present case the conduct of the master, in retaining the servant in his employ when he might have discharged him for dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service after he became aware of his dishonesty, and without the assent or knowledge *of the surety."

[*995] See *Peel v. Tatlock*, Bos. & P. 419; *Smith v. The Bank of Scotland*, 1 Dow. 287; *Montague vs. Tidman*, 2 Vern. 518, post 1001.

A fortiori will the surety be discharged from future liability, if, on discovering the dishonesty of the person for whose good conduct he has bound himself, he revokes his guarantee. See *Burgess v. Eve*, 13 L. R. Eq. 457, 458, where Sir R. Malins, V. C., says, "If there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guarantee I gave you: I give you full notice not to trust him any more.' . . . If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this Court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be canceled." See *Phillips v. Foxall*, 20 W. R. (Q. B.) 902.

A guarantee of this kind will, however, be irrevocable whilst there is no misconduct on the part of the servant or clerk. "When," observes Malins, V. C., in a recent case, "a guarantee is of the fidelity or good conduct of a servant or clerk, or person in a confidential position, it may be considered as a contract by the employer and employed, and the surety on his behalf; therefore, if a father guarantees the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of the son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily and without the fullest justification he desires to withdraw that which he has deliberately entered into, I am of opinion, under such circumstances as those, that he would have no right to withdraw:" *Burgess v. Eve*, 13 L. R. Eq. 457.

If, however, as is laid down by Quain, J., in *Phillips v. Fozall*, 20 W. R. (Q. B.) 902, the surety, after having obtained knowledge of the dishonesty of the person for whose fidelity he gave a guarantee, should agree or assent that it should hold good during the subsequent service, his liability will continue. See *Shepherd v. Beecher*, 2 P. Wms. 288, and the comments thereon in *Phillips v. Fozall*, 20 W. R. (Q. B.) 902.

*Where the creditor releases or compounds with the debtor, without the concurrence of the surety, although it may be done [*996] by mistake, or for the benefit of the surety, unless there be a stipulation to the contrary (*The Union Bank of Manchester (Limited) v. Beech*, 13 W. R. (Ex.) 922), he will thereby discharge the surety (*Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Wilson*, 11 Ves. 410; *Ex parte Glendinning*, Buck, 517; *Ex parte Carstairs*, Buck, 560; *English v. Darley*, 2 Bos. & P. 61; *Lewis v. Jones*, 4 B. & C. 506); and it seems, that one partner in a firm may release or compound with the creditor, so as to bind the firm, and consequently discharge the surety: *Hawkshaw v. Parkins*, 2 Swanst. 539.

If the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt: *Hall v. Hutchons*, 3 My. & K. 428, per Sir J. Leach, M. R.

A creditor, if he has given an absolute release for the debt, cannot reserve his right to proceed against the sureties, whether the release be legal (*Nicholson v. Revill*, 4 Add. & Ell. 675; and the remarks in *Kearsley v. Cole*, 16 Mees. & W. 136) or equitable. See *Webb v. Hewitt*, 3 K. & J. 438. There the plaintiff became surety in a bond to the defendant for one Field. Afterward Field and the defendant entered into an agreement that the defendant should take all Field's property, and should pay his other creditors five shillings in the pound. Upon the death of Field, the defendant having put the bond in suit against the plaintiff, Sir W. Page Wood, V. C., granted a perpetual injunction, and ordered the bond to be canceled. "As to giving time," said his Honor, "the authorities, which are almost innumerable, have settled that upon *any giving of time* to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged. . . . A release, however, stands upon an entirely different footing. The case of *Nicholson v. Revill*, 4 Add. & Ell. 675, which is recognized in *Kearsley v. Cole* (16 Mees. & W. 128), has decided that, when an actual release is given, no right can be reserved, for the debt is gone at law. In *Nicholson v. Revill*, the Court commented on the observations of Lord Eldon in *Ex parte Giffard* (6 Ves. 805), saying, that if these observations were meant to extend to this, that the principal debtor could be *entirely released*, so that the debt should be extinguished, and yet the right reserved against the surety, they thought the

[*997] dicta went too far. . . . In the case before me, *there is clearly no discharge at law by accord and satisfaction, because the instrument by which the accord and satisfaction is alleged to have been made is not under seal. . . . The only question is, what is its effect in equity? There can be no doubt that the agreement is an equitable discharge, which would of course release the surety. . . . What I rest my judgment on principally is, the result of this transaction upon the face of it. There is nothing in evidence that shakes any portion of the agreement. The utmost that the evidence amounts to is, that there was an intention with this agreement, such as it is, to assert a reservation of right against the surety. I hold, that if such a reservation of right had been put in it would have been a nullity. If a man, in consideration of the debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid; and if he has been paid, he cannot reserve his rights."

Where, however, a release, in order to carry out the intention of the parties, can be construed as a covenant not to sue, an unqualified reservation of remedies against the surety is to be construed as allowing the surety to retain all his remedies over against the principal debtor, the covenant not to sue being allowed to operate only so far as the rights of the surety may not be affected: *Bailey v. Edwards*, 4 B. & S. 774; and see *Price v. Barker*, 4 Ell. & Bl. 780; *Keyes v. Elkins*, 5 B. & Sm. 240.

In *Green v. Wynn*, 4 L. R. Ch. App. 204, by a mortgage deed the debtor covenanted to pay the principal sum of 1000*l.* and interest at 10*l.* per cent., and a surety covenanted to pay the interest in default. The debtor afterward, by deed, assigned his property to a trustee on trust to sell and divide the proceeds among his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor. It was held by Lord Chancellor Hatherley, affirming the decision of Sir G. M. Giffard, V. C. (reported 7 L. R. Eq. 28), that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor, and recover the amount from the debtor. "The right," said his Lordship, "reserved against the surety is any right or remedy which the creditor may have against any other person or persons in respect of any debt due by the debtor. The debt due is 1000*l.*, and the right of the creditor against the other person is, that as long as the debt remains *unpaid, that other person may be called upon to pay 100*l.* a year. Then comes the release, and if the debt is extinguished by the release, of course the interest is extinguished. But the authorities say that if, on the one hand, the debtor is released, and, on the other hand, all demands against other persons are reserved, then it is inconsistent with the frame and object of the deed to hold that the release

is intended to be complete and absolute, as that would make the two parts of the deed utterly inconsistent. The release cannot be construed to be absolute, because then no rights would be reserved in any case, and the Courts have therefore held that such a release is *not to be construed as absolute, but only as a covenant not to sue*. That being so, the remedy is gone as between the debtor and creditor, inasmuch as the creditor cannot sue the debtor; but as against all other persons the rights of the creditor are reserved. A surety for the whole debt of course would have to pay it; he is in the position of a person against whom a right is reserved on account of that debt. As against the debtor, the debt is gone, as under a covenant not to sue; yet as against any other person the debt is not gone, but is still existent.

"It is true the surety at the time of the execution of the deed owed nothing, because no interest was due upon the debt, and that he was only called upon to pay whenever interest remained unpaid; but still the creditor's right is reserved, and, according to all the cases, I must hold that as to the surety the debt is not gone. There was one argument by which I was pressed, that if this be so, the surety cannot get rid of the liability, and therefore must have to pay 100*l.* a year forever; but where there is a mortgage, of course any person under a liability to pay the interest would be at liberty to redeem. I entertain no doubt that the surety might call upon the debtor to pay the debt, and in default might himself pay the debt and charge the debtor with the amount so paid. If this could not be done, it would form a strong argument for construing this deed as an absolute release of the debt. But I think that this case comes within the authorities that such a release is not absolute, and is quite distinguishable from *Webb v. Hewitt*, 3 K. & J. 438, where a man took the whole of the assets, agreeing to pay five shillings in the pound to the creditors. This is an absolute assignment, as in bankruptcy, and I have no doubt that, when the creditors were satisfied, there would be a resulting trust of the surplus for the debtor."

So also in *Bateson v. Gosling*, 7 L. R. (C. P.) 9, a deed of arrangement under the Bankruptcy Acts, 1861 and 1869, contained a release of the debtor, subject to a proviso *reserving the rights of creditors holding securities. It was held by the Court of Common Pleas [*999] that this operated as a covenant not to sue, and not as an extinguishment of the debt, so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate. See also *Hooper v. Marshall*, 5 L. R. C. P. 48.

But a surety who, though innocent himself, obtains a release from the creditor by the fraud of another, will not, if there be no consideration moving from him, be able to avail himself of it. See *Scholefield v. Templer*, 4 De G. & Jo. 429. There, a debtor and his surety persuaded the creditor

to accept from the debtor a transfer of a mortgage, which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterward the creditor, at the request of the surety, who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew they had refused to do unless the release was given. It was held by the Court of Appeal in Chancery, affirming the decision of Sir W. Page Wood, V. C. (1 Johns. 155), that the creditor was entitled to be restored to his rights against the surety. It was also held by the Vice-Chancellor, that the creditor was entitled to such relief only upon the terms of repaying the surety's friends the sums lent by them, with the right of standing in their places against the surety; but, on appeal, the provisions in their favor were struck out, and the decree made simply without prejudice to their rights.

A deed under the Bankruptcy Act, 1861, sect. 192, is not invalid, although it has no clause reserving rights against sureties, unless it is shown that there are creditors secured by sureties. *Johnson v. Barratt*, 1 Law. Rep. Ex. 65.

A surety may, by further contract with the creditor, convert himself, in relation to the debt for which he was surety, into a principal debtor; and thus, upon a release being given to the party who was in the first instance the principal, lose the benefit of the doctrine, that a release of the principal releases the surety: *Reade v. Lowndes*, 23 Beav. 361; *Defries v. Smith*, 10 W. R. (V. C. S.) 189.

So, likewise, one of two principal debtors, who, by arrangement with his co-debtor only, has become merely a surety for the debt, will not be released from his liability by the creditor giving time to his co-debtor. [*1000] because as *regards the creditor they both remain principal debtors, and a creditor, by giving time to one of two co-debtors does not thereby release the other: *Maingay v. Lewis*, 3 I. C. L. 495.

A surety has been held not to be discharged by the creditor signing the certificate of the bankrupt debtor after he had proved the debt under the commission, although the surety had given him notice not to sign it: *Browne v. Carr*, 2 Russ. 600; *S. C.*, 7 Bing. 508; and see *Langdale v. Parry*, 2 Dowl. & Ry. 337.

But the surety will be released if the principal creditor releases the estate of the bankrupt upon a bargain without proof of his debt against it and without notice to the surety: *Pledge v. Buss*, Johns. 663, 667.

If the creditor appropriates any security for the debt to another purpose, the surety will, to the extent of the value of the security, be discharged. Thus in *Pearl v. Deacon*, 24 Beav. 186, the plaintiff was surety upon a promissory note to the defendants for a sum lent by them to their tenant, and the defendants also took a mortgage of the tenant's furniture for the same debt. They afterward, under a distress, took the same furni-

ture for arrears of rent. It was held by Sir John Romilly, M. R., that as regarded the plaintiff (the surety) the produce of the furniture was first applicable to the payment of the promissory note, and that the landlord could not, as against the surety, apply it in payment of the rent. "If," said his Honor, "the creditor makes available any of his securities, the surety is entitled to the benefit of it." This decision was on appeal affirmed by the Lords Justices, 1 De G. & Jo. 461.

Mere passiveness by the creditor, in not taking proceedings against the debtor, will not, in the absence of a binding stipulation in the contract of suretyship, rendering activity on his part necessary, release the surety. See *Erye v. Everett*, 2 Russ. 381, where, although the creditor had neglected to sue the obligor on a bond for five years, Lord Eldon held that the surety was not released. "The surety," said his Lordship, "has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing." See also *Shepherd v. Beecher*, 2 P. Wms. 288; *Wright v. Simpson*, 6 Ves. 734; *Lysaght v. Walker*, 5 Bligh. N. S. 1; *Brickwood v. Andies*, 5 Taunt. 614; 1 Marsh. 250; *Perfect v. Musgrave*, 6 Price, 111; *Orme v. Young*, Holt, N. P. C. 84; *Langdale v. Parry*, 1 Dowl. & Ry. *337; *Price v. Kirkham*, [*1001] 3 Hurlst. & Colt. 437.

But passiveness may discharge a surety, if there be a stipulation that the creditor is, on default, to sue the debtor without delay: *The Bank of Ireland v. Beresford*, 6 Dow. 233; *Hall v. Hadley*, 2 A. & E. 758. In *Montague v. Tidcombe*, 2 Vern. 518, a man put out his son an apprentice, giving a bond to his master for his fidelity, taking at the same time a covenant from his master that he would, at least once a month, see his apprentice make up his cash. Upon the apprentice embezzling cash and the master bringing an action on the bond, it was held, on a bill being filed by the father to be relieved against it, that the bond and covenant ought to be taken as one agreement; that the father would be liable, provided the accounts were taken monthly, but for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began.

Taking further security from the debtor, unless it be in lieu of the original security, thereby preventing the creditor from proceeding upon it, will not have the effect of discharging the surety. Thus, in *Gordon v. Calvert*, 4 Russ. 581, B. being hired as clerk to A. & Co., but not for any definite period, C. and D. joined with him in a bond to secure his duly accounting for his receipts. C. died, and his executrix gave a written notice to A. & Co. that she would no longer remain surety. A. & Co. communicated this notice to B., and required and obtained from him another surety. D. died, and also the new surety, and, four years and a

half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice. It was held by Lord Lyndhurst, that, as there was nothing to show that the obligees acquiesced in the wish of the executrix to be released, and there was no ground on which the Court could say, that, when the second bond was executed, there was an intention to give up the first; and as it was reasonable to require a further security, as the executrix of C. would be answerable only to the extent of the assets, the executrix of C. had no equity to restrain A. & Co. from proceeding at law on the bond. See *S. C.*, 2 Sim. 253; *Calvert v. Gordon*, 7 B. & C. 809; and see *Eyre v. Everett*, 2 Russ. 381; *Bank of Ireland v. Beresford*, 6 Dow. 233; *Hodgson v. Nugent*, 5 T. R. 277; *Melville v. Glendinning*, 7 Taunt. 126; *Twopenny v. Young*, 3 B. & C. 208.

Where, however, the creditor takes a second security in satisfaction of the first, the surety will be discharged: *Clarke v. Henty*, 3 Y. & C. Exch. Ca. 187.

As a surety on payment of the debt is entitled to all the securities in the hands of the creditor, whether he is aware of *their exist- [*1002] ence or not (*ante*, Vol. 1, pp. *109, *110), even though they were given after the contract of suretyship (*Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Lake v. Brutton*, 18 Beav. 134; 8 De G. Mac. & G. 440; *Pledge v. Buss*, Johns. 663, 668, overruling *Newton v. Chorlton*, 10 Hare, 646, 2 Drew. 333; *Bechervaise v. Lewis*, 20 W. R. (C. P.) 726), if the creditor, who has had, or ought to have had, them in his full possession or power, loses them, or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice (*Strange v. Fooks*, 4 Giff. 408), the surety to the extent of such security will be discharged: *Capel v. Butler*, 2 S. & S. 457; *Ex parte Mure*, 2 Cox, 63; *Law v. The East India Company*, 4 Ves. 824; *Williams v. Price*, 1 S. & S. 581; *Philips v. Astling*, 2 Taunt. 206; *Wulf v. Jay*, 27 L. T. Rep. (N. S.) 118, 120.

A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by his surety, give him the securities in exactly the same condition as they formerly stood in his hands. Thus, in *Pledge v. Buss*, Johns. 663, a creditor holding a mortgage for a debt for which the plaintiff was surety, after the bankruptcy of the principal debtor, without notice to the surety, released the assignees and the bankrupt's estate in consideration of the conveyance to him of the equity of redemption; it was held by Sir W. P. Wood, V. C., that the surety was discharged, and that it was not enough for the creditor to allow in accounts the dividends released, and to give a new charge on the mortgaged premises. "The law," said his Honor, "is now well established, that a person having a mortgage for a guaranteed debt, is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt which he has guaranteed, to take the security in its original condition unimpaired. In this case, the principal debtor having become bankrupt,

the creditor, instead of going in under the bankruptcy as he might have done, and applying to have the security realized and to be admitted to prove for the balance, in effect purchased the equity of redemption (no doubt on advantageous terms), the price being the surrender of his right of proof. The consequences of this were twofold: in the first place, the surety could not get the security with the same title under which the creditor held it, which dated from 1850. This might be a matter of no small importance, having regard to the possibility of intervening judgments or other charges. All that the creditor can now give to the surety is a security taking priority from the present time. The right of the surety was to have the same *security in exactly the same plight and condition in which it stood in the creditor's hands." [*1003]

Where, however, the debtor becomes bankrupt, a surrender of a policy of assurance to the office in consideration of a sum of money to the personal representatives of the creditor who proved for the rest of the debt, has been held not to discharge a surety. See *Coates v. Coates*, 33 Beav. 249; there, the debtor, John Green, had deposited a policy on his life as security for a debt. He afterward became bankrupt. The executrixes of the creditor proved and received a dividend upon the debt, and surrendered the policy in consideration of a sum of money without the consent of a surety for the debt. It was held by Sir John Romilly, M. R., that the surrender of the policy could not be treated as a discharge of the surety. "John Green," said his Honor, "was a bankrupt, and it was not probable that he would keep up the policy, from which he could derive no benefit, and the executrixes were not bound to do so. To keep it up would have been a mere speculation on their part, which might or might not have turned out beneficial, and if it had turned out unfavorable might have been complained of by the surety. They realized what they could by surrendering it to the office, and whether the policy was surrendered before or after proof in the bankruptcy, I think it did not release the surety. It was the duty of the creditor to sell and realize the security; by so doing he could alone make the estate of the principal debtor available for the payment of a dividend on the debt for which the surety was liable, and consequently the benefit of which dividend is obtained by the surety in further discharge of his debt."

So, also, where a creditor has a security upon the equitable interests of his debtor, and of a surety in a trust fund, and transfers the debt with the securities for the same, the assignee will not lose his right against the interest assigned by the surety, in consequence of his not giving to the surety notice of the transfer. Thus, in *Wheatley v. Bastow*, 7 D. G. Mac. & G. 261, a brother and sister entitled in moieties to a reversionary interest in a fund in court, mortgaged it to secure a debt of the brother, the sister joining, and being described in the security as a surety for the brother. The mortgagee obtained a stop order, and afterward on his marriage assigned the mortgage debt to trustees, who, however, neither obtained a

stop order nor gave notice to the sister of the settlement. On a petition of the brother, stating that the tenant for life had assigned to him her life interest in his share of the fund, and that he had paid a portion of the mortgage debt, and praying for a transfer of his share *of the fund, a solicitor who had acted for the sister and for the mortgagee upon the occasion of the mortgage, took upon himself without authority to instruct counsel to appear for the sister and her husband, and also for the mortgagee, who was abroad, and to consent to or not oppose the petition. Upon the hearing of the petition the fund was ordered to be, and was transferred out of the Court. It was held by the Lords Justices, reversing the decision of Sir John Stuart, V. C., that neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but that it continued subject to the payment of the mortgage debt. See, however, the remarks upon this case in *Strange v. Fooks*, 4 Giff. 408.

A surety, however, will not be discharged where a security becomes worthless, unless it became so by the act of the creditor; *Hardwicke v. Wright*, 35 Beav. 133.

With regard to a security given by co-sureties, it seems that there is an equity that it must not be wasted (*Margretts v. Gregory*, 10 W. R. (Ex.) 630, per Bramwell, B.), but a fair dealing by the creditor with the surety's security under which the creditor sets off the surety's share of the debt due to him against the proceeds of the security does not preclude a resort to the other sureties for their respective shares of the debt: *Margretts v. Gregory*, 10 W. R. (Ex.) 630.

It seems to be settled at law, that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others (*Cheetham v. Ward*, 1 B. & P. 633; *Nicholson v. Revill*, 4 A. & E. 675; *S. C.*, 6 N. & M. 200; *Rex v. Bayley*, 1 C. & P. 435; *Cocks v. Nash*, 4 M. & Sc. 162).

It has, however, been held in equity that a mere composition with one of the sureties would not have that effect. Thus, in *Ex parte Gifford*, 6 Ves. 805, Marshall and Haig, creditors of Bedford, upon a promissory note, requiring a further security, Bedford, Niblock, Burgess, and Baylis joined in a promissory note as a collateral security. Bedford, Niblock, and Burgess became bankrupts. Marshall and Haig proved the whole debt under each commission, and afterward brought an action against Baylis, who entered into a composition with his creditors, under which Marshall and Haig received a dividend of 4s. in the pound, and gave Baylis a receipt in full for the said debt, and all other demands from him. The dividend paid by the estate of Bedford was 4s. in the pound, and that by the estate of Niblock and Burgess, 5s. A petition was presented, praying that proof against the estate of Niblock and Burgess might be expunged. Lord Eldon dismissed the petition. "The

*principle," observed his Lordship, "is to discharge all the obligations of all the sureties; but they stand, with regard to each other, in a relation which gives rise to this right, among others, that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which, in all events, he is to pay. The party has a right to say for himself, he will not consider the relation, but will take 6s., though the surety is liable to pay 10s. He may say, he will be passive as to the other 4s.; or he will discharge the whole debt, and at his own risk, as to the remedy against the other surety; or he may reserve the remedy against the co-surety expressly. It depends upon the effect and terms of the bargain actually entered into. It might be prudent in this very case, for Baylis, Bedford's son-in-law, to say he would pay 4s. in the pound, recollecting that Niblock and Burgess must pay more than 10s. in the pound before any demand could be made by them against Baylis, and recollecting the remedies against Bedford. The question, therefore, is, under the circumstances, what did they mean? As to the receipt, the creditor contends there is no difference whether there is an express reservation of the remedies against the co-sureties. But that distinction has been taken. At the time of Mr. Richard Burke's case, Lord Thurlow admitted, that, if there is a reserve of the remedies against the other, there is consent of the party with whom the composition is made, and if, on that, a demand arises against him, it is a demand which began to exist with his consent, expressed in the terms of the contract, and, under some circumstances, wisely and prudently given; for the party would not have entered into the contract unless he was allowed to contract for that remedy over against the co-sureties. If Niblock and Burgess should not pay more than their moiety, the contract would be a beneficial contract for Baylis: for, though paying more than Baylis, they would not pay enough to bring an assumpsit against him. That would not, therefore, be an imprudent bargain for Baylis to make. It may, however, never be necessary to decide this, as it depends upon what dividends the estates of Bedford and of Niblock and Burgess pay. But I have a strong opinion that, under the circumstances, the other persons liable upon this note are not discharged, because Baylis was contented to make a bargain, the effect of which leaves him to his chance as to his ultimate liability between him and his co-surety; and, therefore, that relief cannot be given even to the extent to which it is now modified."

The principle upon which this case appears to be decided is this, that, since a creditor, who has given a discharge to one *surety for the proportion which he was liable to contribute toward the payment of the general debt, has no right to proceed against the other sureties for more than their proportion of it, no injury is done to them by the discharge of their co-surety. In *Stirling v. Forrester*, 3 Bligh, 591, Lord Redesdale says, "If the creditor discharges one of the co-partners, he cannot proceed for the whole debt against the others: at the most they

are only bound for their proportions." The principle as to co-sureties is the same. The doctrine, however, of Lord Eldon is treated by Sir W. Page Wood, V. C., in *Evans v. Bremridge*, 2 K. & J. 183, as expressly overruled by *Nicholson v. Revill*, 4 A. & E.; 6 N. & M. 192, 211.

Certainly some of the remarks made by Lord Denman in the case of *Nicholson v. Revill* (4 Ad. & Ell. 675), on the doctrine of Lord Eldon, in *Ex parte Gifford*, throw doubt on its correctness, on the supposition that Lord Eldon had held that a creditor could release one joint and several debtor, and hold another liable by a reserve of remedies. Lord Eldon, however, meant only to apply the doctrine to cases where there was no release, but a composition or giving time, not amounting to a release: *Kearsley v. Cole*, 16 M. & W. 136, per Parke, B.

A release, however, of one surety may be so qualified by the reservation of remedies against the co-sureties that it will be construed as a covenant not to sue, and it will thus be prevented from operating as a discharge of a co-surety. *Thompson v. Lack*, 3 C. B. 540, 552; *Price v. Barker*, 4 Ell. & B. 760; and see *Solly v. Forbes*, 2 Brod. & B. 38; *Payler v. Homersham*, 4 M. & S. 423; *North v. Wakefield*, 13 Q. B. 536; *Bailey v. Edwards*, 4 B. & Sm. 761; *Ewin v. Lancaster*, 13 W. R. Q. B. 857.

A subsequent promise by a surety to pay a debt, after he is aware that the principal creditor has given further time to the principal debtor, will revive the liability from which he was discharged by the act of the principal creditor: *Mayhew v. Crickett*, 2 Swanst, 185; and see *Id.* p. 192, and cases cited in the note.

The principle upon which the surety is discharged by certain acts of the creditor, without his concurrence, is well stated by Lord Loughborough in the principal case: "It amounts," he observes, "to this, that there shall be no transaction with the principal debtor without acquainting the person who has the greatest interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs * (for [*1007] they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence, contrary to the nature of his engagement."

The liabilities of sureties are governed by the same principles at law as in equity. And, although different doctrines formerly prevailed at law, it is at present firmly established, that the same principles which have been held to discharge a surety in equity will operate to discharge him also at law. However, although the same relief may be obtained in both, a Court of equity will not send a party who is suing there to a Court of law for the discharge to which he is equally entitled in equity: *Samuell v. Howarth*, 3 Mer. 278; *Mayhew v. Crickett*, 2 Swanst. 185; *Hawkshaw v. Parkins*, 2 Swanst. 539, 546; *Eyre v. Everett*, 2 Russ. 382; *Mackintosh*

v. *Wyatt*, 3 Hare, 567. See also *Moore v. Bowmaker*, 6 Taunt. 379; *S. C.*, 2 Marsh. 81; *Melville v. Glendinning*, 7 Taunt. 126; *Philpot v. Briant*, 4 Bing. 717.

Relief, however, might sometimes have been had in equity, where it could not formerly have been obtained at law. Thus, where it did not appear upon the face of the instrument that a person was a surety; if, for instance, in a bond, the principal debtor and surety were bound jointly and severally, the surety, as is laid down in the principal case, could not, at law, aver by pleading that he was bound only as surety (*Lewis v. Jones*, 4 B. & C. 506), and the remarks of Lord Abinger in *Ashbee v. Pidduck*, 1 Mee. & W. 564; sed vide *Laxton v. Peat*, 2 Camp. 185; *Hall v. Wilcox*, 1 M. & Rob. 58; but in equity, although they both appeared as principals, parol evidence has always been admissible to show that one was only a surety. The consequence was that, upon the creditor giving further time to the principal debtor, the surety, upon proving that fact, might have relief in equity, although he would formerly still be held bound at law, as he would appear there only as a principal: *Craythorne v. Swinburne*, 4 Ves. 160, 170; *Clinton v. Hooper*, 1 Ves. jun. 173; 3 Bro. C. C. 201; *Clarke v. Henty*, 3 Y. & C. Exch. Ca. 187; *Ashby v. Pidduck*, 1 Mee. & W. 564; *Oakley v. Pasheller*, 4 C. & F. 207; *Oriental and Financial Corporation v. Overend, Gurney & Co.*, 7 L. Q. Ch. App. 142.

But since equitable pleas have been used at common law, it may be shown that a person appearing on the face of an instrument as a principal is only a surety (*Davies v. Stainbank*, 6 De G. Mac. & G. 679; *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Manley v. Boycott*, 2 Ell. & Bl. 46; *Wake v. Harrop*, 1 H. & C. 202; *Greenhough v. McClelland*, 2 Ell. & Ell. 424; *Re Mutual Loan Fund Association v. Sudlorn*, 5 C. C. N. S. 449; *Taylor v. Burgess*, 5 H. & N. 1; **Lawrence v. Walmsley*, 12 C. B. N. S. 799; *Bailey v. Edwards*, 4 B. & S. 761; *Ewin v. Lancaster*, [*1008] 13 W. R. (Q. B.) 857); and it seems that in order that a surety may be discharged by a creditor giving further time, it is sufficient that the true relationship between the parties should, although after the original contract, be known to him at or before the extension of time. See *The Oriental Financial Corporation v. Overend, Gurney & Co.*, 7 L. R. Ch. App. 142; 20 W. R. (L. C.) 253, disapproving of *Ex parte Graham*, 1 De G. Mac. & G. (Bank.) 396. See also *Strong v. Foster*, 17 C. B. 201.

Again, as, in general, an obligation created by an instrument can, at law, only be dissolved by one of equal force, time given by mere parol agreement, although for valuable consideration, would not at law discharge a surety by an instrument under seal, as a bond (*Davey v. Prendergrass*, 5 B. & Ald. 187; *Woosnam v. Price*, 1 Cr. & Mee. 352; *Ashby v. Pidduck*, 1 Mee. & W. 564); or by matter of record, as a recognizance (*Bulleel v. Jarrold*, 8 Price, 467). In equity, however, the rule of law is disregarded, and, as what is agreed to be done by a binding agreement is

looked upon as done, relief will be given: *Bowmaker v. Moore*, 3 Price, 214; 7 Price, 723; *Blake v. White*, 1 Y. & C. Exch. Ca. 420.

A principal creditor may be held at law to have released a surety, where in equity the surety would be held still liable; as, for instance, where the principal creditor has by deed, with the parol consent only of the surety, released the principal debtor: *Brooks v. Stuart*, 1 Beav. 512.

Where the debt for which a person is surety becomes due, he may file a bill in equity to compel the principal to discharge him from his liability. In the words of an old case, where this subject was much discussed, "Although the surety is not troubled or molested for the debt, yet, at any time after the money becomes payable, the Court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him;" per Lord Keeper in *Ranelagh v. Hayes*, 1 Vern. 188: and see *Antrobus v. Davidson*, 3 Mer. 579; *Lee v. Rook*, Mos. 318.

In *Woolridge v. Norris*, 6 L. R. Eq. 410, a surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the Court. It was held by Sir *G. M. Giffard, [*1009] V. C., that the surety, though he had not paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity, and that it was not necessary that the bill should be filed on behalf of all the creditors.

But where the creditor has not a present right to sue, the surety cannot come into equity to be discharged from his liability. See *Padwick v. Stanley*, 9 Hare, 627, 628, where Sir George Turner, V. C., said that he considered that the cases in which such a jurisdiction is exercised by the Court, are cases where the creditor has a right to sue the debtor, and refuses to exercise that right.

The Roman-Dutch law, and the old French law, upon the subject of this note, were discussed before the Judicial Committee of the Privy Council in the cases of *Macdonald v. Bell*, 3 Moore, P. C. C. 315; *Bellingham v. Freer*, 1 Moore, P. C. C. 333.

It was essential at common law that the consideration of a parol contract should have moved from the party who sought to enforce it by suit, but the direction which it took was immaterial, and the obligation was the same whether it went into the hands of the defendant or of a third person; see 2 American Leading Cases, 169, 5th

ed. Thus, the material question in an action on the case in assumpsit was, did the plaintiff part with value on the faith of the promise? and not whether the defendant received value for making it. Contracts under seal were valid without a consideration, and it was immaterial when present. The subject was viewed in a different aspect by the Court of Chancery, which regarded the relation of the parties as depending not only on the sacrifice made on one side, but upon the circumstances under which the liability was incurred on the other. Thus, where a sale took place in reliance on a promise of payment made by two persons jointly, the legal obligation of the contract was the same whether it was understood between the promisors, that the right of property should vest in both of them or exclusively in one, and although the latter entered into the agreement solely for the purpose of enabling the former to obtain credit. In either case each was equally liable, and neither could set up any defence that would not be equally available in favor of the other. In equity such an agreement creates the relation of principal and surety, and gives rise to peculiar rights and duties. The obligation imposed by the contract is unchanged as between those who are bound to perform it and those who are entitled to insist on its fulfillment; but an additional duty is imposed on the obligee. So far as he is concerned, the principal and surety are under an equal obligation; but as between themselves, the whole duty of performance devolves, in the contempla-

tion of a chancellor, on the principal. The creditor may remain quiescent, without doing anything to preserve this equity, and may exert every power given by the contract, although the effect is to subvert it; see *Perry v. Saunders*, 36 Iowa, 427; but if he goes further, and takes any unauthorized step by which it is impaired, he will discharge the surety.

The equity does not depend on the wording of the contract. Whether the surety has made himself directly answerable, or is merely a guarantor, and whether he does or does not appear on the face of the instrument as a surety, he is within the equitable principles that one who incurs a liability for the benefit of another is entitled to an indemnity, and that every man should, even when exercising a legal right, refrain from causing needless injury. The former rule applies as between the principal and the surety, the latter as between the surety and the creditor, and affords a safeguard for the equities arising under the former; *Wharton v. Woodbury*, 4 Dev. & Bat. 507; *Purviance v. Sutherland*, 2 Ohio N. S. 400; notes to *Aldrich v. Cooper*, ante, 228. It follows that although *prima facie* the makers of a joint and several note or bond are primarily answerable, and each may be dealt with as if he were the only debtor, yet, if the holder of the instrument has notice that one of them is a surety, and does any act by which the equity of subrogation incident to that relation is impaired, he will lose the right to enforce the contract against him.

The direct operation of the sure-

ty's equity is confined to the relation between himself and the principal, but it has a material, although indirect, influence on the creditor. The latter is entitled to enforce the contract against the surety without taking any corresponding measures against the principal, even when the effect is practically to throw the whole burden on the surety. A court of equity may indeed require the creditor to place his remedies under the contract at the disposal of the surety, but it will not compel him to proceed against the principal, nor restrain the use of any remedy which he has against the surety; *ante*, 317; *Wright v. Simpson*, 6 Ves. 714; *In re Babcock*, 3 Story, 393; *Abercrombie v. Knox*, 3 Alabama, 728; *Marsh v. Pike*, 1 Sandford, Ch. 210; *Geddis v. Hawk*, 1 Watts, 280; *Stephenson v. Taverners*, 9 Grattan, 398; *Gary v. Higunt*, 32 Maryland, 552; 2 American Leading Cases, 412, 417, 5th ed. But while the surety's equity is subordinate to the legal right of the creditor, it is, notwithstanding, entitled to consideration, and cannot be disregarded with impunity. Although, therefore, the creditor may enforce the contract in every particular, yet if he goes beyond this, and does any act unauthorized by its terms, and which is calculated to prejudice the surety, he will lose his recourse against him; *Hollier v. Eyre*, 9 Cl. & F. 1; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Pooley v. Harradine*, 7 Ellis & Bl. 431; *Fulmer v. Seitz*, 18 P. F. Smith, 562; *Vose v. The Florida R. R. Co.*, 50 New York, 369. This is simply an ap-

plication of the rule that releasing one who is primarily liable in person or estate will discharge every other whose liability is secondary; *ante*, p. 306, notes to *Aldrich v. Cooper*. Thus, when land bound by a mortgage is sold in parcels to successive purchasers, the first purchaser is entitled to throw the whole weight of the mortgage on those of later date, and if the mortgagee releases them he will be precluded from enforcing the mortgage against the first purchaser. Under these circumstances there is obviously no privity of contract, and the authorities proceed on the broad ground that every man should respect the rights of others in using his own. This principle applies with at least equal force in favor of the equity between principal and surety, which arises from a contract with the creditor of which he has received the benefit.

It follows from what has been said that the duty of performing the contract, or seeing that it is performed, is on the surety, and that he cannot require the creditor to assume any part of a burden which he has made his own; *Villars v. Palmer*, 67 Illinois, 207; *The R. R. Co. v. Schaeffer*, 9 P. F. Smith, 350; *McKecknie v. Ward*, 58 New York, 541. The authorities accordingly agree that the surety cannot resist a suit on the contract on the ground that the creditor omitted to proceed against the principal, and that the debt was lost in consequence of the delay; *Morris Canal Co. v. Van Vort*, 1 Zabriskie, 100; *The Bank of Alabama v. Godden*, 15 Alabama, 616; *Buckalew v. Smith*, 44

Id. 638; *Adams Bank v. Anthony*, 18 Pickering, 238; *United States v. Simpson*, 3 Penna. 437; *Richards v. The Commonwealth*, 4 Wright, 146; *Ring v. The Bank*, 4 English, 185; *Carr v. Howard*, 8 Blackford, 190; *Kirby v. Studebaker*, 15 Indiana, 45; *Alcock v. Hill*, 4 Leigh, 622; *Davis v. Graham*, 29 Iowa, 514; *Andrews v. Carpenter*, 52 Illinois, 172; *Villars v. Palmer*, 67 Id. 204; *Hunter v. Clark*, 25 Texas, 159; *Ray v. Brenner*, 12 Kansas, 105; *Deal v. Cochran*, 66 N. Car. 269; *Freanor v. Yingling*, 37 Maryland, 491; *McKecknie v. Ward*, 58 New York, 541; 2 American Leading Cases, 389, 5 ed. The law was so held by Chancellor Kent in *King v. Baldwin*, 2 Johnson, Ch. 554, and notwithstanding the reversal of his decision by the Court of Errors on a somewhat different point, it has since been followed on this throughout the Union; *Fulton v. Matthews*, 15 Johnson, 433; *The People v. Russel*, 4 Wend. 570; *The Commercial Bank v. French*, 21 Pick. 486; *Jordan v. Trumbo*, 6 Gill & John. 103; *Joslyn v. Smith*, 13 Vermont, 353; *Sibley v. McAllaster*, 8 New Hampshire, 389; *The Farmers' Bank of Canton v. Reynolds*, 13 Ohio, 84; *The United States v. Kirkpatrick*, 9 Wheaton, 760; *McLemore v. Powel*, 12 Id. 554; *The United States v. Nichol*, Ib. 505; *Doe v. The Postmaster-General*, 1 Peters, 318; *Montgomery v. Dillingham*, 3 Smedes & Marshall, 467; *Haynes v. Covington*, 9 Id. 479; *Caruthers v. Dean*, 11 Id. 178; *Anderson v. Mannon*, 7 B. Monroe, 217; *Johnson v. Searcy*, 4 Yerger, 102; *Dawson v. The Real Estate Bank*, 5

Pike, 283; *Creath v. Sims*, 5 Howard, 192; *Locke v. The United States*, 3 Mason, 447; *The United States v. Hunt*, 1 Gallison, 42; *Daniels v. Peterson*, 3 Comstock, 47; *Carter v. Jones*, 5 Iredell, Eq. 196. And it is well settled, in general, that although an agreement for time will discharge the surety, whether it is or is not carried into effect, he will not be discharged by a merely gratuitous indulgence, however long it may endure; the material question being, not whether there has been forbearance, but whether there was a contract for delay; see *Nichols v. McDowell*, 14 B. Monroe, 6; *Sailly v. Elmore*, 2 Paige, 497; *Vilas v. Jones*, 10 Id. 76; *Jordan v. Trumbo*, 6 Gill & John. 103; *Draper v. Romeyn*, 18 Barbour, 166; *The United States v. Simpson*, 2 Penna. R. 437; *Menifee v. Clark*, 35 Indiana, 304; *The Atlas Bank v. Brownell*, 9 Rhode Island, 168; *Freanor v. Yingling*, 37 Maryland, 491; 2 American Leading Cases, 466, 5 ed.

Indulgence to the principal is, accordingly, inoperative as a defence, even when granted in pursuance of an express promise, unless the promise is sustained by a consideration and legally valid, and although the creditor refrains from bringing suit notwithstanding a request from the surety that measures should be taken to collect the debt; *Townsend v. Riddle*, 2 New Hampshire, 448; *Tudor v. Goodloe*, 1 B. Monroe, 322; *The Blackstone Bank v. Hill*, 10 Pick. 129; *Hubbard v. Davis*, 1 Aiken, 296; *The Montpelier Bank v. Dixon*, 4 Vermont,



587; *Page v. Webster*, 15 Maine, 249; *Mahurin v. Pearson*, 8 New Hampshire, 539; *Pintard v. Davis*, 1 Spencer, 205; *Bull v. Allen*, 19 Conn. 101; *Broughton v. Duval*, 3 Call, 61; *Jenkins v. Clark*, 7 Hammond, 72; *Meniffee v. Clark*, 35 Indiana, 304. This doctrine is illustrated by the case of *The Adams Bank v. Anthony*, 18 Pick. 238, where it was held that the surety could not defend himself by showing that the creditor had omitted to include the debt in a prior attachment against the principal for another demand, although the amount of property taken under the writ was sufficient to have discharged both debts. And the general rule, that it is the duty of the surety to see that the contract is fulfilled, has been carried to the extent of deciding that the creditor may stop short in a proceeding against the principal, although it would be effectual if prosecuted to judgment, and its discontinuance results in the loss of the debt; *Daniels v. Peterson*, 3 Comstock, 47; *Melton v. Howard*, 7 Howard (Miss.), 103; *Caruthers v. Dean*, 11 Smedes & Marshall, 178. Nor is the right to use all the remedies given by the contract, at the time and in the manner which he may think best, affected by their passing into judgment and becoming a lien on real or personal property. Thus, it has been determined that a failure to issue execution on a judgment which binds the real estate of the principal, or to take proper measures to revive the judgment, by which the lien is lost and the judgment rendered unavailable, is not an exonera-

tion of the surety; *The United States v. Simpson*, 3 Penrose & Watts, 437; *Munsdorff v. Singer*, 5 Watts, 172; *The Farmers' Bank of Ohio v. Reynolds*, 13 Ohio, 84; and the principle is the same where a judgment does not take effect as a lien in consequence of the omission of the creditor to enroll it; *Pickens v. Finney*, 12 Smedes & Marshall, 468.

It has also been held that the surety will not be discharged by the withdrawal of an execution against the principal after it has been placed in the hands of the sheriff, but before actual levy, even where it appears that chattels which were bound by the lien of the execution, and would presumably have been available as satisfaction, were removed by the debtor beyond the reach of process, or levied on and sold by other creditors; *Hetherington v. The Branch Bank at Mobile*, 14 Alabama, 68; *Royston v. Howie*, 15 Id. 309; *Forbes v. Smith*, 5 Iredell, Eq. 369; *Lenox v. Proul*, 3 Wheaton, 520; *Sawyer v. Bradford*, 6 Alabama, 572; *The Union Bank of Tennessee v. Govan*, 10 Smedes & Marshall, 333; *Newell v. Hamer*, 4 Howard (Miss.), 684; *Hunter v. Jett*, 4 Randolph, 104; *McKenney v. Waller*, 1 Leigh, 434; *Alcock v. Hill*, 4 Id. 622; *Humphrey v. Hitt*, 6 Grattan, 509; *Wright v. Yell*, 8 English, 503.

In *Hampton v. Levy*, 1 McCord, Ch. 107, followed in *Lang v. Brevard*, 3 Strobbart, Eq. 59, the same doctrine was applied to a lien on the principal's real estate, arising from his voluntary act, and it was decided that the omission of the

creditor to record a mortgage given as collateral security, by which it was postponed to a subsequent incumbrance, did not exonerate the surety; *ante*, 313, see *Burr v. Boyer*, 2 Nebraska, 265.

But, although the creditor need not take active measures to enforce the payment of the debt, and may, therefore, discontinue those which he has instituted, he is not entitled to relinquish any hold that has actually been acquired, and which might have been made effectual as a means of payment. It is accordingly well settled that when the property of the principal has been attached or taken in execution by the creditor, or when it has been voluntarily delivered to him as a security, the lien cannot be relinquished without discharging the surety to an extent commensurate with the resulting loss; *Mayhew v. Crickett*, 2 Swanston, 193; *Cooper v. Wilcox*, 2 Dev. & Bat. Eq. 90; *The Commonwealth v. Miller*, 8 Serg. & Rawle, 452; *Lichtenthaler v. Thompson*, 13 Id. 157; *The Commonwealth v. Haas*, 16 Id. 252; *Dixon v. Ewing*, 3 Hammond, 280; *The Bank v. Matson*, 24 Missouri, 333; *Baker v. Briggs*, 8 Pick. 122; *Law v. The East India Co.*, 4 Vesey, 829; *Payne v. The Commercial Bank*, 6 Smedes & Marshall, 24; *Carpenter v. Devon*, 6 Alabama 718; *Smeed v. White*, 3 J. J. Marshall, 525; *Givens v. Briscoe*, Ib. 534; *Jones v. Bullock*, 3 Bibb, 467; *The Farmers' Bank of Canton v. Reynolds*, 13 Ohio, 84; *Baker v. Fordyce*, 9 Barr, 275; *Talmage v. Burlingame*, Ib. 21; *Ferguson v. Turner*, 7 Missouri, 497; *Curan v. Colbert*, 2 Georgia,

239; *Brown v. Riggins*, 3 Id. 405; *Richards v. The Commonwealth*, 4 Wright, 146; *Perkins v. McNeese*, 34 Texas, 189; *McMullen v. Hinkle*, 39 Mississippi, 142; *Martin v. Taylor*, 8 Bush, 384; *Springer v. Toothaker*, 43 Maine, 381; *Shenaden v. Parker*, 24 Iowa, 28; *The City v. Willey*, 35 Iowa, 323; *Hurd v. Spencer*, 40 Vermont, 581; *Spangler v. Shiffer*, 19 P. F. Smith, 255; *Freenor v. Yingling*, 37 Maryland, 491. The same result will follow where a mortgage executed by the creditor, and to which the surety might have had recourse as an indemnity, is invalidated by a stipulation for usurious interest, or where such a security becomes unavailing through the laches of the creditor; *Hayes v. Ward*, 4 Johnson, Ch. 123; *Capel v. Butler*, 2 Simmons, 457; *Burgher v. Duphorn*, 9 Gill, 314. So the refusal of a tender by the principal, though not discharging him, will exonerate the surety; *Johnson v. Mills*, 10 Cushing, 503; and where the terms of an executory contract are that payment shall be made in proportion to the amount of work performed, or that a certain sum shall be withheld until the whole is done, they must be observed, and a premature payment will be a defence to an action against the contractor's sureties to recover damages for his default; *Calvert v. The London Dock Co.*, 2 Keen, 639; *Taylor v. Peter*, 23 Missouri, 244; *Bragg v. Shain*, 49 California, 131; 2 American Leading Cases, 477, 5 ed.

It is, notwithstanding, established that the laches of the creditor with regard to the property or securities

held for the debt are not material unless they result in injury, and that the exoneration of the surety will not extend beyond his actual loss; *Ward v. Vass*, 7 Leigh, 135; *Payne v. The Commercial Bank of Natchez*, 6 Smedes & Marshall, 24; *Neff's Appeal*, 9 Watts & Serg. 36; *Everly v. Rice*, 8 Harris, 297; *Succession of Pratt*, 16 La. An. 357; *Burr v. Boyer*, 2 Nebraska, 265; *Benjamin v. Hilliard*, 23 Howard, 149; *Gamble v. Dunklin*, 48 Alabama, 428; *Telegraph Co. v. Barnes*, 39 New York, Sup. Ct. 40; *Vose v. Railroad*, 50 New York, 369; *Berhydt v. Ellis*, 45 Id. 107; *Cummings v. Little*, 45 Maine, 183; *Burr v. Boyer*, 2 Nebraska, 265; although where the act of the creditor is wrongful and impairs a lien or security, the law will presume injury until it is disproved; *Holt v. Bodey*, 6 Harris, 207; *The Bank v. Colcord*, 15 New Hampshire, 119; *Loomis v. Fay*, 24 Vermont, 240; *Neff's Appeal*, 9 Watts & Serg. 36.

It is not easy to reconcile the decisions that the withdrawal of a levy discharges the surety, with those which hold that he will not be discharged by a stay of execution before the goods have been seized. There seems to be no difference in principle between a waiver of the lien arising from the delivery of the writ to the sheriff and of that which exists after it has been levied, because both are binding, although one is liable to be defeated by contingencies which would not affect the other. The only way of overcoming the difficulty is by regarding the former class of decisions as

founded, not on the peculiar equity of the surety, but on the general principle that a levy is *prima facie* evidence of satisfaction, which may be rebutted in the case of a principal debtor by proof that the writ was withdrawn at his instance, or that the goods were restored to him, while a surety is necessarily injured when property which has been taken for the debt is diverted to other purposes; *The Commonwealth v. Miller*, 8 Serg. & Rawle, 452; *The Commonwealth v. Haas*, 16 Id. 252; *Green v. Burke*, 23 Wend. 490; *Cathcart's Appeal*, 1 Harris, 416, 420; *Holt v. Bodey*, 6 Id. 207; *Martin v. Taylor*, 8 Bush. 384; *Miller v. Dyer*, 1 Duvall, 263.

It does not appear that the distinction is recognized by the English courts. In *Williams v. Price*, 1 Simons & Stuart, 581, a direction to the sheriff not to levy under an execution on a judgment which had been assigned to the creditor as a collateral security, was held to discharge the debt; and the case of *Ex parte Mure*, 2 Cope, 63, is to the same effect. The party discharged in these instances was a principal debtor, but the defence would have been at least equally effectual had he been a surety.

The cases which deny the necessity for diligence as against the principal, may, perhaps, be reconciled with those which exact it as to the collateral securities for the debt, by the difference between the remedies which the creditor holds under the contract against the parties, and those which he derives from the parties against third per-

sons. The latter are regarded as trusts requiring diligence, while the former are held by the creditor exclusively for his own benefit, and need not be exercised unless he thinks proper. Thus, it has been seen that a failure to collect a judgment which has been assigned as collateral security will discharge the debt, and with it both the principal and surety. This is obviously because the transfer of the judgment, by placing it beyond the control of the assignor and within that of the assignee, makes it incumbent on the latter to use due diligence to render it effectual as a means of payment. The principle applies wherever a right of action is transferred as a security. In every such case negligence, though passive, will operate as a defence to a subsequent suit for the debt, although it is not always easy to determine the precise point at which negligence begins. The law was so held in *Ex parte Mure* and *Williams v. Price*, and again in *Goodloe v. Clay*, 6 B. Monroe, 236. But as the remedies under the contract are not held in trust for the surety, so he cannot complain of the supineness of the creditor in not using them to enforce the fulfillment of the contract.

Although, therefore, a failure to revive the lien of a judgment against the estate of a third person may discharge the principal, a like failure with regard to a judgment against the principal's estate will not exonerate the surety; see *Mundorff v. Singer*, 5 Watts, 172; *The United States v. Simpson*, 3 Penna. 437. When, however, goods or securities are delivered by the princi-

pal to the creditor on account of the debt, a lien is created which cannot be relinquished without a willful disregard of the surety's equity, involving a loss of the right of recourse against him. As this result does not depend on the peculiar equity of the surety, it may occur between co-sureties or in favor of a principal debtor; *Goodloe v. Clay*; *Nixsen v. Lyell*, 5 Hill, 466. The principle is the same where a levy on the goods of the principal is withdrawn, and would be applicable if a judgment lien on his real estate were released, and not merely suffered to expire; *Nelson v. Williams*, 2 Dev. & Bat. Eq. 118. Such acts fall on the other side of the line which divides negligence from misfeasance, and exonerate the surety by throwing a greater burden on him than he can legitimately be required to bear.

The American courts do not carry the duty of the creditor to take active measures to make the collateral securities for the debt available as far as the English. It is well settled in both countries that if he does any act which impairs their value, he will be answerable for the loss; *Nixsen v. Lyell*, 5 Hill, 466; but our law does not require him to bring suit or issue an execution after the case has gone to judgment; *Burr v. Boyer*, 2 Nebraska, 265; *Ormsby v. Fortune*, 16 Serg. & Rawle, 302; *McLaughlin v. Bovard*, 4 Watts, 308; *Schroepfel v. Shaw*, 5 Barb. 580; 3 Comstock, 446; and it was held in the case last cited that the supineness of the creditor in not collecting a mort-

gage which had been given to secure the debt did not discharge the surety.

By statute, in Georgia, any act of the creditor which injures the surety or increases the risk discharges him. In *Toomer v. Dickerson*, 37 Georgia, 428, the Court held that a failure to record a mortgage resulting in the loss of the lien was such an act; and the same rule was applied in *The Brunswick R. R. Co. v. Hughes*, 52 Georgia, 555, to an unexplained omission to enter judgment on a verdict against the principal debtor.

The weight of authority is that the creditor need not prove the debt against a bankrupt, insolvent, or deceased principal debtor, even when the effect of the omission is to discharge his estate and leave the surety without the means of indemnity. It has accordingly been held that a failure to present a demand to the executors of a deceased co-obligor within the period prescribed by law, will not exonerate his sureties. The remedy is gone, but not the debt, and the surviving obligors are answerable; *Sibley v. McAllaster*, 8 New Hampshire, 389; *Johnson v. The Planters' Bank*, 4 Smedes & Marshall, 165; *Cohen v. The Commissioners of The Sinking Fund*, 7 Id. 437; *Villars v. Palmer*, 67 Illinois, 204. Where, however, the omission to make such proof is a statutory extinguishment of the debt, it will discharge all the parties who are answerable for it, whether as principals or sureties; see *Clark v. Hill*, 9 Vermont, 147; *McCollum v. Hinckley*, Ib. 143; *Gillespie v. Darwin*, 6 Heiskell, 21.

It has been stated that a surety may have recourse to equity to enforce the fulfillment of the contract and make the creditor a party in order to obtain the use of his remedies. But while a court of equity may require the creditor to place every means within his reach at the disposal of the surety, it will not ordinarily go further or compel him to undergo the expense and trouble of a lawsuit for the benefit of one who is himself in default; notes to *Aldrich v. Cooper*, ante, 317.

This is the more just because the surety may by fulfilling his obligation acquire the power of proceeding in his own name against the principal together with the control of all the liens and remedies for the debt. The creditor may, nevertheless, be compelled to prove the debt against the estate of a bankrupt principal, because the surety would otherwise be without a remedy. And where there is reason to believe that a mortgage given by the principal debtor has been invalidated through the fault of the creditor, the court may compel him to bring the matter to a test by proceeding on the mortgage before issuing an execution against the surety; *Hayes v. Ward*, 4 Johnson, Ch. 123; 2 American Lead. Cases, 398, 5 ed.

In *Pain v. Packard*, 13 Johnson, 174, the Supreme Court of New York took it for granted that the surety may require the creditor to collect the debt from the principal; and it was held to be a necessary inference that if the surety makes such a request and it is not complied with, he will be discharged.

In the subsequent case of *King v. Baldwin*, 2 Johnson, Ch. 554; 17 Johnson, 384, Chancellor Kent denied that there is any principle that can entitle the surety to impose the task of enforcing the fulfillment of the contract on the creditor, but his judgment was reversed by the Court of Errors, which affirmed the doctrine of *Pain v. Packard*.

The rule established in these instances is followed in New York, Pennsylvania, Tennessee, Alabama, and some of the other States; *The Manchester Iron Manufacturing Co. v. Sweeting*, 10 Wend. 162; *Cope v. Smith*, 8 Serg. & Rawle, 110; *Hancock v. Bryant*, 2 Yerger, 476; *Lang v. Brevard*, 3 Strobbart, Eq. 59; *Bruce v. Edwards*, 1 Stewart, 11; *Goodman v. Griffith*, 3 Id. 168; *Thompson v. Watson*, 10 Yerger, 362; *Hempstead v. Watkins*, 1 English, 317; *Buckalew v. Smith*, 44 Alabama, 638; *Remsen v. Beekman*, 25 New York, 552; *Thornburgh v. Madren*, 33 Iowa, 380; although it has been determined that the surety will not be discharged unless the failure to comply with his request results in loss, which may appear from proof that the principal was solvent at the time and became insolvent afterwards; *Huffman v. Hurlburt*, 13 Wend. 377; *Herriek v. Borst*, 4 Hill, 650; *Gardner v. Ferree*, 15 Serg. & Rawle, 28; *Cope v. Smith*, 8 Id. 110; *Merritt v. Lincoln*, 21 Barbour, 249; *Weiler v. Hoch*, 1 Casey, 525; nor unless the request to sue is accompanied by an explicit declaration that he will consider himself freed from liability if the creditor does not proceed forth-

with; *Cope v. Smith*; *The Erie Bank v. Gibson*, 1 Watts, 143; *Wilson v. Glover*, 3 Barr, 404; *Greenawalt v. Kreider*, 1b. 264; *Wollesblaren v. Sheales*, 9 Wright, 45; *Shimer v. Jones*, 11 Id. 268; *Conrad v. Foy*, 18 P. F. Smith, 381; *Lockridge v. Upton*, 24 Missouri, 184; see 2 American Leading Cases, 414, 5 ed. There is, moreover, nothing in the decisions to indicate that a request to sue the principal will preclude the creditor from bringing an action against the surety and proceeding to judgment and execution; see *Harriman v. Egbert*, 36 Iowa, 270.

Although the qualification of the doctrine of *Pain v. Packard* by the subsequent course of decision renders it less objectionable, it is still radically unsound, and has been rejected as such in many of the States; *Hubbard v. Davis*, 1 Aiken, 296; *Montpelier Bank v. Dixon*, 4 Vermont, 587; *Page v. Webster*, 15 Maine, 249; *Mahurin v. Pearson*, 8 New Hampshire, 539; *Bull v. Allen*, 19 Conn. 101; *Pintard v. Davis*, 1 Spencer, 205; 1 Zabriskie, 632; *Carr v. Howard*, 8 Blackford, 190; *Croughton v. Duval*, 3 Call, 60; *Dennis v. Rider*, 2 McLean, 451; *Jenkins v. Clark*, 7 Hammond, 72; *Baldwin v. The Western Reserve Bank*, 5 Id. 276; *Hickok v. Bank*, 35 Vermont, 476; *Dane v. Carduan*, 24 California, 158. In others, again, it has been enacted by the Legislature as a convenient method of enabling the surety to obtain a settlement and discharge; *Wright v. Stockton*, 5 Leigh, 153; *Parrish v. Gray*, 1 Humphreys, 88; *Braman v. Howk*, 1 Blackford, 493;

Reid v. Cox, 2 Id. 312; *Halstead v. Brown*, 17 Indiana, 202; *Whittlester v. Heberer*, 48 Id. 260; *Moreland v. The State Bank*, 1 Breese, 207; *Towns v. Riddle*, 2 Alabama, 694; *Howard v. Brown*, 3 Georgia, 523; *Bolton v. Lunday*, 6 Missouri, 46; *Christy v. Horne*, 24 Id. 242; *Lockridge v. Upton*, Ib. 184; *Cockrill v. McCurdy*, 33 Id. 365; *Simpson v. Blunt*, 42 Id. 542; *Peters v. Linenschmidt*, 48 Id. 464; *Nichols v. McDowell*, 14 B. Monroe, 6; *Bank v. Smith*, 25 Iowa, 210; *Harriman v. Egbert*, 36 Id. 270; *Gillilan v. Ludington*, 6 West Va. 128; *Harrison v. Price*, 25 Grattan, 553; *Taylor v. Davis*, 38 Mississippi, 493; *Villars v. Palmer*, 67 Illinois, 204.

Agreeably to the *Black River Bank v. Page*, 44 New York, 453, delay in fulfilling a request to collect a collateral security will not discharge a surety unless it is negligent or corrupt, and results in loss. And in *Wells v. Mann*, 45 New York, 327, the Court held that one who sells a note or bond with a guaranty is not a surety within the rule in *Pain v. Packard*.

It has been stated that although the creditor need not use the remedies for the collection of the debt, he must not take any course which will render them less available as an indemnity. It follows that if the creditor gives time to the principal, that is, if he enters into an agreement for forbearance, he will exonerate the surety. For under these circumstances the right of the principal to postpone the fulfillment of the contract is at variance with that of the surety to resort to a

court of equity to enforce its punctual performance, or to perform it himself and then sue for an indemnity. It is accordingly established that any act of the creditor which precludes the surety from insisting on the fulfillment of the contract as originally made, or entitles the principal debtor to an appreciable delay, is an equitable defence to the surety; *Miller v. McCan*, 7 Paige, 452; *Bangs v. Strong*, 11 Id. 11; 7 Hill, 250; *Rathbone v. Warren*, 10 Johnson, 587; *Huffman v. Hurlburt*, 13 Wend. 377; *Hubbell v. Carpenter*, 5 Barbour, 526; *Smith v. Townsend*, 25 New York, 479; *Grant v. Smith*, 46 Id. 93; *Greely v. Dow*, 2 Metcalf, 176; *Dundas v. Sterling*, 4 Barr, 73; *The Manufacturers & Mechanics' Bank v. The Bank of Pennsylvania*, 7 Watts & Serg. 335; *Neff v. Horner*, 13 P. F. Smith, 327; *Austin v. Dorwin*, 21 Vermont, 38; *The Grafton Bank v. Woodward*, 5 New Hampshire, 99; *Bailey v. Adams*, 10 Id. 162; *The Savings Bank v. Ela*, 11 Id. 335; *The Merrimack Bank v. Brown*, 12 Id. 320; *Fowler v. Brooks*, 13 Id. 240; *McComb v. Kittridge*, 14 Ohio, 348; *The Branch Bank of Mobile v. James*, 9 Alabama, 949; *Cox v. Mobile Co.*, 44 Id. 611; *Chute v. Pattee*, 37 Maine, 102; *Apperson v. Cross*, 5 Heiskill, 481; *Barnes v. Pilgrim*, 24 Texas, 385; *Chustner v. Brown*, 16 Iowa, 130; *Chickasaw Co. v. Pitcher*, 36 Id. 594; *Martin v. Thomas*, 24 Howard, 315; *Smith v. United States*, 2 Wallace, 219; *Darwin v. Rippey*, 63 N. Car. 318; *Boynnton v. Phelps*, 52 Illinois, 210; *Robinson v. Miller*, 2 Bush,

179; *Rose v. Williams*, 5 Kansas, 483; *Fornacht v. Winkelman*, 21 La. An. 727; *Rowan v. Sharp's Rifle Co.*; 21 Conn. 1; *Bragg v. Shain*, 49 California, 131; *Button v. Drenkler*, 46 Missouri, 391. It is not essential to this result that the debt should be actually suspended, it is enough if there be an agreement for delay which a chancellor would enforce; *Austin v. Dorwin*; *Moss v. Hall*, 5 Exchequer, 46; *Frazer v. Jordan*, 8 Ellis & Bl. 303, 309; *Albany Co. v. Deventorf*, 43 Barbour, 445; *Bank v. Tinsdell*, 55 Id. 602. The effect will be the same where the contract is varied as it regards the place or manner of performance, by an agreement between the principal debtor and the creditor without the consent of the surety, because the surety is not a party to the new contract, and cannot insist on the fulfillment of that which was made in the first instance. He is, therefore, entitled to resist a suit on the former as not bound by its terms, and on the latter because a recovery upon it would leave him without indemnity, or make the principal indirectly liable on a contract which has ceased to be operative; *Mayhew v. Boyd*, 5 Maryland, 102; *Gass v. Stinson*, 2 Sumner, 453; *Sasscer v. Young*, 6 Gill & J. 243; *Watriss v. Pierce*, 32 N. Hamp. 560. The rule is irrespective of the form of the agreement and of whether the surety is directly answerable or merely as an indorser or guarantor; *The Bank of the United States v. Hatch*, 6 Peters, 250; *Smith v. Rice*, 27 Missouri, 505; and the alteration of an

agreement will discharge one who has given his note as a collateral security for its fulfillment, unless he is informed of the change and assents; *Bingham v. Wentworth*, 11 Cushing, 123.

Although the discharge of the surety by time given to the principal grows out of the relation between them, it may occur where the surety has made himself answerable at the creditor's request, and without the knowledge or assent of the principal debtor. For, although the law does not afford an indemnity to one who makes himself answerable for the debt of another without consulting him, yet a court of equity regards a payment made in pursuance of such a guaranty, as a purchase entitling the guarantor to protection against any act by which the value of his acquisition will be diminished. Whether the right of subrogation grows out of a contract with the principal debtor or with the creditor, it is the same in principle and has an equal claim to the favor of a court of equity. If, therefore, the creditor varies the contract, he will discharge every one who has guaranteed its fulfillment, although at his instance and not at that of the debtor; *Carter v. Jones*, 5 Iredell, Eq. 105; *Matthews v. Aiken*, 1 Comstock, 595; *Talmage v. Burlingame*, 9 Barr, 21; *Peake v. Dorwin*, 25 Vermont, 28.

In like manner, the alteration of a note or other written instrument, although with the consent of the principal debtor and conformably to the original agreement with him, will discharge the sureties unless

they also agree; *Fulmer v. Seitz*, 18 P. F. Smith, 237; *Neff v. Horner*, 15 Id. 327; *Hanson v. Crawley*, 41 Georgia, 303; *Britton v. Durker*, 46 Missouri, 591; *Hart v. Clouser*, 39 Indiana, 210. See *Kountz v. Kennedy*, 15 P. F. Smith, 187; *Cooke v. The U. S.*, 2 Wallace, 218.

It has been stated that the misfeasance of the creditor in dealing with the securities for the debt is not an equitable defence unless it is prejudicial, and then only to the extent of the ensuing loss; but it is well settled that when the contract is varied, either as it regards the time or manner of performance, a court of equity will discharge the surety without further inquiry, because the question whether the alteration is beneficial or the reverse depends on circumstances that cannot always be judicially ascertained, and the surety can no longer require the principal to fulfill the contract in its original form; *Smith v. Rice*, 27 Missouri, 505; *Mayhew v. Boyd*, 5 Maryland, 102; *Pipkin v. Bond*, 5 Iredell, Eq. 91; *Miller v. McCann*, 7 Paige, 452; *Bangs v. Strong*, 11 Id. 11; 7 Hill, 250; *Comegys v. Booth*, 5 Stewart, 14; *Davis v. The People*, 1 Illinois, 409; *Rathbun v. Warren*, 10 Johnson, 587; *Huffman v. Hurlburt*, 13 Wend. 377; *Wilson v. Edwards*, 6 Lansing, 134; *Bethune v. Dozier*, 10 Georgia, 235; see *Huline v. Coles*, 2 Simons, 12; *Ghan v. Neimcewicz*, 8 Paige, 614; *Bonney v. Bonney*, 29 Iowa, 448; *Rowan v. Sharp's Rifle Co.*, 21 Conn. 1; *U. S. v. Corwine*, 1 Bond, 339; *Toomer v. Dickerson*, 37 Georgia, 428; *Fulmer v. Seitz*, 18 P. F. Smith, 237;

Grant v. Smith, 46 New York, 93; *Clippinger v. Creps*, 2 Watts, 45; *Boschert v. Bizon*, 22 P. F. Smith, 372, 375.

As the discharge of the surety by a variation of the contract does not depend on whether it is prejudicial, it may, perhaps, take place although he has been indemnified by the principal. See *Myers v. Wells*, 5 Hill, 436; *Rittenhouse v. Kemp*, 37 Indiana, 258. But his right in this regard is equitable and cannot be exercised without placing the property or securities which he has received from the principal in the hands of the creditor; *ante*, Vol. 1, p. 174, notes to *Dering v. Winchelsea*; *Carrigan v. Noble*, 9 Barr, 366; *Smith v. Steele*, 25 Vermont, 427; *Hayden v. Brown*, 18 Alabama, 641; *Moses v. Murgatroyd*, 1 Johnson, Ch. 119; *Chilton v. Robbins*, 4 Alabama, 223; *Eastman v. Foster*, 8 Metcalf, 19; *Curtis v. Tyler*, 9 Paige, 432; *Vail v. Foster*, 4 Comstock, 312; *Paris v. Hulett*, 26 Vermont, 308;

The surety will be discharged if the right to enforce the debt be suspended for any period, however brief, and forbearance for a day will have the same effect as if it were for a month or for a year; *Pipkin v. Bond*, 5 Iredell, Eq. 91; *Bangs v. Strong*, 7 Hill, 250; *Fellows v. Prentiss*, 3 Denio, 512; *Okie v. Spencer*, 2 Wharton, 253; *Miniffee v. Clark*, 35 Indiana, 304; *Apperson v. Cross*, 5 Heiskell, 481; *Huff v. Cole*, 45 Indiana, 300; but this result will not ensue unless the agreement of the creditor is sufficiently definite to bind him to delay. See *Miller v. Stem*, 2 Barr, 286;

Creath v. Sims, 5 Howard, 192; *Norris v. Crumney*, 2 Randolph, 323; *Alcock v. Hill*, 4 Leigh, 622; *Chichester v. Mason*, 7 Id. 244; *Amistead v. Wallace*, 2 Patton & Heath, 504; *Newell v. Hamer*, 4 Howard (Miss.), 684; *Parnell v. Price*, 3 Richardson, 121; *The Bank of Utica v. Ives*, 17 Wend. 501; *The Board of Police v. Covington*, 24 Mississippi, 470. Although, therefore, a promise not to enforce the contract during a time which is certain or susceptible of being reduced to certainty, as, for instance, a reasonable time, will exonerate the surety, this result will not follow from an indefinite promise of forbearance. The criterion is, would the creditor have made himself liable to the principal by proceeding against him immediately after giving the promise? for if he would not, the legal relation of the parties is unchanged, and there is no equitable ground for the exoneration of the surety. See *Moss v. Hall*, 5 Exchequer, 46, 50; *Frazer v. Jordan*, 8 Ellis & Bl. 303, 309; *Philpot v. Briant*, 4 Bingham, 117; *Reynolds v. Ward*, 5 Wend. 501; *Leavitt v. Savage*, 16 Maine, 72; *Harnsberger v. Geiger*, 3 Grattan, 144; *Hayes v. Wells*, 34 Maryland, 512; *Jarvis v. Hyatt*, 43 Indiana, 463. An agreement to wait for a definite period and a sufficient consideration for its support are consequently essential to a defence founded on an allegation that the principal debtor has been indulged. *Frazer v. Jordan*, 8 Ellis & Bl. 303, 310; *Marshall v. Aiken*, 25 Vermont, 328; *Deal v. Cochran*, 66 North Carolina, 269

In order, moreover, to discharge the surety on the ground of the postponement of the period at which the principal can be compelled to fulfill the agreement, it must appear that the delay is real, and a contract between him and the creditor for a confession of judgment, with a stay of execution, will not exonerate the surety where it appears that judgment was entered sooner than it could have been without the aid of the agreement, so that the remedy on the contract was in fact accelerated and not retarded; *Barker v. McClure*, 2 Blackford, 14; *Hallett v. Holmes*, 18 Johnson, 28; *Fletcher v. Gamble*, 3 Alabama, 335; *Suydam v. Vance*, 2 McLean, 99; *Price v. Edmunds*, 10 B. & C. 578; *Hulme v. Coles*, 2 Simons, 12; and it has been said that the surety will not be discharged by an immaterial variation of the contract, nor where it could not have been prejudicial to him in any event; *Hollier v. Eyre*, 9 Cl. & F. 1, 52; *Amicable Life Insurance Co. v. Sedgwick*, 110 Mass. 163; *Roach v. Simmons*, 20 Wallace, 165; *Clairborne v. Bank*, 42 Texas, 98; *Gardiner v. Harbick*, 21 Illinois, 129. But every agreement which fixes a subsequent period for the entry of judgment, and precludes the creditor from proceeding until then, is *prima facie* a defence, unless it distinctly appears that judgment could not have been obtained and execution issued at an earlier day in the ordinary course of legal procedure; and the courts have in some instances refused to enter upon an investigation of this question, or allow the creditor to show that time was gained by the

seeming delay; *Clippinger v. Creps*, 2 Watts, 45; *Bower v. Tiemann*, 3 Denio, 378; *Young v. Littlejohn*, 2 Hawks, 526; *Comegys v. Booth*, 3 Stewart, 14.

It is well settled that an agreement to give time to the principal, or vary the contract in any other particular, will not exonerate the surety when made with a reservation of his equity, for under these circumstances he is still entitled to insist on a fulfillment of the contract as originally framed, or to perform it himself, and then look to the principal for indemnity. The only way in which such an agreement can affect him is by inducing the creditor to forbear longer than he might otherwise have done, and as it is not incumbent on the latter to be diligent, there can be no right to complain of his entering into an agreement for delay which does not tie the hands of the surety; *Claggett v. Salmon*, 5 Gill & Johnson, 314; *Bangs v. Strong*, 10 Paige, 11; *Prout v. The Branch Bank*, 7 Alabama, 309; *Viele v. Hoag*, 24 Vermont, 46; *Voiles v. Green*, 43 Indiana, 374. The result will, moreover, be the same where the creditor reserves the right to proceed against the surety, which necessarily implies that the surety may protect himself by proceeding against the principal; *Willis v. De Castro*, 4 C. B. N. S. 215; *Nicholls v. Morris*, 3 B. & Ad. 41; *Hubbell v. Carpenter*, 1 Selden, 171; *Lohier v. Loring*, 6 Cushing, 537; *Hearsley v. Cole*, 16 M. & W. 128; *Yates v. Donaldson*, 5 Maryland, 389; *Campbell v. Booth*, 8 Id. 107; *Lysaght v. Phillips*, 5 Duer,

100; *Hagey v. Hill*, 25 P. F. Smith, 108; *Hunt v. Knox*, 34 Miss. 655.

It is obvious that the surety cannot complain of a variation to which he agreed, whether his assent was given at the time of entering into the contract or afterwards (*Reddish v. Watson*, 5 Ohio, 510; *Baldwin v. The Western Reserve Bank*, 5 Id. 273; *Hunter v. Jett*, 4 Raudolph, 104; *Suydam v. Vance*, 2 McLean, 99; *Ammons v. Whitehead*, 31 Mississippi, 99; *Bruen v. Marquand*, 17 Johnson, 58; *Hollier v. Eyre*, 9 Clarke & F. 1; *Furber v. Bassett*, 2 Duvall, 433; *Treat v. Smith*, 54 Maine, 112; *Adams v. Way*, 32 Conn. 160; *Wright v. Storrs*, 32 New York, 691; 6 Bosworth, 600; *Rice v. Isham*, 4 Abb. App. Dec. 37; *Voiles v. Green*, 43 Indiana, 374), and whether it was expressed in terms or implied from usage, or the previous dealings of the parties; *The Strafford Bank v. Crosby*, 8 Maine, 191; *Alcock v. Hill*, 4 Leigh, 622. Hence, one of the makers of a note who executes it as surety, with a view to its being discounted at bank for the benefit of the principal, will not be discharged by its renewal at maturity, if he knew when he affixed his signature that the course of business in the part of the country where the transaction occurred was to renew such notes on receiving the interest in advance, or a part payment of the principal; *The Strafford Bank v. Crosby*, 8 Maine, 191; *The Freeman's Bank v. Rollins*, 13 Id. 202; *Crosby v. Wyatt*, 23 Id. 156; *The Oxford Bank v. Lewis*, 8 Pick. 458; *The Blackstone Bank v. Hill*,

10 Id. 129. But his assent will not be implied without proof that such was the usual course of business, and that it was known to the surety; *Crosby v. Wyatt*, 10 New Hampshire, 318; *The Savings Bank v. Ela*, 11 Id. 335.

To render an alleged gift of time an equitable defence, it must appear that time was actually given, or, in other words, that something was said or done which varied the obligation of the principal and entitled him to postpone the fulfillment of the contract. Hence, a promise of forbearance will not exonerate the surety if it is wanting in any of the requisites to a valid agreement. The question in every such case is, could the promise have been enforced by the principal as a defence or cause of action, for if it could not it is legally invalid, and will not be an equitable discharge; *Dra-per v. Romeyn*, 8 Barb. 166; *Tou-sey v. Bishop*, 22 Iowa, 178; *Hunt v. Postlewait*, 28 Id. 427; *Davis v. Graham*, 29 Id. 514; *Oberndorff v. Bank*, 31 Maryland, 126; *Hayes v. Wells*, 34 Id. 512; *Rucker v. Robinson*, 38 Wisconsin, 154; *Lane v. Kennedy*, 23 P. F. Smith, 182, 193. This definition was cited and adopted by Isham, J., in delivering judgment in *Wheeler v. Washburn*, 24 Vermont, 293, and would seem to be well founded in the general course of decision.

In the absence of a seal or a consideration a new agreement between the creditor and principal is necessarily inoperative, and cannot therefore be relied on by any of the parties to the contract; *Lane v. Kennedy*; *Brubaker v. Okeason*, 12

Casey, 519; *McLemore v. Powell*, 12 Wheaton, 554; *Creath v. Sims*, 5 Howard, 192; *Bailey v. Adams*, 10 New Hampshire, 162; *Clairborne v. Bank*, 42 Texas, 98; *Blackstone Bank v. Hill*, 10 Pick. 129; *Bagley v. Buzzell*, 19 Maine, 88; *Wayne v. Kirby*, 2 Bailey, 551; *Rhoads v. Frederick*, 8 Watts, 448; *Sharp v. Fagin*, 3 Sneed, 541. What is a consideration for such a contract depends on the principles which apply when other contracts are in question; but it may be said in general that a promise by one of the parties to an agreement to waive or vary any right which it confers, will uphold a promise by the opposite party not to enforce the agreement as originally made; and it is not less well settled that where the consideration for a promise of forbearance is legally sufficient, a court of equity will not inquire whether it is adequate; *Whittle v. Skinner*, 23 Vermont, 331. Hence, a promise by a principal debtor to pay part of the debt before it matures, is a consideration for a promise to give time for the payment of the residue, which will exonerate the sureties (*Uhler v. Applegate*, 2 Casey, 140; *Austin v. Dorwin*, 21 Vermont, 38; *Matthewson v. Bank*, 45 New Hamp. 104; *Woodford v. Dow*, 34 Illinois, 424; *Hunt v. Knox*, 34 Mississippi, 653; *Hartman v. Danver*, 24 P. F. Smith, 36; *Crawford v. Gaveden*, 33 Georgia, 173), although an agreement for time cannot be sustained by a promise to fulfill an obligation which is already due; *McCann v. Dermott*, 13 New Hamp. 528; *Jarvis v. Hyatt*, 43 Indiana,

163; *Abel v. Alexander*, 45 Id. 323; *David v. Malone*, 48 Alabama, 428; *Sharp v. Fagin*, 3 Sneed, 541; So the payment of interest in advance is *prima facie* evidence of an agreement for forbearance, and consequently a defence to the sureties in the original agreement; *The Bank v. Pearce*, 31 Vermont, 711; *Preston v. Henning*, 6 Bush, 556; *Christner v. Brown*, 16 Iowa, 136; *Rose v. Williams*, 5 Kansas, 483; *Abel v. Alexander*, 45 Indiana, 523; *Hamilton v. Winterrowd*, 43 Id. 393, 399. The question is, nevertheless, one of intention, and the court will not infer a contract to extend the debt where the acts and declarations of the parties show that such was not their design; *Hunt v. Postlewait*, 28 Iowa, 427; *Davis v. Graham*, 29 Id. 514.

It has been held in some instances that a promise to pay the debt with interest at a future day, is not a consideration which will sustain an agreement for forbearance, or discharge the surety, because it gives the creditor nothing that he might not have had without the promise; *Abel v. Alexander*, 45 Indiana, 523; and such is undoubtedly the rule, unless a higher rate of interest is reserved, or the effect is to preclude the payment of the debt before the time fixed by the new agreement. See *Hess v. Cole*, 45 Indiana, 300; *McComb v. Kirtidge*, 14 Ohio, 348; 2 American Lead. Cases, 469, 5 ed.; *The Wakefield Bank v. Truesdell*, 55 Barb. 602.

"When a debtor," said Worden, J., in *Hamilton v. Winterrowd*, 43

Indiana, 396, "pays to his creditor interest in advance on money which he owes him and the creditor receives it as such, in the absence of any understanding to the contrary the implication is irresistible that the debtor is to have the use of the money during the time for which interest is paid, and that the creditor shall forbear collection during the same time. We think the law clearly implies an agreement for forbearance in such case. We are aware that in Massachusetts, and some other States following her, a contrary doctrine has been apparently held, but other authorities sustain the view which we take of the law in this respect; *Crosby v. Wyatt*, 10 New Hamp. 318; *New Hampshire Savings Bank v. Colcord*, 15 Id. 119." See *Jones v. Brown*, 11 Ohio N. S. 601, 609.

A surety will not be discharged by an agreement to forbear proceeding against the principal debtor unless it is so far fulfilled by the latter that it could be enforced by him; and when the consideration is performance as distinguished from a promise to perform, the burden is on the surety to show that the consideration was actually given; see *Vernon v. Farley*, 1 M. & W. 316; *Leavitt v. Savage*, 16 Maine, 72; *Hunt v. Knox*, 34 Miss. 655.

A declaration that the debt has been discharged by the principal, or a promise to look exclusively to him, which would be a *nudum pactum* and inoperative if regarded merely as a contract, may, nevertheless, discharge the surety by leading him to surrender the securities for the

debt to the principal or to omit proceeding against him; see *Carpenter v. King*, 9 Metcalf, 511; *Wilson v. Green*, 25 Vermont, 450; *Hogeboom v. Hussick*, 4 Id. 131; *Baker v. Briggs*, 8 Pick. 122; *Harris v. Brooks*, 21 Id. 195; *The Westmoreland Bank v. Klingensmith*, 7 Watts, 523; *Kingsley v. Vernon*, 4 Sandford, 361.

In like manner the surety will not be freed from liability by an agreement for time of which the consideration is usurious; *Vilas v. Jones*, 1 Comstock, 274; *Schroepfel v. Shaw*, 5 Barb. 580; *Pyle v. Bostock*, 10 Alabama, 589; 11 Id. 256; *Tudor v. Goodloes*, 1 B. Monroe, 322; *Pyke v. Clark*, 3 Id. 262; *Scott v. Hull*, 6 Id. 285; *Anderson v. Mannon*, 7 Id. 217; *Mount v. Tuppy*, 7 Bush, 617; *Standclift v. Allen*, 14 Vermont, 258; *Meiswinkle v. Jung*, 30 Wisc. 361; *Hunt v. Postlewait*, 28 Iowa, 427; *Halstead v. Brown*, 17 Indiana, 202; *Abel v. Alexander*, 45 Id. 530 (overruling *Pierce v. Goldsberry*, 31 Id. 52); *Galbraith v. Fullerton*, 53 Illinois, 126; *Hartman v. Danver*, 24 P. F. Smith, 36; *Jones v. Trusdell*, 8 C. E. Green, 554; nor where the agreement is invalidated by the statute of frauds; *Agee v. Steele*, 8 Alabama, 948; nor where it does not go into effect in consequence of the non-fulfillment of a condition precedent; *Payne v. The Commercial Bank*, 6 Smedes & Marshall, 24; *Harnsberger v. Geiger*, 3 Grattan, 146; *Hollier v. Eyre*, 9 Cl. & F. 1, 52.

The performance of an illegal agreement may, nevertheless, give rise to a contract which the law

will enforce, and the creditor may consequently exonerate the surety by receiving the consideration for a promise which was made on Sunday, and therefore void; *Uhler v. Applegate*, 2 Casey, 140.

It has also been held, that when usurious interest is paid in consideration of a promise of forbearance, the surety will be discharged, because the creditor is *particeps criminis* and cannot allege the illegality of the agreement as a cause for setting it aside; *Vilas v. Jones*, 10 Paige, 76; *Draper v. Trescote*, 29 Barbour, 401; *Austin v. Dorwin*, 21 Vermont, 38; *Turrill v. Boynton*, 23 Id. 142; *Billington v. Wagoner*, 33 New York, 31; but the soundness of this conclusion has been denied in other instances, on the ground that such agreements are prohibited by statute and merely void; *Armistead v. Ward*, 2 Patton & Heath, 504; *La Farge v. Herter*, 5 Selden, 241; *Galbraith v. Fullerton*, 53 Illinois, 126; and it would seem to be inadmissible, unless the usurious interest is paid in advance; *Vilas v. Jones*; *Pyke v. Clark*, 3 B. Monroe, 262; *Scott v. Hill*, 6 Id. 285; *Patton v. Shanklin*, 14 Id. 325; *Hamilton v. Winterrowd*, 43 Indiana, 393; 2 Am. Lead. Cases, 470, 5 ed.

Agreeably to the weight of authority, the "sureties of an officer, upon his official bond, are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to, and come within the scope of, the particular office, though not for those which

have no connection with it, and cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed;" *Illinois v. Ridgway*, 12 Illinois, 14; *Smith v. Peoria*, 59 Illinois, 413, 425; *The People v. Vilas*, 36 New York, 459; *Mooney v. The State*, 13 Missouri, 71; *Coulter v. Morgan*, 12 B. Monroe, 278; *The People v. McHutton*, 2 Gilman, 216. So a legislative extension of the time within which a public officer is to pay over money, or perform any other duty appertaining to his office, will not exonerate his sureties; *The People v. Vilas*; *The State v. Carleton*, 1 Gill, 249; *Kindle v. The State*, 7 Blackford, 586.

When a parol dispensation with the performance of a sealed agreement is sustained by a consideration it will be enforced by a chancellor, and may consequently be an equitable defence to the parties who have made themselves answerable for the fulfillment of the contract as sureties or guarantors; *Smith v. Turner*, 1 McCord, Ch. 443; *The Bank v. Leavitt*, 5 Ohio, 207; *The Bank v. Hoge*, 6 Id. 17; *Artcher v. Douglass*, 5 Denio, 509; *Dickerson v. The Commissioners*, 6 Indiana, 128; *Locke v. The United States*, 3 Mason, 446; *Steph v. Harvey*, 7 Leigh, 501; *Tate v. Wymond*, 7 Blackford, 240; *Carr v. Howard*, 8 Id. 190; *Yates v. Donaldson*, 5 Maryland, 389; *Devers v. Ross*, 10 Grattan, 252.

The effect of such a waiver as a legal defence depends on whether the surety has made himself primarily answerable for performance by the principal. If A. and B.

enter into a joint bond, one as principal, the other as surety, and A is exonerated from paying at the day, B. will not be discharged, because the license is revocable, and does not preclude the obligee from insisting on an exact fulfillment of the bond; *Davey v. Prendergrass*, 5 B. & Ald. 187. It is well settled that a specialty cannot be varied by parol, except on equitable grounds; *Cordevant v. Hunt*, 8 Taunton, 596; *West v. Blakway*, 2 M. & G. 729; 1 Smith's Leading Cases, 7 Am. ed. The case is widely different where B. covenants that A. shall pay, and if time is given to A., B. will be discharged, because the creditor cannot recover for a default which he has sanctioned, and B. is not bound by the new agreement to which he is not a party; see *The United States v. Howell*, 4 W. C. C. R., 620; *Fleming v. Gilbert*, 3 Johnson, 528; *Langworthy v. Smith*, 2 Wend. 587; *Leavitt v. Savage*, 16 Maine, 72; *Marshall v. Craig*, 1 Bibb, 379; 2 American Leading Cases, 434, 590, 5 ed.

Agreeably to some of the authorities, when judgment is obtained against the surety, he becomes primarily liable, and cannot rely on a subsequent gift of time to the principal debtor as a ground of exoneration; *Bryant v. Rudesell*, 4 Heiskell, 656; *La Farge v. Herter*, 3 Denio, 157; *Naylor v. Moody*, 3 Blackford, 92; *Deberry v. Adams*, 9 Yeager, 52; *Findlay v. The Bank of the United States*, 2 McLean, 44; *Bay v. Tallmadge*, 5 Johns. Ch. 305. These decisions proceed on an erroneous view of the surety's equity, which depends not on his

relation to the creditor, but on his right to an indemnity from the principal debtor, and the consequent obligation of the creditor to do no act by which that right may be frustrated. It follows that as a judgment does not vary the relative position of the principal and surety, so it will not place the surety in a worse position as it regards the creditor, or preclude him from requiring that the remedies of the creditor shall be preserved intact for his benefit. It is accordingly established, under the more recent course of decision, that time given to the principal, or a material variation of the contract in any other particular, will discharge the surety as effectually after judgment as before (*Morton v. Rice*, 19 Missouri, 263; *Smith v. Rice*, 27 Id. 505; *The Commonwealth v. Miller*, 8 Serg. & Rawle, 452; *Potts v. Nathans*, 1 Watts & Serg. 155; *The Manufacturers' Bank v. The Bank of Pennsylvania*, 7 Id. 335; *Talmage v. Burlingame*, 9 Barr, 21; *Boschert v. Brown*, 22 P. F. Smith, 372; *Carpenter v. King*, 9 Metcalf, 511; *Bangs v. Strong*, 10 Paige, 11; 7 Hill, 250; 4 Comstock, 315; *Boughton v. The Bank of Orleans*, 2 Barbour, Ch. 458; *Storms v. Thorn*, 3 Barbour, 314; *Hubbell v. Carpenter*, 5 Id. 520; *La Farge v. Herter*, 11 Id. 159; *Trotter v. Strong*, 63 Illinois, 272), although he may be unable to take advantage of the defence without the aid of a court of equity; see *Smith v. Rice*; *Marshall v. Aiken*, 25 Vermont, 328; *Herrick v. The Ocean County Bank*, 1 Williams, 584.

It has been held that as an in-

dorser who receives value is not a surety, although the form of the instrument renders him a guarantor, he will not be discharged by an agreement to forbear proceeding against the maker after his own liability has been fixed by a judgment; see *Lennox v. Prout*, 3 Wheaton, 520; *Poll v. Ford*, 2 Chitty, 125; *Pitts v. Congdon*, 2 Comstock, 352. Such a conclusion is questionable, because the right of an indorser to subrogation is not less clear than that of a surety, and he may with equal justice complain of any act by which it is prejudiced. The better opinion would consequently seem to be that the relation between the maker and the indorser of a note and the obligation which the holder of it is under as it regards both of them, is not varied by his obtaining judgment; see *Smith v. Rice*; *The Manufacturers' Bank v. The Bank of Penna.*, 7 Watts & Serg. 335.

It is well settled that taking a bill or note payable at a future day for an existing debt, implies an agreement to wait until the instrument matures, which will discharge all the parties who are secondarily liable for the payment of the debt as sureties or guarantors; *Okie v. Spencer*, 2 Wharton, 253; *Mercer v. Lancaster*, 5 Barr, 160; *Myers v. Welles*, 5 Hill, 463; *Fellows v. Prentiss*, 3 Denio, 512; *Bangs v. Mosher*, 23 Barb. 478; *Chickasaw Co. v. Pitcher*, 36 Iowa, 593; *Brooks v. Wright*, 13 Allen, 72; *Andrews v. Marrett*, 58 Maine, 539; *Appleton v. Parker*, 15 Gray, 173; 2 American Leading Cases, 275, 5 ed. The inference is, nevertheless, one

of fact, and may be repelled by proof that the note was taken as collateral security and not as conditional payment; *Armistead v. Ward*, 2 Patton & Heath, 504; *Elwood v. Deifendorf*, 5 Barb. 398; *Weakly v. Bell*, 9 Watts, 273; *Shaw v. The Church*, 3 Wright, 226; *Ripley v. Greenleaf*, 2 Vermont, 129; *Pring v. Clarkson*, 1 B. & C. 14; *Wade v. Stanton*, 5 Howard, 631; *Paine v. Voorhees*, 26 Wisconsin, 522; *Appleton v. Parker*, 15 Gray, 173. It does not, moreover, arise in the case of rent, or of a debt secured by a bond or judgment; *Paine v. Voorhees*, 26 Wisconsin, 522 (see 2 American Leading Cases, 282), although the opinion of the Court of Exchequer in *Baker v. Walker*, 14 Mees & Welsby, 465, would seem to point the other way.

It is hardly requisite to say that receiving bonds, mortgages, stocks, or value in any other form from the principal, will not affect the position of the creditor as regards the surety, unless he enters into some new agreement which varies or extends the original obligation; *The Bank of Utica v. Ives*, 17 Wend. 501; *Elwood v. Deifendorf*, 5 Barb. S. C. 398; *Remsen v. Graves*, 41 New York, 471; *Wade v. Stanton*, 5 Howard, 631; *The United States v. Hodge*, 6 Id. 279; *Cruger v. Burke*, 11 Texas, 694; *Hernsberger v. Keirney*, 13 Grattan, 511; *Oxley v. Storer*, 54 Illinois, 159; *Spangler v. Shuffer*, 19 P. F. Smith, 255; *Hayes v. Wells*, 34 Md. 512. See *Chickasaw Co. v. Pitcher*, 36 Iowa, 593.

A promise to pay the debt may operate as a waiver of a defence

arising from an alteration of the contract, or the creditor's negligence; *The Bank v. Monmouth*, 66 Illinois, 331; *Morgan v. Peet*, 32 Id. 281; *Fowler v. Brooks*, 13 New Hamp. 241; *Thornton v. Wynn*, 12 Wheaton, 183; *The Amicable Life Ins. Co. v. Sedgwick*, 110 Mass. 163; but this result will not follow unless the circumstances which operate as a discharge are known to the surety at the time of his entering into the new engagement; *The New Hampshire Savings Bank v. Colcord*, 15 New Hamp. 119; 2 American Lead. Cases, 476, 5 ed.

The relation of principal and surety does not depend on the form of the contract, but may exist not only where the surety is jointly bound, but where, as in the case of a note made for the accommodation of the payee, he appears on the face of the instrument as the debtor, and the principal as the person to whom the obligation is incurred; *Lee v. Rook*, Mosely, 378; *Moore v. The Wesley Church*, 10 Barr, 273; *Mauri v. Heffernan*, 13 Johnson, 58; *Apgar v. Hiler*, 4 New Jersey, 812; ante, vol. 1, 164, 186, notes to *Dering v. Winchelsea*.

It is accordingly conceded that one of several joint contractors may show that he entered into the contract for the benefit of the others without sharing in the consideration, and should therefore be indemnified by them; but it has been contended that although this may be done collaterally between parties of the same part, it cannot be done in a suit brought directly on the contract by the party of the opposite part; *Ashbee v. Pidduck*,

1 M. & W. 564; *Ward v. Johnson*, 6 Munford, 6; *Steptoe v. Harvey*, 7 Leigh, 501; *Deberry v. Adams*, 9 Yerger, 52; *Dozier v. Lea*, 7 Humphreys, 520; *Pintard v. Davis*, 1 Zabriskie, 632; *Yates v. Donaldson*, 5 Maryland, 389; *Bull v. Allen*, 19 Conn. 101; *Strong v. Foster*, 17 C. B. 201; *Tate v. Wymond*, 7 Blackford, 240; *Locke v. The United States*, 3 Mason, 446. In *Rees v. Berrington*, Lord Loughborough observed, in conformity with this view, that where the parties are bound jointly and severally the surety cannot aver in pleading that he is a surety; *ante*, 1869. This argument is fallacious, because the motive for reducing the contract to writing is to define the relation between the obligors and obligee, and it does not, therefore, preclude proof of the relation which the obligors bear to each other; *The Farmers' Bank v. Rathbone*, 26 Vermont, 19, 24; 2 American Leading Cases, 429, 442, 5 ed. The weight of authority, accordingly, is that the equity of the surety may be shown, although the contract is under seal and there is nothing on the face of the instrument to indicate that he is not a principal; *Pain v. Packard*, 13 Johnson, 174; *Schroeppel v. Shaw*, 5 Barbour, 580; 3 Comstock, 446; *Artcher v. Douglass*, 5 Denio, 509; *Wilson v. Green*, 25 Vermont, 450; *Holt v. Bodey*, 6 Harris, 207; *The Bank v. Hoge*, 6 Ohio, 17; *The Grafton Bank v. Kent*, 4 New Hamp. 221; *Smith v. Tunno*, 1 McCord, Ch. 443; *Dickerson v. The Commissioners*, 6 Indiana, 128; *Harris v. Brooks*, 21 Pick. 195; *Carpenter v. King*, 9 Metcalf, 511;

The Branch Bank v. James, 9 Alabama, 949; *Rose v. Williams*, 5 Kansas, 483; *Jones v. Fleming*, 15 La. An. 522; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Hollier v. Eyre*, 9 Cl. & F. 1, 51; *Pooley v. Harradine*, 7 Ellis & Bl. 431, 434, 441; *Fowler v. Alexander*, 1 Heiskell, 425; *Rose v. Williams*, 5 Kansas, 483; 2 American Leading Cases, 444, 5 ed. An estoppel should be certain, and will not be deduced inferentially from language which admits of a different interpretation.

The question, nevertheless, depends on the intention of the parties as disclosed by their words, and one who expressly agrees to be answerable as a principal cannot show that he is a surety, or take advantage of the equities incident to that relation. The doctrine was applied in *Sprigg v. The Bank*, 10 Peters, 257; 14 Id. 201, in a suit on a bond, and again in *The Claremont Bank v. Wood*, 10 Vermont, 582, where the question arose on a promissory note.

Agreeably to some of the authorities, the acceptor of a bill of exchange or the maker of a note is within this principle, and cannot rely on his having put his name to the instrument without consideration, for the accommodation of the payee, as a reason why he should be discharged by time given to the latter; *Fentum v. Pocock*, 5 Taunton, 192; *The Bank of Montgomery v. Walker*, 9 Serg. & Rawle, 229; 12 Id. 382; *Lewis v. Hanchman*, 2 Barr, 416; *Murray v. Judah*, 6 Cowen, 484; *Clopper v. The Union Bank of Maryland*, 7 Harris & J. 92; *The Farmers and Mechanics' Bank*

v. Rathbone, 26 Vermont, 19; *The Bank of Ireland v. Beresford*, 6 Dow, 233; *Harrison v. Courtland*, 3 B. & Ad. 36; *The Howard Banking Co. v. Welchman*, 6 Bosworth, 280. The rule was applied in *The Bank of Montgomery v. Walker*, and *Murray v. Judah*, 6 Cowen, 484; and the better opinion seems to be in conformity with these decisions, that one who renders himself primarily liable for the payment of a negotiable instrument cannot show, as against the holder, that his liability is in fact secondary. The inclination of the recent English decisions is, nevertheless, that negotiable instruments are not exceptions to the general rule that a creditor who knowingly prejudices the surety's right to indemnity will be precluded from enforcing the contract as against him. See *Pooley v. Harradine*, 7 Ellis & Bl. 430; *Davies v. Stainbank*, 6 De G. M. & G. 677; *Laxton v. Peat*, 2 Campbell, 185; *Ex parte Glendinning*, 1 Buck, 171; *The Farmers' Bank v. Rathbone*, 26 Vermont, 19.

As the privilege of the surety is an equity, it is not complete without notice, and must be communicated to the creditor in order to be valid as against him; *Hollier v. Eyre*, 9 C. C. & F. 1; *Gahn v. Neimcevicz*, 1 Paige, 614; 11 Wend. 312; *Elwood v. Diefendorf*, 5 Barb. 398; *Wilson v. Foot*, 11 Metcalf, 285; *Agnew v. Merritt*, 10 Minnesota, 308; *Kaign v. Fuller*, 1 McCarter, 419. A maker or obligor who asks to be discharged on the ground that time has been given to a co-contractor without his assent, must consequently show, not only that he is a surety, but that

this was known to the holder or obligee; *Burke v. Cruzer*, 8 Texas, 66. A different view taken in *Holt v. Bodey*, 6 Harris, 207, which puts the burden of inquiry on the creditor, is not sustained by the authorities, and would seem to be erroneous. See *Martin v. Taylor*, 8 Bush. 384; *Miller v. Dyer*, 1 Duvall, 263.

Whether the creditor is informed of the equity at the time of entering into the contract or afterwards, it is equally incumbent on him to do no act that will impair the right of subrogation, or deprive the surety of any just means of indemnity; *The Bank v. James*, 9 Alabama, 949; *Nichols v. Parsons*, 6 New Hamp. 30; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Pooley v. Harradine*, 7 Ellis & Bl. 431. This is the more obvious, because the surety's equity results from the relation which he holds to the principal debtor, and not from the contract with the creditor; *ante*, 1897. Such, at least, is the main current of decision, although an opposite conclusion has been reached in some instances. See *Strong v. Foster*, 17 C. & B. 201; *Manley v. Boycott*, 2 Ellis & Bl. 46; *Yates v. Donaldson*, 5 Maryland, 389.

In *Davies v. Stainbank*, Daniel Davies was held to be discharged from liability, on a bill which he had accepted for the accommodation of his nephew, Benjamin Davies, by an agreement between the latter and the Messrs. Stainbank, who were the holders of the bill, that time should be given for its payment, on proof that they had been informed of the true nature of the transaction before

entering into the agreement with the principal, whether they were or were not acquainted with it in the first instance. This case was cited and approved in *Pooley v. Harradine*, when Coleridge, J., said, "It should be remembered that the acceptances undoubtedly made Daniel Davies a principal debtor, and primarily liable to the payees, and that there seems to have been no trace of any agreement either on the face of or *dehors* the written instruments, as between the creditors, and the acceptor, that he should be, as between them, in the nature of a surety only. Whence then does the equity arise, except from the relation of suretyship existing between the principal debtor and the surety, and from that relation being known to the creditor? Whether that relation must, according to some of the expressions used by learned judges, have been known to the principal at the time of the original transaction is immaterial, with reference to the plea now before us, as it contains an allegation of knowledge by the creditor at the time of the making and receipt of the notes; but we may remark, that there does not appear to have been such knowledge at the date of the original transaction in the case of *Stainbank v. Davies*, 6 De G. M. & G. 679; and if the equity does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of the surety against the principal, the equity would seem to extend to the case of the principal knowing the existence of the relation of suretyship only at the time

of his dealing in such a manner with the principal debtor as to prejudice the rights of the surety. We believe the doctrine laid down in the cases we have cited from the courts of equity is well warranted by the authorities in equity, many of which are collected in the report of the case of *Strong v. Foster*, 17 C. B. 201, and we think it quite consistent with the principle on which the interfering with the rights of the surety against his principal are founded. The surety, we apprehend, on paying the debt, has always a right to require the creditor to sue, or allow him to sue the principal in his, the creditor's, name: and if, to use the words of my brother Williams, in *Strong v. Foster*, 17 C. B. 201, 269, 'the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety.' He has, on this supposition, knowingly and wrongfully interfered with the position and rights of the surety. Now does this right of placing himself, as it is said, in the shoes of the creditor, depend on a prior contract between the creditor and surety, or on an implied duty of the creditor not to injure the surety's rights, when he knows of the relation subsisting between him and his principal? We do not see that by the doctrine asserted in courts of equity the primary liability is at all altered. In truth, the defence, either at law or in equity, does not arise by any alteration of the original contract, which indeed it assumes and relies on in its original terms, but that the creditor cannot fairly or equi-

tably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal. We agree that no defence could be set up by parol which should depend on altering the rights of the creditor on the contract as between himself and the alleged surety as a primary debtor; as, for instance, by making him liable only on default of the principal, or after a request to him; but in truth the surety, in most of the cases where the suretyship is apparent on the deed or written instrument, contracts, not as surety collaterally, but as a principal debtor or covenantor. His being named as surety may operate as proof of notice or knowledge; but his contract is generally that of primary liability. Thus, in the case of common money bonds, the liability is not collateral, but primary, though in bonds and contracts to indemnify it is generally collateral. In the case of money bonds, where the party is sued as surety, there is no contract as between the surety, obligor, and the obligee, of any kind but that which imposes a primary liability: and it may well be argued that it is immaterial whether the knowledge proceeds from a recital in the instrument or from extraneous facts. We conceive that equity would relieve in the case of a co-obligor in a common money bond being made out to be a surety by extrinsic evidence only, if time were given in such a way as to discharge a surety in the ordinary case of principal and surety, when the relation of surety-

ship appears on the face of the instrument. It may be worth remarking that in *Laxton v. Peat*, 2 Camp. 185, one of the earliest cases on this subject, Lord Ellenborough seems to have proceeded on the ground of the plaintiff having notice of the suretyship when he gave the time, as the plaintiff was the indorsee of the bill, and there does not appear to have been evidence of any agreement between him and the surety. The plaintiff, the indorsee, gave value, but had notice of the circumstances of the original formation of the bill; and his giving time, with such knowledge, discharged the surety, although the suretyship, as regarded the indorsee, depended on no agreement with him.

"In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and if this was a plea of a legal defence, we should probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think that we ought to decide it according to what we believe to be the doctrine in courts of equity. At the same time we shall not regret if this important subject should now, or on any future occasion, be reviewed in all its bearings by the court of error.

"We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficient to state that the relation of principal and surety existed between the defendant and the principal debtor *inter se*, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor."

Although proof that one of the parties to a joint contract is a surety does not contradict the writing, the defence which it discloses is an equity that cannot be a subject of judicial consideration in a court governed by the rules of the common law. The remedy of the surety was, therefore, formerly in chancery, as the only tribunal competent to solve the nice and complicated problems growing out of the two-fold relation in which he is at once debtor and creditor. The jurisdiction of the courts of law has been enlarged in some of the States by statute, and a surety may now in general make any defence to a legal proceeding which would be available in a court of equity; *Gifford v. Allen*, 3 Metcalf, 255; *Greely v. Dow*, 2 Id. 176; *Rathbone v.*

Warren, 10 Johnson, 587; *Orosby v. Wyatt*, 10 New Hamp. 318; *The Grafton Bank v. Kent*, 4 Id. 221; *Hutchinson v. Moody*, 18 Maine, 393; *Leavitt v. Savage*, 16 Id. 72; *Davis v. The People*, 1 Gilman, 409; *Waters v. Simpson*, 2 Id. 570; *The People v. McHatton*, Ib. 638; *Holmes v. Dole*, 1 Clark, 71; *Comegys v. Booth*, 3 Stewart, 14; *Inge v. The Branch Bank*, 8 Peters, 108; *Clippinger v. Creps*, 2 Watts, 45; *The Bank of Steubenville v. Hoge*, 6 Hammond, 17; *Wayne v. Kirby*, 2 Bailey, 551; *Dennis v. Rider*, 2 McLean, 451; *Viele v. Hoag*, 24 Vermont, 46. But the change is not universal, and there are cases where it is still requisite to seek the redress in chancery which cannot be had in the ordinary course of legal procedure; *Irick v. Black*, 2 C. E. Green, 189; *The State Bank v. Locke*, 4 Devereux, 529, 547; *Shaw v. McFarlane*, 1 Iredell, 216; *McHaney v. Crabtree*, 6 Monroe, 144; *Lewis v. Harbinger*, 5 B. Monroe, 564; *Manning v. Shotwell*, 2 Southard, 584; *Pintard v. Davis*, 1 Spencer, 205; *The United States v. Howell*, 4 W. C. C. R. 620; *Bull v. Allen*, 19 Conn. 101; see 2 American Leading Cases, 448, 5 ed.

MORTGAGE BY WIFE.

[*1010] *THE RIGHT HON. GEORGE, EARL OF HUNTINGDON *v.* FRANCES, COUNTESS-DOWAGER OF HUNTINGDON.

JANUARY 12, 1702.

REPORTED 2 BRO. P. C. 1, TOML. EDIT. 1

MORTGAGE OF WIFE'S ESTATE OF INHERITANCE FOR THE BENEFIT OF HER HUSBAND—WIFE'S ESTATE CONSIDERED ONLY AS A SURETY.—*A wife joins with her husband in a mortgage of her own inheritance, in order to buy him a place, and the husband covenants to pay the money. He accordingly pays the money, and takes an assignment of the mortgage in trust for himself. The mortgage being for a term of years, the husband devises it for the benefit of his younger children. But it was held, that the eldest son, as heir of the wife, was entitled to have the term assigned as he should direct, discharged from all demands of the younger children.*

By indenture, dated the 25th of November, 1681, and by a fine levied in pursuance thereof, Theophilus, Earl of Huntingdon, and Elizabeth, his then wife, settled certain lordships, manors, lands, and hereditaments, in the county of York, which were the estates and inheritance of the Countess, as one of the daughters and co-heirs-at-law of Sir John Lewis, to the use of the said Countess Elizabeth and her assigns, during her natural life, and after her decease, to the use of the appellant her son, and the issue of his body, with other remainders over, but subject to a power reserved to the Earl and Countess, during their joint lives, to revoke and limit new uses.

Some time afterward, the Earl, being desirous of purchasing the place of Captain of the Band of Gentlemen Pensioners, he [*1011] prevailed with the Countess to join with *him in mortgaging the settled estate, for raising 4500*l.* to make such purchase, *promising to repay the money out of the profits of the place, or otherwise.*

Accordingly, by a deed dated the 1st of August, 1682, the Earl and Countess revoked all the former uses, and declared, that, in consideration of 4500*l.* paid to the Earl by one Cropper, the premises should remain and be to the use of the said Cropper for a term of 1000 years, subject to redemption on payment of the 4500*l.* and interest; and after the expiration, or other sooner determination of the said term, to the use of the said Countess Elizabeth and her assigns, during her natural life, with remainder to the appellant and the issue of his body, and such other re-

¹S. C., 2 Vern. 437; 1 Eq. Ca. Ab. 62; Ca. 4; 4 Vin. 69; Ca. 9; 10 Vin. 345; Ca. 17.

mainders over as were limited by the first settlement. And by this deed the Earl covenanted *that he would pay off the mortgage-money.*

On the 2d of January, 1683 Cropper, together with the Earl and Countess, assigned over this mortgage to one Mr. Newport and Sir William Cooper, subject to a proviso or agreement, that, if the Earl and Countess, *or either of them*, should pay the 4500*l.* and interest, the term of 1000 years should be assigned to the said Earl and Countess, or to one of them, or *as they or either of them should appoint.*

The Earl having afterward paid off this mortgage, procured the term to be assigned by deed, dated the 11th of February, 1687, to Sir John Foach and the respondent Sir Philip Meadows, in trust for the said Earl, his executors, administrators, or assigns; but the Countess did not join, or was privy to this agreement.

On the 24th of December, 1688, the Countess died, and the Earl continued in possession of the estate till his death, applying part of the profits toward the maintenance of the appellant, who ~~was~~ the reversioner, and the residue toward satisfying the debt secured by the said mortgage.

The Earl having six younger children by his second wife, to be provided for out of his personal estate, of which he considered this mortgage-money to be part, **made his will on the* [1012] 11th of April, 1698, and thereby devised the said mortgage, and all other his personal estate, to the respondent Dr. Gery, his executor, in trust for his said six younger children.

In 1701 the Earl died; and in Michaelmas Term in that year, the appellant exhibited his bill in the Court of Chancery against the respondents, praying an account of the rents and profits of the estate from the death of his mother; and that the defendant Sir Philip Meadows, as the surviving trustee of the 1000 years' term, might surrender or assign the same, to attend the inheritance, free from incumbrances.

The cause being at issue, was heard before the Lord Keeper Wright, on the 12th of May, 1702;¹ when his Lordship decreed an account to be taken of what rents and profits had been received by the late Earl out of the mortgaged premises since the death of the Countess Elizabeth; and that the same, after a reasonable allowance to be thereout made for the plaintiff's maintenance and education, and other just allowances, should be applied toward the discharge of the said mortgage; and, on payment of what should appear to be remaining due thereon, to the defendant Dr. Gery, in trust for the defendants the infants, the mortgage was to be assigned to the plaintiff, or as he should appoint.

From this decree the plaintiff appealed, insisting that he was thereby, in effect, decreed to pay the mortgage debt, which was wholly a debt of the late Earl, created to serve his particular oc-

casions, and never was in any shape the debt of the late Countess, nor did any part of the money come to her use; besides, the Earl covenanted in the mortgage deed to pay and satisfy the mortgage-money and interest; and this covenant being in fact performed, the term ought not any longer to have been kept on foot, unless to protect and defend the inheritance, but not to charge it. That the appellant's mother being, at the time of making this mortgage, tenant for life, with remainder to the appellant in tail, and the premises being her own *inheritance, the same ought not to be charged further or otherwise than she agreed or consented: and it could not be imagined that she agreed to charge her land any otherwise than to stand as a security for the money which her husband had occasion for, and was thereby enabled to borrow, and to be exonerated when he, the principal debtor, should pay off the debt; but she never meant to make any absolute gift of so much money to her husband, or that her estate should stand mortgaged to him, or in any trust for him, for that or any other sum. That it appeared by proof in the cause, that the Earl, in order to gain the Countess' consent to the mortgage, had promised that he would pay off the money and discharge the land; but, if the Earl had made no such promise, yet he ought not in conscience to be deemed a mortgagee or incumbrancer upon the estate, for having discharged his own debt, which he alone was liable to pay, and to be sued for, by virtue of his covenant; and it was not agreeable, either to reason or experience, that a principal debtor, merely by paying the debt he owes, should become a creditor, and charge his own surety with the payment of the debt, by any means or contrivance whatever.

On the other side, it was contended that the late Earl was compellable to discharge the land of this debt; nor did the Countess, when she agreed to mortgage the premises for raising the 4500*l.*, desire or insist on any covenant or agreement for that purpose; but on the contrary, by the assignment of the mortgage in January, 1688, it was expressly agreed, that, on payment of the 4500*l.*, the term should be assigned to the Earl and Countess, or as they or *either of them* should direct. That the Earl was so far from intending to exonerate the land by his paying off the mortgage-money, that he not only took care to have the mortgage assigned and kept on foot, but also, considering himself as a creditor for the money so advanced, he constantly, after the death of the Countess, kept regular and exact accounts of his receipts and payments relating to the mortgaged premises. That it was [*1014] certainly as lawful for *the Earl to lay down the money, and take an assignment of the mortgage, as it would have been for any other person to have done; and therefore, it was but reasonable that he should have the like benefit thereof, to reimburse what he paid of such assignment, as a stranger might have had; and since the Earl had thought fit to leave his money due on the mortgage as a provision for his six younger

children, who had very slender fortunes, and a narrow subsistence, it was hoped that there would appear no ground or reason to reverse or alter his decree.

But after hearing counsel on this appeal, it was ordered and adjudged, that so much of the decree as was complained of should be discharged from any demands which the respondents, the Countess of Huntingdon, or her children, or their trustees, or either of them, pretended to have, in respect of the 4500*l.* and interest; and that the term should be assigned as the appellant should direct or appoint; and that the profits of the estate in question, which grew due and were received by the late Earl after the death of the late Countess, or by his executors since his death, should be accounted for to the appellant, without being discounted out of the money pretended due on the mortgage; but the Master to whom the account stood referred was to make the respondents all such allowances for the appellant's maintenance and education, and for all moneys laid out and expended in or about the management and preservation of the said estate, and all other just allowances as in the decree were directed.

It is a well-established general rule, that whenever husband and wife mortgage the estate of inheritance of the wife for the benefit of the husband, the wife or her heir will be entitled, after the death of the husband, to have it exonerated out of the real and personal estate of the husband, her estate being considered only as a surety for his debt. Even a creditor of the wife, upon the refusal of her representatives to take proceedings, may file a bill *to obtain exoneration: *Lancaster v. Evors*, 10 Beav. 154, 266. And see *Stamford, Spalding, and Boston Railway Company v. Ball*, 31 L. J. N. S. Ch. 143. [*1015]

The principal case is usually referred to, as the earliest and leading authority on the subject. In *Pocock v. Lee*, 2 Vern. 604, A. and his wife mortgaged the wife's estate, and A. covenanted to pay the money, but the equity of redemption was reserved to them and their heirs. Upon the death of the husband the question was, whether the mortgage-money should stand charged upon the land, or the land be exonerated out of the husband's personal estate: et per Cur. "The husband, having had the money, is in equity the debtor, and the land is to be considered but as an additional security, and so decreed it according to the judgment in the House of Peers, in the case of *Lord and Lady Huntingdon*." Again, in *Tate v. Austin*, 1 P. Wms. 264, the wife joined with her husband in a fine to raise 500*l.* by way of mortgage out of her own estate, to supply her husband's occasions, and particularly to purchase him a commission in the army. The husband having given legacies out of his personal estate to several charities, and being indebted by simple contract, the question was

to what extent, if any, the widow's estate was entitled to exoneration out of her husband's assets. Lord Cowper held, that her estate was entitled to exoneration in preference to the legacies; but he also held, erroneously, it will be submitted, that the debts of the husband, even by simple contract, should be preferred to the claims of the wife. "The mortgage," said his Lordship, "is a debt of the husband, which must be paid before legacies; and the wife, by consenting to charge her land with it, does not make it less his debt than it was before; the personal estate shall be liable to pay debts before legacies, though to a charity, for they are still but legacies; but all other debts of the husband shall be preferred to this; everything shall be taken favorably for the wife, who, for the supplying the husband's occasions, has agreed to charge her land with a debt of his. The fine and deed of uses by which the mortgage is created are but as one conveyance; so that these legacies, though for a charity, are to be left unpaid, since it appears there are not assets of the husband to pay both the mortgage and the legacies.

"On this occasion, the Lord Chancellor put the counsel in mind of *Lord Huntingdon's case*, where husband seized in fee in right of his wife, did with his wife by deed and fine mortgage her estate for 500 years, remainder to the use of the wife in fee. The mortgage was to raise a sum of money for the use of the husband, *to buy him a place, which [*1016] accordingly he did buy, and thereby got money and paid off the mortgage, taking an assignment of it in trust for himself, his executors, and administrators; afterward, the husband and wife died, and the heir of the wife brought his bill to exonerate the inheritance, and to have this mortgage paid off out of the husband's personal estate. And though it was decreed by Lord Keeper Wright (2 Vern. 437), that the heir of the wife was not entitled to have the personal estate of the husband so applied, yet upon an appeal to the House of Lords, that decree was reversed, and the mortgage decreed to be paid out of the husband's personal assets; which Lord Cowper thought very just." See *S. C.*, 2 Vern. 689.

The late Mr. Jacob, in a learned note, has clearly shown, that, as the wife is a surety, she is to be paid her debt out of his estate, with other creditors, according to its degree, and is not to be postponed to them, as Lord Cowper thought in *Tate v. Austin*. "The reports," he observes, "of the case of *Tate v. Austin* do not state the principle upon which it was decided, that the amount of the mortgage, which was admitted to be a debt due from the husband, was to be postponed to his other debts. The decision appears to have been sanctioned by Lord Thurlow, in *Clinton v. Hooper*: according to the report in 1 Ves. jun. 189, his Lordship, speaking of the wife's right to exoneration, said, the cases obliged him to put it in the same way as between heir and executor; for this reason, that an assumpsit between man and wife would not be raised more in equity than at law. If this reason were conclusive, it would be difficult to say why the wife should, in any case, be entitled to claim this exoneration. But

if, on the other hand, the law considers the wife, when mortgaging her property for her husband's debt, to stand in the situation of a surety, it seems to follow, that she must be invested with the usual rights of a surety, and, therefore, that she must be entitled to the benefit of the securities as against her husband's estate, and to receive satisfaction of the debt according to its degree. This is the view of the question which has been taken in several cases. In *Partridge v. Poulet* (2 Atk. 384), Lord Hardwicke lays it down, that the wife, paying her husband's mortgage debt by a loan of money out of her separate estate, is equally entitled to stand in the place of the mortgagee as a stranger; and that, if she joins with him in charging her estate, she is, in like manner, entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. The expressions of Lord Hardwicke, in *Robinson v. Gee* (1 Ves. 252), are to the same effect. He states, that she is entitled to satisfaction out of the real and personal assets of the husband, thus treating her as a specialty creditor: he adds, that her estate is only a [*1017] surety, and that the other creditors of the husband cannot stand in the place of the mortgagee against her—a right which they would, of course, have, if they were entitled to a preference in the administration of the husband's assets. In *Kinnoul v. Money* (3 Swanst. 217, n.), Lord Camden considers it in the same manner; the Court, as he expresses it, dissolving the marriage quoad the transaction. In *Aguilar v. Aguilar* (5 Madd. 414), the wife joined her husband in granting an annuity charged upon her separate estate, and also upon a fund to which the husband was entitled jure mariti. It was held, that she was entitled to have the latter fund applied toward payment of the annuity (in exoneration of her separate estate), not only as against her husband, but as against his assignee, under the Insolvent Debtors' Act, and as against persons in whose favor he had subsequently charged it:" 1 Rep. H. & W. 145, note (b). See also *Pitt v. Pitt*, T. & R. 180, and the remarks of Sir W. Page Wood, V. C., in *Hudson v. Carmichael*, Kay, 620, 621, 622; *Gee v. Smart*, 8 Ell. & Bl. 313.

Upon the bankruptcy of the husband, the wife, after she has paid the debt, is entitled to go in as a creditor upon her husband's estate in bankruptcy, and there, with his other creditors, to receive a dividend. Per Lord Westbury, C., 1 De G. Jo. & Sm. 96.

In a recent case a husband and wife mortgaged in fee land of which they were seized in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in a suit by the wife for a settlement of the equity of redemption on herself and her children, and for redemption as against the mortgagee, and for foreclosure against the assignees and the husband, the assignees having disclaimed, it was held by Lord Westbury, C., that the wife was entitled to redeem as against the mortgagee, and to have the whole fee

settled upon herself and her children, the husband not objecting: *Gleaves v. Paine*, 1 De G. Jo. & Sm. 87.

If a wife mortgages her own separate estate to raise money for her husband, as it is clear that in equity she is competent to deal with such property as a feme sole, an assumpsit would arise just as if she were a stranger, and consequently there would be no pretence for postponing her to other creditors of her husband. Thus in *Hudson v. Carmichael*, Kay, 613, where a married woman, entitled to leasehold property for her separate use, concurred with her husband in raising money upon the [*1018] mortgage of her separate estate, by a deed which expressed that the money was borrowed by and paid to herself and her husband, and which contained a covenant by the husband for payment of the debt, the presumption that the money was received by the husband not being rebutted by extrinsic evidence, it was held by Sir W. Page Wood, V. C., that the wife was only a surety for the husband, and was, after his death, entitled, as against his other creditors, to all the rights incident to that relation, and therefore had a right to have the debt paid off as a specialty debt, out of the husband's assets, in priority to the simple contract creditors. After noticing with disapprobation the dicta in *Tate v. Austin* and *Clinton v. Hooper*, according to which the wife would be postponed to the other creditors of the husband, his Honor says, "Whatever should ultimately be held to be the law in this respect—and I think there will be some difficulty in supporting these dicta, although by such eminent judges—it is clear, that no question as to assumpsit can exist where the estate is settled to the separate use of a married woman. That is a case in which the Court recognizes her as a feme sole, competent to deal with her property in every respect; and, therefore, an assumpsit would arise just as though she were a mere stranger. A wife effecting a charge upon her separate property in favor of her husband, is precisely in the same position as though she had lent to him the savings of the income of such property deposited at her bankers, and which there is no doubt that he can lawfully borrow from her. . . . It must be observed, that it is difficult to see on what other ground, except that of an implied assumpsit, this doctrine of her right as surety ever arose. The wife is not in the mere position of the heir, for the heir cannot assert his right against legatees, but the wife can; and how she can acquire a better position than the heir, except by such an assumpsit, it is not easy to understand. Where the wife has a separate estate, then, as it is laid down in *Parteriche v. Poulet* (2 Atk. 383), her separate property being applied to pay off the husband's debts, the wife must be considered as a distinct person, and is equally entitled to stand in the place of the husband's creditors as a stranger; and according to the dictum in *Robinson v. Gee* (1 Ves. 252), if her mortgage to secure her husband's debt is paid off out of his assets, the other creditors of the husband have no equity, in case of a deficiency of his assets, to come upon her estate."

Where a husband and wife mortgaged their respective estates to secure a debt of the husband's, and both estates were afterward sold, free from the mortgage, and the debt paid out of the produce of the wife's estate, it was held by *Lord Langdale, M. R., that the representative of [*1019] the wife was entitled to have the amount recouped out of the produce of the estate of the husband which was in Court, but that he was not entitled to interest on the amount paid: *Lancaster v. Evors*, 10 Beav. 154, 266.

The debt, however, affecting the estate of the wife, must be the debt of the husband, otherwise her claim to exoneration will fail. Thus, if the estate of the wife be mortgaged, in order to pay debts contracted by her before marriage, she cannot claim exoneration out of the estate of her husband, even although he covenants to pay the sum raised: *Lewis v. Nangle*, Amb. 150; 1 Cox, 240; *Earl of Kinnoul v. Money*, 3 Swanst. 201, n.

Upon the same principle, in *Bagot v. Oughton*, 1 P. Wms. 347, where the wife's estate was mortgaged before the marriage, and transferred after, and the husband joined in the transfer, and covenanted that he or his wife would pay the money, it was held that his personal estate should not exonerate his wife's estate; because the debt was not substantially and in effect his, though he covenanted to pay it; but, being a debt existing on the estate before, his covenant was collateral in support of the debt.

However, it has been said by Lord Thurlow, in *Clinton v. Hooper*, 3 Bro. 213, "that, where it has been clearly proved that the money borrowed had been paid into the hands of the wife, and that she had been perfect mistress, and had converted it to her own use as her separate money, there can be no reason why the Court should not declare that it was so applied, and consequently could not be deemed the debt of the husband, and the covenant of the husband was merely a necessary covenant for the purpose of confirming the debt. So, where the wife, having the absolute disposal of it, appropriates it to the use of her husband, that fact would reach the original contract, but still resolves itself into the same principle as before, and makes her estate liable." See also *Thomas v. Thomas*, 2 K. & J. 79.

To entitle the wife to have her estate exonerated, it is not incumbent on her to show that the money was borrowed for the benefit of the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to show the contrary. But though this is the general rule, that the husband shall *prima facie* be liable, yet it is but an equity, and may therefore be rebutted by another equity, viz., that the money was borrowed for the benefit of the wife, which may be set up by parol proof: *Earl of Kinnoul v. Money*, 3 Swanst. 208, n.; *Clinton v. Hooper*, 1 Ves. jun. 173; 3 *Bro. C. C. 212, 213; *Hudson v. Carmichael, Kay*, 613.

So, also, parol evidence of the declarations of the wife to prove [*1020]

that the money raised by mortgage of her estate was not applied for the husband's use, is admissible, but it will not be admissible to prove the transaction itself different from what it appears by the instruments and evidence: as, that it was a gift to him; *Clinton v. Hooper*, 1 Ves. jun. 173.

After the death of the husband, the wife can waive her right to exoneration: and parol evidence of her declaration to the executors of her husband, that she did not intend to make any claim against his estate, has been held admissible: *Clinton v. Hooper*, 1 Ves. jun. 188; 3 Bro. C. C. 201.

But the claim of the wife will not be held waived by her borrowing a further sum in addition to the sum advanced for her husband's benefit, and agreeing that her estate should not be redeemed without payment of both sums: *Lacoin v. Mertins* 1 Ves. 312.

If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use: *Thomas v. Thomas*, 2 K. & J. 79.

But an estate will not be considered as the wife's, so as to entitle her to claim to be exonerated from a mortgage which was created by a joint power executed by the husband and wife, and which power has precedence over the interests of the wife in the property. See *Scholefield v. Lockwood*, 4 De G. Jo. & Sm. 22; 12 W. R. (L. C.) 114; 33 L. J. N. S. Ch. 106. There, by a post-nuptial settlement certain estates of the husband were limited by him for valuable consideration to himself for life, with remainder to such uses as the husband and wife should jointly appoint, for the purpose of raising money by mortgage or otherwise, in default of appointment, to a trustee to raise a sum of money to pay off a debt of the husband's, with remainder to the wife for life, with remainder to the husband and wife in equal moieties. The husband and wife, by a joint exercise of the power, mortgaged the estates for a debt of the husband's. It was held by Lord Westbury, C., affirming the decision of Sir J. Romilly, M. R. (reported 32 Beav. 434), that it was not a mortgage of what could properly be called the wife's estate, and that she was not entitled to exoneration. See also *Heather v. O'Neil*, 2 De G. & Jo. 399.

So, where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the *heirs of the husband*, there is a resulting trust for the wife and her heirs, the husband merely having the estate he had before, *jure uxoris*: *Broad v. Broad*, 2 Ch. Ca. 161; 1 Vern. 213, nom. **Brend v. Brend*; 2 Ch. Ca. 99, nom. *Brond v. Brond*.

[*1021] Upon the same principle, if a wife, joining her husband in a mortgage, releases a rent-charge on the same estate to the mortgagees, and their heirs, to whom at the same time the estates are conveyed, it will, it seems, in the absence of a clear intention to re-settle the equity of redemption of the rent-charge, be held that the absolute release of the rent-charge was to be, like the absolute conveyance of the estate, subject

to the same equity of redemption. So that, on a re-conveyance to the husband by the mortgagees of part of the estate, released from the mortgage, the right of the wife to the rent-charge revived. *In re Belton's Trust Estates*, 12 L. R. Eq. 553.

The principle is this, that, in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such case (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage.

Thus, in *Ruscombe v. Hare*, 6 Dow. 1; 2 Bligh. N. S. 192, a man having mortgaged his estate to secure two sums, the one at 4½l. per cent., and the other at 4½l. per cent., devised it to his wife in fee, and made her sole executrix, and residuary legatee. The wife, having married again, joined her second husband in another mortgage of the estate to the same mortgagee, consolidating the two former mortgages into one. The mortgage deed, after reciting that the sums were then due, but that all interest had been paid up to that time, it was witnessed, *that, for better securing the said sums, with interest at 5l. per cent.*, the husband and wife conveyed the premises to the mortgagee, discharged of the former proviso for redemption, but subject to another proviso, that, in case the husband should pay the two sums, amounting together to 1250l., and interest at 5l. per cent., at a time therein specified, the mortgagee *should re-convey to the husband, his heirs and assigns, forever*. And the husband and wife covenanted to levy a fine, which was afterward levied, and the husband executed a bond to the mortgagee as a collateral security for the due payment of the mortgage money. The husband afterward alone mortgaged the estate to secure some arrears of interest. The wife died, leaving a son by her former marriage her heir-at-law. The husband then sold part of the estate, and paid off the sum due to the mortgagee, who thereupon re-conveyed to him the remainder of the estate, in the possession of which he continued until his death, and devised it. It was held by the Court of Exchequer, and the decree was *affirmed in the House of Lords, upon the advice of Lord Eldon, and with the concurrence of Lord Redes- [*1022] dale, that the equity of redemption belonged to the wife, and at her death descended to her heir-at-law, and did not vest in the second husband, under the reservation in the mortgage deed; and that his covenants and bond could not be deemed a purchase of her equity of redemption; and that the purchaser from the second husband could not be deemed a purchaser without notice, inasmuch as the equity appeared upon the deed; and the decree was that the heir-at-law might redeem. In moving the judgment of the House, Lord Eldon made the following important remarks: "If," said his Lordship, "it clearly appears to have been the intention of the wife that he should have the equity of redemption, he must have it. But still, the question is, what Courts of equity have agreed to consider as evidence of that intention, manifested on the face of the in-

strument, from which you are to draw your conclusion. I perfectly recollect what fell from the lips of Lord Thurlow, though it is a quarter of a century ago, upon that point: that where the equity of redemption is in these cases reserved to the husband, if there is no other evidence of the intention, and if the recital shows that the instrument is framed for other purposes, the husband is seized of the estate which he before had; with this difference, that if he before had the legal estate *jure uxoris*, he afterward had the equity of redemption, but still *jure uxoris*; or if the estate which he before had *jure uxoris* was equitable, so it remained equitable, but still *jure uxoris*; and that equity throws this protection round the wife, that the deed shall operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit. But there may be complex cases, such as some of those which have been cited, very different from the case of a simple reservation of the equity of redemption to the husband, where the estate belonged to the wife. And yet it appears that, even in these complicated cases, the rule of law prevailed."

In *Whitbread v. Smith*, 3 De G. Mac. & G. 727, an estate was by deed, dated July, 1817, settled to such uses as A. and his wife should jointly appoint, and in default of appointment to A. for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon, or consistently with the uses of the deed of July, 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons *as they should direct," and by a deed of even [*1023] date certain terms were assigned to attend the inheritance, according to the uses of the mortgage deed of even date. The husband, after the death of his wife, sold as if he were seized in fee. On a bill for redemption being filed by the son against the purchaser, it was held by the full Court of Appeal, reversing the decision of Sir R. T. Kindersley, V. C. (reported 1 Drew. 531), that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee to the son in the deed of July, 1817. See also *Wood v. Wood*, 7 Beav. 183; *Clark v. Burgh*, 2 Col. 221; *Hipkin v. Wilson*, 3 De G. & Sm. 738; and see *Plowden v. Hyde*, 2 De G. Mac. & G. 684, reversing *S. C.*, 2 Sim. N. S. 171; *Stansfield v. Hallam*, 29 L. J. (Ch.) 173; 8 W. R. (M. R.) 34; *Gleaves v. Paine*, 1 De G. Jo. & Sm. 87; *Smith v. Etches*, 1 Hem. & Mill. 558, 12 W. R. (V. C. W.) 192; *Lord Hastings v. Astley*, 30 Beav. 260. See, however, *Walker v. Armstrong*, 25 L. J. (Ch.) N. S. 406.

Where it appears to have been the intention of the wife to alter limitation of the equity of redemption, effect will be given to the intention; and it is not necessary, as Lord Eldon erroneously supposed, that the intention should appear in the recitals. Thus in *Jackson v. Innes* (1 Bligh, 104),

the lands of the wife upon her marriage were settled to the use of the husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses, and she joined with her husband in a mortgage, and by the deed, to lead the uses of the fine which the husband and wife afterward levied according to covenant, the lands; after the determination of the term created to secure the repayment of the money borrowed, were limited to the husband and wife, and the survivor, for their lives and the life of the survivor, and from the decease of the survivor to the use of the heirs of their two bodies, and for default of such issue, to the use of the right heirs of the survivor of the husband and wife forever. The wife having died without issue, leaving the husband survivor, it was held by the House of Lords, reversing the decision of Lord Eldon (reported 16 Ves. 351), that this was more than a mere mortgage transaction; that there was evidence of an intention to effect a change in the beneficial interest; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and consequently, that the husband and his heirs, and not the heirs of the wife, were entitled to the equity of redemption. Lord Redesdale, *in moving the judgment of the House of Lords, entered into an elaborate examination of [*1024] the authorities; and after admitting the rule laid down in *Broad v. Broad*, and *Ruscombe v. Hare*, added: "But it is an exception to that rule, where other circumstances occur affording evidence of an intended alteration of rights.

"In *Rowel v. Whalley* (1 Ch. Rep. 116), the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration that, if the husband and wife, or either of them, or their heirs, executors, &c., paid to the mortgagee, his executors, &c., the sum borrowed, that the fine to be levied, according to the covenant contained in the deed, should inure to the husband and wife, and the longest liver of them, with remainder to the right heirs of the husband forever. Here is a case of a distinct declaration, in no manner depending upon the proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage. A fine was afterward levied, according to the agreement among the parties; and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband, being a party defendant in the suit, was an infant. The Court decreed, that the plaintiff and the infant should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating the estate for life of the plaintiff in the premises at one-third, and the reversion in fee of the infant at two-thirds. In that case it was determined, that the subsequent declaration and limitation, having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was

held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment, the distinction is stronger; for it is the mortgage term, which is made redeemable by the husband and wife, and the fee is the subject of settlement. In the case of *The Earl of Huntingdon v. The Countess of Huntingdon*, the mortgage was made by the mother of the plaintiff, joining with her husband, of lands, being her inheritance; and the purpose was to raise money for the husband to pay for the place of Captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess (the plaintiff's mother) for life, remainder to the plaintiff in tail. The proviso for redemption was, that on payment of the mortgage-money the term should cease. In 1683 the Countess joined with her husband in an assignment *of the mortgage; and in the deed of assignment [*1025] the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they or either of them should direct or appoint. The husband afterward paid off the mortgage, and took an assignment of the term in trust for himself; and by will bequeathed his personal estate to the defendant, his second wife, who claimed the term. The plaintiff filed a bill in Chancery, praying that the term might be assigned to him. The Lord Keeper refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal to Parliament, the decree was reversed, and the term directed to be assigned to the appellant, with an account of profits from the death of the appellant's mother, making to the respondent just allowances for the maintenance of the appellant, and management of the estate. In that case the limitation, after the life estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife and the heirs of their bodies, or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the *Earl of Huntingdon's case* was, that, on payment by either of them, the term should be assigned as they or either of them should direct. Under these circumstances, the executrix and devisee of the husband insisted, that as he had paid the mortgage and taken the assignment, it belonged to her as his representative. The son of the former wife contended that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest; and it was held, as to the term assigned to the husband; and possessed under his will by the defendant, that there was a resulting trust for the son.

"In the case of *Lewis v. Nangle* (Amb. 150), the property which belonged to the wife was mortgaged and settled upon the husband and wife, with remainder, not to the wife herself, but to the wife's sister. The wife died, and the sister brought a bill, in order to compel the husband to pay off the mortgage. In that case it appeared that the money raised upon

the mortgage, being 1100*l.*, was in part borrowed for the use of the husband, and part of it for the purpose of paying a debt incurred by the wife previous to the marriage. In giving judgment upon the case, the Lord Chancellor said, 'The general rule is, that when the husband borrows a sum of money for his own use, and the wife joins in a mortgage of her jointure for repayment of it, that her estate shall be a creditor upon the husband for *that sum. So it is where there is no settlement, and [*1026] the wife mortgages her estate of inheritance to raise money for the husband; but where, at the time of executing such mortgage or security, a settlement is made either before or after marriage, there is no instance in which the husband has been considered answerable to the wife's estate for the money borrowed;' and he there held, that, under the circumstances of this case, there being a settlement of the estate, the husband was not liable for the money borrowed. The subsequent limitation was not impeached by the person who brought the bill, because that person was entitled to the estate under that limitation.

"In the case of *Jackson v. Parker* (Amb. 687), which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and, in order to make a security by mortgage of his own estate, his wife joined in a fine, which would have the effect of barring her of any claim of dower. The limitation of the equity of redemption was to the husband and the wife and their heirs; and there was a declaration in the deed, that after payment of the money lent on this mortgage, the fine should inure to the husband and his heirs. Other charges were afterward made upon the estate, and those subsequent charges were all made redeemable by the husband and wife and their heirs. The husband by his will made a disposition of this property, in trust to raise provisions for all his children. But the will was disputed by the eldest son and heir-at-law, upon the ground that it was a devise of the equity of redemption, of which the husband was not solely seized, because the equity of redemption was reserved to the husband and wife and their heirs. Sir Thomas Sewell had some difficulty upon the subject at first, in consequence of the words of the Statute of Wills, which does not admit of a devise of property of which the devisor is not solely seized. But, upon reflection, he decided that the case was to be considered as in equity; it was not a legal estate, and, as an estate to be governed by the rules of equity, it was the seizin of the husband, and not of the wife. Upon a contest for redemption, the Court would regard the ownership of the estate previous to the mortgage, and, in that view, the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband. In such case, she would have been entitled to have had the estate redeemed for the purpose of letting in her dower; but there her right ended; and that, therefore, the husband

[*1027] must be taken *to be in equity solely seized of the estate, as if the mortgage had not been made. In that case it was argued, 'that the Court will put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made; that the husband was the owner of the estate, and the intention of the deed was merely to make a mortgage, and the wife was made a party, and joined in the fine, for the sake of the mortgagee.' And this argument was adopted by the judgment.

"In the case of *Corbett v. Barker* (1 Anstr. 138), according to the report, the Court do not seem to have the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe v. Hare*, and they dismissed the bill. In that case it appears probable that Baron Thompson doubted the correctness of the decision; for he says, 'that a reservation of the kind now under discussion, in a fine levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel.' The cause being afterward reheard, the Court seems to have been of opinion that a trust resulted in favor of the original owner of the estate, and determined accordingly. The report of the case is so very imperfect in its language and statements, that it is difficult to discover what are the facts of the case, and the point decided; but as far as they can be collected, the case appears to have been of the same nature as *Broad v. Broad*, and the other cases which have been decided upon a similar principle.

"It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband; if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me that the operation of the deed as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption, but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct *in the deed. The term is a security for the repayment of

[*1028] the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was by declaring that upon payment of the money due the term shall cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But

there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connection whatsoever with the existence of a term which then would have ceased to exist. A court of equity will so deal with a declaration that, upon payment of a sum of money on a given day, the term shall cease; that, although the term becomes absolute by non-payment of the money at the day, it is still subject to redemption. By whom it may be redeemed must be discovered from the title, which, by the deed itself, is declared to be in the husband and wife for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself declaring who were the persons entitled to the estate.

"In all the other cases decided upon the general principle the grounds of the decisions were, 'that the mode in which the redemption was limited was by mistake or improper contrivance introduced into the deed.' But in this case there is no ground to raise such imputation, for the deed is clear and express in its declarations and provisions. The case is really in principle, if not in circumstances, the same as the case of *Rowell v. Whalley*.

"Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage, where it is simply a declaration that, the money being paid; the fine shall inure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, it seems to me, the rules which have been established in the cases of resulting trusts do not in any degree apply."

Lord Eldon, adopting the opinion *of Lord Redesdale, observed that, "the circumstances of the case were certainly, in [*1029] point of fact, much better understood than they were, and much greater research had been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it now appeared. The judgment of the House would remove a difficulty which he knew was floating in the minds of many persons. He conceived it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary that there should be, in the recitals of the instrument, some expression that the parties meant it so; that it was not enough to collect the intention from the limitations, but that there must be something more upon the face of the deed to lead the

wife to understand what the limitations were. It did, however, occur to him, on looking into the cases which had been referred to, that such a proposition could not be supported, and therefore he was of opinion that the decree must be reversed."

In *Reeve v. Hicks* (2 S. & S. 403), a husband and wife mortgaged the wife's freeholds for 1000 years, to secure the repayment of a sum of money lent to the husband; the deed contained a reservation of a peppercorn rent during the term, to the husband and wife and the heirs and assigns of the wife, and also a covenant on the part of the husband, that he and his wife would levy a fine to the use of the mortgagee for the term thereby demised, for better securing the mortgage-money, and subject thereto *to the only use and behoof of the husband, his heirs and assigns forever, and for no other use, intent, or purpose whatsoever*. The clause for redemption provided that, upon payment of the mortgage-money and interest by the husband and his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, upon the 10th of February, 1771, the term of 1000 years should cease. The husband released the equity of redemption to the mortgagee in fee, who entered into possession. On the death of the husband, it was held by Sir John Leach, V. C., that the wife was not entitled to redeem.

"The case," said his Honor, "is not distinguishable in principle from *Innes v. Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of the mortgage, or the proviso of redemption, but *is altogether a new settlement*, which defeats the heir of the wife." See also *Eddleston v. Collins*, 3 De G. Mac. & G. 1; *Heather v. O'Neill*, 2 De G. & Jo. 399, reversing the decision of Sir J. Romilly, M. R., 6 W. R. 176; *Atkinson v. Smith*, 3 De G. & Jo. 186.

A wife who mortgages her estate for the debt of her husband is a surety, and as such entitled to an indemnity from him, and his assets will, if the circumstances admit, be taken in the first instance to satisfy the mortgage; *Hawley v. Bradford*, 9 Paige, 200; *Fitch v. Cotheal*, 2 Sandford, Ch. 29; *Ayres v. Husted*, 15 Conn. 504; *Johns v. Reardon*, 11 Maryland, 465; *Sheidle v. Weishlee*, 4 Harris, 134; *Weeks v. Haas*, 3 Watts & Serg. 520; *Knight v. Whitehead*, 26 Mississippi, 245.

A court of equity may accordingly direct that the husband's interest in the land as tenant by curtesy shall be first exposed for sale; or, if this would be impracticable or injurious, that the whole shall be sold and the surplus invested for the separate use of the wife, who will then be regarded as a purchaser; *Gahn v. Neimcewicz*, 3 Paige, 164; 11 Wendell, 312; *Duffy v. The Ins. Co.*, 8 Watts & Serg. 413. In like manner, where the husband's bond is secured by two mortgages, one of her estate,

and the other of his, the latter is the primary fund for the payment of the debt, and the equity will be enforced not only between the parties, but against purchasers with notice; *Sheidle v. Weishlee*; *Loomer v. Wheelright*, 3 Sandford, Ch. 135. Hence, one who purchases land which has been mortgaged for the husband's debt, with notice that the lien extends to other land owned by the wife, is answerable for the application of the purchase money, and must see that it is appropriated to the exoneration of her property; *Sheidle v. Weishlee*, 4 Harris, 134.

It results from the same principle that if the creditor has the means of paying the debt out of the husband's assets and suffers them to be withdrawn, or uses them for a different purpose, the wife's estate will be exonerated; *Ayres v. Husted*, 15 Conn. 504; *Johns v. Reardon*, 11 Maryland, 465; and hence, where the equity of redemption in the husband's land which had been mortgaged simultaneously with the wife's, was conveyed to the mortgagee at a price which exceeded the mortgage debt, the wife's land was held to be discharged by the payment of the purchase money to the husband; *Loomer v. Wheelright*, 3 Sandford, Ch. 135.

The equitable principles relating to sureties apply equally to a wife mortgaging her estate for her husband's benefit; and it is well settled that a valid agreement between the creditor and husband, by which the time of payment is extended, will, if unauthorized by the wife, discharge her mortgage; *Smith v. Townsend*, 25 New York, 479; *The Bank v.*

Burns, 46 Id. 170; *ante*, 1906, see *Gahn v. Neimcewicz*, 3 Paige, 164.

As the husband is the principal debtor, if he acquires the mortgage it will be discharged. In *Fitch v. Cotheal*, 2 Sandford, Ch. 29, the wife was allowed to enforce this equity against a third person, who had taken an assignment of the mortgage for value and without notice from the agent into whose hands it had been covertly transferred for the husband's use; *ante*, notes to *Basset v. Nosworthy*.

To make the wife's equity good against the mortgagee, it must appear that he had notice (*ante*, notes to *Rees v. Berrington*), which cannot be inferred from the mere circumstance that the consideration was paid to him, because it might well have been that he received it as her agent, and with a view of applying it to her use; see *Gahn v. Neimcewicz*, 3 Paige, 614; 11 Wend. 312. Proof that the debt was the husband's, and that this was known to the creditor, is, however, sufficient to establish the wife's equity as a surety, and the duty of the creditor to be careful of it in his subsequent dealings with the husband; see *Knight v. Whitehead*, 26 Mississippi, 245; *Loomer v. Wheelright*, 3 Sandford, Ch. 135.

A mortgage of a wife's estate for her husband's debt renders the mortgagee a purchaser, but is merely gratuitous as it regards the husband, and therefore subject to the equitable doctrines applying to voluntary conveyances.

Where it appears, in view of all the evidence, that the provisions of a voluntary deed transcend the pur-

pose for which it was executed, the excess may be corrected at the instance of the grantor, although the mistake was not mutual, or shared by the persons claiming under the instrument; *ante*, 1250, notes to *Huguenin v. Baseley*. A mortgage by a wife for her husband's debt is within this principle, and she may redeem notwithstanding a clause reserving or limiting the right to him, unless her intention was to convey the premises absolutely and not merely as a security; *Demarest v. Wyncoop*, 3 Johnson, Ch. 129. In *Duffy v. The Insurance Company*, 8 Watts & Serg. 413, 433, Kennedy, J., said: "If a wife unite with her husband to pledge her estate, or otherwise, to raise money out of it to pay his debts, or meet any other occasion for his accommodation, whatever may be the mode or form adopted to carry such purpose into effect, the transaction will, in equity, be treated according to the true intent of the parties. See *Tate v. Austin*, 1 P. Wms. 264, and Mr. Coxe's note thereto; *S. C.* 2 Vern. 689, and Mr. Raithby's note; also *Pawlet v. Delaval*, 2 Ves. sen. 663, 669." The wife is, moreover, entitled, as a surety, to require that the debt shall be discharged by the principal, and that the property shall then revert to her. To overcome these presumptions it must appear from the recitals in the instrument or *aliunde*, that she meant to make a gift, and not simply to execute a mortgage. Such would seem to have been the opinion of Lord Eldon, and we may regard it as sound, notwithstanding the decisions by which he was, to some extent,

overruled; *ante*, 1933; see *Weeks v. Haas*, 3 Watts & Serg. 520, 523.

It was held, on like grounds, in *Weeks v. Haas*, that where wives, who are tenants in common of land, divide it by releasing to their husbands, a court of equity will decree a trust for the wives, on proof that the object was to make partition, and that the husbands gave no consideration. Gibson, C. J., said: "The deeds being in *pari materia*, and made at the same time, constitute but one assurance, and the statute which gives her power to convey makes her a free agent. Yet, what is there in the deed to the plaintiff's husband to warrant the intendment of a gift of her land to him by means of it? By relinquishing her right in the two-thirds of her patrimony, she furnished the consideration for it, and as she was the party to be benefited, the object being partition and not conversion, the law raises a presumption that the husband took the legal title as her trustee, for the same reason that it raises a resulting trust of land paid for with the money of another. With what did he pay? Certainly with his wife's land, for all but an inconsiderable part of the value, and this land was, as usual, her separate estate, as money settled to her separate use, which, had it been the consideration, would have given her an indisputable trust estate by implication of law.

"Such an implication is a matter of course in regard to a mortgage of the wife's land in which there is no limitation of the estate beyond the mere security, and the equity of redemption happens to be reserved

to the husband. In that case, her original ownership is preserved on the legal presumption that the form of the reservation originated in the inaccuracy or mistake of the person who prepared the deed. To this effect is *Broad v. Broad*, 2 Ch. Ca. 98, 161, which is the leading case, and *Ruscombe v. Hare*, 6 Dow's Parl. Cas., which is the latest one. In the decision of *Jackson v. Innes*, 1 Bligh, 104, on appeal to the House of Lords, Lord Redesdale said, that whether the wife has joined in the mortgage because the estate belonged to her, or because she had a charge on it by jointure or dower, yet, if there be a reservation in the proviso for redemption, which would carry the estate from the person who was the owner of it at the execution of the mortgage, it is now an admitted principle of interpretation that there is a resulting trust for that person, whether husband or wife; and his position, as the result of the decisions, is sustained by *Cotton v. Cotton*, 2 Ch. Rep. 72; *Huntingdon v. Huntingdon*, 2 Vern. 437; *Brend v. Brend*,

1 Vern. 213; *Jackson v. Parker*, Amb. 687, and by all the other decisions except that of Lord Eldon in the same case, 16 Ves., 369, who was disposed to carry the protection of the wife still further, and perhaps it is to be regretted that he was reversed. * * * It is unnecessary to pursue the train of these decisions on mortgages, as those cited establish the principle of the case before us upon a just foundation. "Where it is her purpose to give him her land, the accomplishment of it by means of a conveyance to a convenient friend cannot be prevented; yet the step is so obviously the consequence of the husband's avarice, that it is seldom to be commended. But certainly no such purpose is to be implied in the case before us; and, independent of parol evidence of intention, it is consonant with principle and authority to hold him to be a trustee."

In some States a feme covert is prohibited by statute from charging her property with the payment of her husband's obligations; see *Dunbar v. Mize*, 53 Georgia, 435.

THORNBROUGH v. BAKER.

[*1030]

TERM. TRIN. 28 CAR. 2.

REPORTED 1 CH. CA. 223.1

EXECUTOR OF MORTGAGEE IN FEE ENTITLED TO MONEY SECURED ON MORTGAGE.]—*The executor, not the heir of a mortgagee in fee, is entitled to the money secured by the mortgage.*

Reasons of that doctrine.

THE plaintiff's bill being, that Lawrence Clifton, by indentures of lease and release between him and James Baker, bearing date

¹ S. C., 3 Swanst. 628: nom. Thornborough v. Baker, and 2 Freem. 143.

the 20th and 21st of October, 1656, in consideration of 500*l.* paid to him by the said James Baker, did convey to the said James Baker and his heirs several lands in Stoak, in the county of Surrey; and by another indenture, executed at the same time between the same parties, it was agreed between them, that if the said Lawrence Clifton should, during his life, pay to the said James Baker, his heirs, executors, administrators, or assigns, 30*l.* yearly, at Lady-day and Michaelmas, or within thirty days after, by equal portions; and if the heirs of the said Lawrence should, within six months after the death of the said Lawrence, pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 500*l.*, with interest since the paying of the last 15*l.*, then the lease and release should cease and be void.

About one year after, the said Lawrence Clifton died, leaving the said Jane [the plaintiff's wife] his only daughter and heir. And by another indenture, bearing date the 25th of May, 1658, made between the now plaintiff and the said James Baker, the said James Baker did covenant with the plaintiff, that if they, or [*1031] either of them, *should pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 20*l.* only, on the 20th of October then next following, and the sum of 530*l.* on the 20th of October, 1659, that then the said indenture of lease and release should be void.

The said James Baker died about May, 1659, and the premises being forfeited, they descended to the said defendant John Baker, son and heir to the said James; and the defendant Sarah, the relict of the said James Baker, having administration of his estate granted to her, her husband, John Nichols, and she do pretend to the said mortgage; and the plaintiff, praying a reconveyance on payment of what was due, the defendant John Baker, by his answer confessing the mortgage and agreement aforesaid, and that the mortgage, being forfeited, descended upon him as heir to his father, and submitted to reconvey the premises on payment of principal, interest, and costs to him; the defendant and John Nichols and his wife confessing the said mortgage, and insisting, that the said Sarah was administratrix to her former husband, and thereby entitled to the said mortgage-money and interest, although she hath other assets of her husband's estate, with a considerable overplus.

It was upon the hearing of the cause, the 11th of February, in the twenty-third year of his now Majesty's¹ reign, decreed by the Master of the Rolls,² that, *upon payment of principal, interest, and costs*, the defendant John Baker should reconvey the premises; and it was then further ordered, that the party should attend the Right Honorable the Lord Keeper of the Great Seal of England for his Lordship's directions, whether the principal and interest should be paid to the defendant John Baker, the heir, or to the

¹ Charles 2d.

² Sir Harbottle Grimstone.

defendant Sarah, the relict and administratrix of the said James Baker; since which the said principal and interest having been paid by the plaintiff [and his wife], and a reconveyance made unto them, but the question between the heir and the administratrix being not settled. Now, upon *hearing and full [*1032] debating of the matter, this present day, by counsel learned, as well for the heir as the administratrix, whether the said principal money and interest doth belong and ought to be paid the heir or administratrix; and the former precedents being produced, the Lord Keeper, having been attended with the said cause and precedents, and having taken time to consider thereupon, did now declare, that the mortgage ought to go to the other defendant, John Nichols, and his wife, the administratrix of James Baker, and not to John Baker, son and heir of the said James Baker; because the reason of the common law in these cases ought, as near as may be, to be followed in equity. Now, by the common law, if the conditions or defeasance of a mortgage of inheritance be so penned that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executrix, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeasance appoints the money to be paid either to heirs or executors disjunctively, there by the common law, if the mortgagor pay the money precisely at the day, he may elect to pay it either to the heirs or executors, as he pleaseth; but where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. Then, when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election, for then the mortgagor might defer the payment as long as he pleaseth, and at last, for a composition, by payment of the money to that hand which will use him best; much less can the Court elect or direct the payment where they please; for a power so arbitrary might be attended with many inconveniences throughout. Therefore [we ought] to have a certain rule in these cases, and a better cannot be chosen than to come as near unto the rule and reason of the common law as may be. Now, the law *always [*1033] gives the money to the executor, where no person is named; and where the election to pay to either heir or executor is gone and forfeited in law, 'tis all one in equity, as if either heir or executor were named, and then equity ought to follow the law, and give it to the executor; for, in natural justice and equity, the principal right of the mortgagee is to the money, and his right of the land is only a security for the money; wherefore, when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money, the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors

or administrators of the mortgagee. And for this reason, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may seem hard that the heir should part [with] the land, and be decreed to make a reconveyance without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that, after payment of the money, the law keeps a trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his Lordship declared, that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore, his Lordship did not think it material that the administratrix in this case had assets without this money: for assets, or not assets, is not the measure of justice to executor or administrator, but serves only as a pretence to favor the heir, who either ought to have the money, if there be no assets, or not to have it, though there be assets. And for the same reason, his Lordship did not think it material that there wanted circumstances of a personal covenant from the mortgagor to pay the money; for though the case of the administratrix of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared, that he had considered the various precedents in this case [*1034] which had been *urged, whereof not one did come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase-money; the other late precedents, which made for the heir, being contrary to the more ancient precedents of this Court, and to some modern precedents also, which seemed to his Lordship of more weight, his Lordship being of opinion that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee in his lifetime, or by his last will, do otherwise declare and dispose of the same.¹ Wherefore, and upon the whole matter, his Lordship having fully weighed the precedents, and what was said on either side, doth order and decree, that the mortgage-money and interest shall be paid unto the said John Nichols and his wife, and kept by them; and that, what security hath been given by either of them concerning the disposing of the said moneys and interest, or the abiding the order of this Court as to the payment of the said money and interest, be delivered up to them and canceled.

See 1 Vern. 271, 412; 2 Ch. Ca. 49, 50, 51, 220; 2 Vent. 348, 351; 1 Ch. Ca. 98; 3 Ch. Rep. 187.

*CASBORNE v. SCARFE.

[*1035]

HILARY VACATION, 1737.

REPORTED 1 ATK. 603.

NATURE OF EQUITY OF REDEMPTION—IS AN ESTATE IN LAND.]—

A., a feme sole, seized in fee of a freehold estate, mortgages it, and afterward intermarries with B. A. dies, and the mortgage is not redeemed during the coverture. This is, notwithstanding, such a seizin in the wife as entitles the husband to be tenant by the curtesy of the mortgaged premises; for in a Court of equity the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

THE father of the plaintiffs (Elizabeth and Mary Casborne) devised to Anne, his daughter, the plaintiffs' eldest sister, all his estate, freehold and copyhold, in fee, charged with 200*l.* apiece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterward intermarried with the defendant Inglis, and soon after died, leaving issue a son, who died an infant and without issue; upon whose deaths the plaintiffs, as heirs-at-law both to the infant and their sister, became entitled to the real estate. Anne Inglis, before her marriage, mortgaged part of the freehold premises to the defendant Scarfe, for 930*l.* The bill is brought against the mortgagee and the husband for an account, and for the direction of the Court.

The defendant Alexander Inglis insisted that, having had issue by his wife, he was entitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premises, subject to the mortgage of the defendant Scarfe.

On the 5th of May, 1735, the Master of the Rolls,¹ on hearing the cause, was of opinion the defendant Inglis *was not entitled to a tenancy by the curtesy in the estate com- [*1036] prised in the mortgage.

The defendant appealed from this decree to Lord Chancellor Hardwicke, and the cause came on before his Lordship on the 28th of January and 4th of March, 1737.

For the plaintiffs it was insisted, the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage. It was compared to the case of a proviso for a re-entry in a conveyance, and no re-entry ever made, and to a condition broken, and no advantage ever taken thereof; that the wife was never seized in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and

¹Sir Joseph Jekyll.

was in receipt of the rents and profits ; so that the mortgagor had merely a right of action, or a suit in a court of equity, in order that the estate might be reconveyed to her, upon complying with the terms in the mortgage ; that it was the laches of the husband he did not pay off the mortgage-money, which would have re-vested the estate in the wife ; but, not having done that, there is no more reason that he should be a tenant by the curtesy here, than that he should have the benefit of a seizin in law in the wife, which he cannot have, for there must be an actual seizin ; for the words of Lord Coke, in his comment upon the 35th section of *Lytleton*, are—*A man shall not be a tenant by the curtesy of a bare right, title, use, or of a reversion, or a remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.* It was likewise said, if it be considered as an interest, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the estate again, for it was entirely at her election ; and supposing it to be mortgaged to the value, though she had a right to redeem, yet she was under no obligation to do it ; and it does not appear in this case the wife ever intended it ; and if the law should cast the estate on the husband, he, by never paying the interest during his life, [*1037] might *load the inheritance in such a manner that it would never be of any benefit to the heir.

The Attorney-General cited the case of *Penville v. Luscombe*, at the Rolls, the 4th of February, 1728, where the Master of the Rolls¹ was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. He likewise cited the case of *Reynolds v. Messing*, at the Rolls,² the 20th of February, 1732, where it was held a wife was not dowable of an equity of redemption in the case of a mortgage in fee ; and in the case of *Robinson v. Tongue*, Michaelmas Term, 1730, Lord Chancellor King was of the same opinion.

Mr. Fazakerley, e contra, insisted that the husband's paying off the mortgage would have been buying what the law gives him as a tenant by the curtesy ; that, though at law a mortgage in fee is a revocation of a will, yet in a court of equity it is otherwise ; and here a mortgagor is considered as having still the ownership of the estate, which is only a pledge or security for the money of the mortgagee, without making any alteration in the property, for the estate retains all its former qualities as any other not in mortgage.

That the argument ab inconvenienti falls to the ground ; for, as a tenant for life, he will be obliged to keep down the interest during life ; so that there is no danger of his injuring the inheritance. That there is a difference between a tenant by the curtesy and a tenant in dower, *with regard to a trust* ; for there may be a tenancy by the curtesy of a trust, though a woman is not endowable of it ; but what were the grounds of this distinction he

¹Sir Joseph Jekyll.

²Sir Joseph Jekyll.

would not take upon him to say; for as, both by the decrees of this Court and in the House of Lords, it has been so determined without giving any reasons, he would not presume to offer any: 2 Vern. 585 and 680.

That, in the case of *Penville v. Luscombe*, nothing was therein determined by the Master of the Rolls, who was very doubtful in the principal point; but Mr. Fazakerley said he had a note of a case, with the same names, determined by Lord Cowper in 1716, who held directly the *contrary, that there might be a [*1038] *possessio fratris* of an equity of redemption; and if so, the rule of *equitas sequitur legem*, in cases of property, is certainly the best guide; and if this Court upon niceties should relax this rule, it would be a precedent to dispense with it in other cases. He said it was agreed the principal point had never been determined, though it is at the same time admitted there are many cases where, after a recovery at law, either of dower or tenancy by the curtesy, a trust term has been laid out of the way for the benefit of dowress, &c.

Mr. Murray, of the same side, said the Statute of Uses interposes only between a cestui que trust and his own feoffee, strictly speaking; that, in this Court, the cestui que trust is considered as the owner of the land, and the trustee, like the conusee of a fine, only the mere instrument, and no more. That the case of *Lady Radnor v. Vandebendy*¹ was affirmed in the House of Lords for this reason, because all conveyancers have insisted, that, where there is a trust term, it may be safely purchased without any danger of dower, and is one reason for the distinction between a dowress and a tenancy by the curtesy.

That a mortgage in fee is no more than a charge upon the land; and that, in the case of *Taber v. Grover*, 2 Vern. 367, it was held a mortgage in fee (though two descents cast, and though more was due upon it than the value, and though the mortgagor by his answer said he would not redeem) should go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclosed or released. The several cases following were likewise cited by the defendant's counsel: *Hall v. Dench*, 1 Vern. 329; *Amherst v. Dawling*, 2 Vern. 401; *Strode v. Lady Russell*, 2 Vern. 621, 625; *Lady Williams v. Wray*, 1 P. Wms. 137; Prec. Ch 151; 8 Co. 96; and *Pawlett and the Attorney-General*, Hard. 467, 469.

After the point had been argued on both sides, the Lord Chancellor declared his surprise that this matter, as it seemed a case which must frequently happen, should never have been brought before the Court till now; and *as it was a question of [*1039] great consequence and general concern, should take time to give his opinion.

On the 25th of March, 1738, the cause stood for judgment.

¹Show. P. C. 69.

LORD CHANCELLOR HARDWICKE.—This question depends on two considerations:—

First, what sort of interest an equity of redemption is considered to be in this Court.

Secondly, what is requisite to entitle the husband to be tenant by the curtesy.

First, an equity of redemption has always been considered as an estate in the land; for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seizin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed;¹ and if, after such devise made, a foreclosure is had, yet such shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate, and after makes a mortgage in fee; though that is a total revocation in law, yet in this Court it is a revocation pro tanto only.

It is certain the mortgagee is not barely a trustee to the mortgagor; but to some purposes, videlicet, with regard to the inheritance, he certainly is, till a foreclosure.

Secondly, at common law, four things are necessary to entitle the husband to the tenancy by the curtesy: *marriage*, [*1040] **issue, death of the wife, seizin in fact*. In this case, the three first concur; but it is objected, that here is no seizin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such a seizin or possession of the equitable estate in the wife as in this Court is considered as equivalent to an actual seizin of a freehold estate at common law? and I am of opinion there was.

Actual possession, clothed with the receipt of the rents and profits, is the highest instance of an equitable seizin, both of which there was in this case; and that a husband shall be tenant by the curtesy of the equitable estate of the wife, has been often determined, as in *Sweetapple v. Bindon*, 2 Vern. 536, which was a much stronger case than this; for in that case there was neither seizin nor land; and in *Greenhill v. Greenhill*, 2 Vern. 680, it was held that lands articleed for only, will pass by a will.

The principal objections are two:—

First, *laches*, and neglect in the husband by not paying off the mortgage.

¹ *Strode v. Russel*, 2 Vern. 625.

Secondly, that the rule ought to be equal between dower and curtesy, and that dower cannot be of a trust estate.

As to the first, it is not similar to the cases of laches in the husband, viz., as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and it holds equally strong in the case of a trust estate; for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is necessarily attended with many delays.

The second objection proves too much, if anything, and entirely fails by the precedents of this Court. If any innovations were to be made, I am of opinion the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it; and there can be no inconvenience *to the heir-at-law, for he [*1041] would have the same remedy in this Court, to make a tenant by the curtesy keep down the interest, as against any other tenant for life. For these reasons I am of opinion the defendant is entitled to be tenant by the curtesy; and the decree at the Rolls as to this part must be reversed.

*HOWARD v. HARRIS.

[*1042]

NOVEMBER 6, 1683.

REPORTED 1 VERN. 190.1

RESTRICTIONS ON REDEMPTION OF MORTGAGE DISCOURTENANCED IN EQUITY—MORTGAGE CANNOT BE MADE IRREDEEMABLE.]—*No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.*

MR. HOWARD settles a jointure on plaintiff, his lady, before marriage, which, proving defective, and not of value according to the marriage agreement, he therefore afterward makes her an additional jointure of other lands; and afterward, Mr. Howard, in 1673, makes a mortgage to the defendant Harris, for securing 1000*l.*, with interest, in which (among others) part of the lands belonging to the additional jointure was comprised; and in the mortgage there is a special clause of redemption; viz., that Mr. Howard, or the heirs males of his body, should, in June, 1686, pay the principal sum of 1000*l.*, and 60*l.* per annum interest in the meantime, then Mr. Howard, or the heirs males of his body, might re-enter; and Mr. Howard covenants that no one but he or the heirs males of his body should be admitted to redeem this mortgage: and

¹ S. C., 1 Eq. Ca. Ab. 312, pl. 11; 2 Ch. Ca. 147.

likewise covenants to pay the 1000*l.* on the — day of —, in the year 1686, and 60*l.* per annum interest in the meantime, by half-yearly payments, from the date of the mortgage.

Mr. Howard dies without issue.

The plaintiff being a jointress of part of the mortgaged lands, and so entitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

[*1043] *The defendant, by answer, insists the lands are now become irredeemable.

This cause was heard before the Lord Chancellor Nottingham, and now, upon the defendant's petition, came to be reheard before the Lord Keeper North,¹ and was by them both decreed for the plaintiff.

For the plaintiff it was insisted :

1st. That restrictions of redemption in mortgages have always been discountenanced in this Court, and it would be a thing of mischievous consequence should they prevail; for then it would become a common practice and a trade among the scriveners, so to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement; and the plaintiff's counsel insisted, that there was no more in this case against redemption than there was in every mortgage. It is true, here is an express covenant that none but Mr. Howard, or the heirs males of his body, should redeem; and in every mortgage there is a proviso, that, in case the money be not paid by such a day, the mortgagee shall hold the land discharged: and not only so, but there is likewise an express covenant for further assurance; so that, in every mortgage, the agreement of the parties upon the face of the deed seems to be, that a mortgage shall not be redeemable after forfeiture.

2d. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage.

3d. It is another standing rule, that a mortgage cannot be a mortgage of one side only.² And here it is plain, Mr. Harris may make it a mortgage; for he has a covenant for the repayment of his mortgage-money. And *for precedents was [*1044] cited the case of *Kilvington v. Gardiner*, who was to redeem at any time in his lifetime, and Sir Robert Jason's case.³

For the defendant it was insisted, that this express agreement of the parties ought to be pursued; and they pretended the same

¹Afterward Earl of Guildford.

²*Greaves v. Exton*, 1 Vern. 139.

³*Jason v. Eyres*, 2 Ch. Ca. 33.

was made upon good consideration, viz., that the defendant Harris had formerly purchased those very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seized in fee; but this land was afterward evicted, upon pretence that Sir Robert was only tenant for life; and the reason of this special clause of redemption was, that, in case Mr. Howard should have issue male, the estate might remain in the family; but if he had none, it should be left to the defendant as something toward a compensation for the loss in his purchase, and Mr. Harris was to submit to the loss, and not to question Mr. Howard's title. But, as to this, they had not a word of it in proof, saving only, that the defendant had made such a purchase, but not that this was the consideration of the agreement; and it likewise appeared that Mr. Howard claimed by an ancient settlement from the Lord Suffolk, and not by any settlement made by his father, Sir Robert.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage-money; and one that comes in by a voluntary conveyance may redeem a mortgage; and if the additional jointure was voluntary, so likewise was the agreement that none but Mr. Howard, or the heirs males of his body, should redeem; and that was subsequent to the additional jointure.

And it was further urged, that the mortgaged estate is a reversion after lives only, and is at present but 7*l.* per annum; and that Mr. Harris did actually borrow the mortgage-money to lend on this reversion; and it could not be presumed he would have so done, unless it had been in *consideration that this mortgage had been made in a special manner redeem- [*1045] able.

But it was answered, that, possibly, the defendant might design such a catching bargain of this mortgage; but that was a sort of circumvention, and the worst part of the case.

LORD KEEPER NORTH,¹ after long debate, decreed the mortgage should be redeemed; the rather, that the defendant had a covenant for repayment of his mortgage-moneys;² but said, if the case had been, that a man had borrowed money of his brother, and had agreed to make him a mortgage, and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity.

But then, for the defendant, the mortgagee, it was insisted, that this mortgage having been made ten years since, and of a reversion, where 7*l.* per annum rent was only reserved, that, in this case, the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

¹Afterward Earl of Guildford.

²The omission of the covenant is immaterial; see 1 P. Wms. 271; 2 Atk. 496; *King v. King*, 3 P. Wms. 358.

But, as to that, it was answered, that the plaintiff's bill to redeem was filed so long since as 1677, and that the defendant had by answer opposed the redemption; and, therefore, from that time, he had no pretence to an allowance of interest for his damages. And it was never known in this Court that interest upon interest was at any time allowed in any case.

But the Lord Keeper was clear of opinion, that, as to so much interest as was reserved in the body of the deed, that should be reckoned principal;¹ for, it being ascertained by the deed, an action of debt would lie for it; and therefore, it was reasonable that there should be damages given for the non-payment of that money. And whereas it was urged, that this had never been practiced, and that there was not any such precedent in the Court; and that, if this were to be established for a rule, every scrivener would reserve all his interests half-yearly, from time to time, as long as the money should be continued out upon *the [*1046] security; which would be to change the law and practice in this Court, and make all mortgagors pay interest upon interest.

But the Lord Keeper said, he was clear in that distinction, between debt and damages; and he saw no inconvenience that could ensue: it would serve only to quicken men to pay their just debts; and accordingly decreed, that, after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a year, for which the defendant might have sued at law and recovered damages.

In *Howard v. Harris*, *Cusborne v. Scarfe*, and *Thornbrough v. Baker*, were decided some of the most important points connected with the jurisdiction of equity relative to mortgages, which, by its conformity to justice and common sense, has enabled it to prevail over the narrow prejudices and unjust severity of the common law.

At common law, unless the mortgagor or his heirs, by payment of the mortgage-money and interest at the time and place appointed, strictly comply with the condition, upon the fulfillment of which it is stipulated that he should re enter on his estate, it becomes, however much it may exceed in value the sum advanced, the absolute property of the mortgagee; nor has the mortgagor any right at law to repossess himself of the estate on payment of the money. Thus, to make use of the instance given by Littleton, "If a feoffment be made upon such condition, that, if the feoffor pay to the feoffee, at a certain day, &c., 40*l.* of money, then the feoffor may re-enter; if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken away from him forever, and so dead to him upon condition:" Litt. s. 332.

¹ Sed vide *Thornhill v. Evans*, 2 Atk. 330.

In equity, however, notwithstanding the opposition of the judges of the common law, who have always strictly adhered to the doctrine of forfeiture on non-performance of the condition, it was, at a very early period, held, that, until foreclosure by decree, the mortgagor, by applying within a reasonable time, and offering to pay principal, interest, and all proper costs, might redeem the estate forfeited at law. See *Langford v. Barnard*, Tothill, 134, decided *in the 37th year of Queen Elizabeth's [*1047] reign; *Emmanuel College v. Evans*, 1 Ch. Rep. 18, decided in the first year of Charles the First. This right to redeem, because it can be enforced only in courts of equity, is called the mortgagor's "equity of redemption."

As soon as the right of redemption was established, courts of equity, in order to prevent its evasion, were obliged to lay down (in contradiction to the well-known maxim, *Modus et conventio vincunt legem*), as a rule never to be transgressed, that a mortgagor cannot, by any contract entered into with the mortgagee *at the time of the mortgage*, give up his right of redemption, or fetter it in any manner by confining it to a particular time, or to a particular description of persons. Thus, in the principal case of *Howard v. Harris*, where Howard covenanted that no one but *he, or the heirs males of his body*, should be admitted to redeem, it was contended, upon Howard's death *without issue*, that the land had become irredeemable; the jointress was, however, admitted to redeem; and it was correctly laid down *arguendo*, that it is a maxim in equity, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; that a mortgage can no more be irredeemable than a distress for a rent charge can be irreplevable; that the law itself will control that express agreement of the party; and, by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage. So, it was said by Mr. Vernon, in *East India Company v. Atkyns*, Com. Rep. 349, that if a man makes a mortgage, and covenants not to bring a bill to redeem, nay, if he goes so far, as in *Stisted's case*, to take an oath that he will not redeem, yet he shall redeem. So, also, in *Kilvington v. Gardiner*, cited in the principal case of *Howard v. Harris*, where the right of redemption was attempted to be confined to the lifetime of the mortgagor, it was held that it existed after his death. See also, *Jason v. Eyres*, 2 Ch. Ca. 33; *Spurgeon v. Collier*, 1 Eden, 55; *Goodman v. Grierson*, 2 Ball & B. 278; and see *Cowdry v. Day*, 1 Giff. 316, where it was held that a stipulation by the mortgagor with the mortgagee (who was his solicitor) that the mortgagor should not pay the mortgage money or institute any proceedings in equity for redemption of the estate for twenty years, was invalid, as being contrary to public policy.

No person, moreover, can, under color of a mortgage, obtain a collateral advantage not strictly belonging to the contract of mortgage. Thus, a stipulation that if interest is not paid at the end of *the year it shall be converted into principal (*Chambers v. Goldwin*, 9 [*1048]

Ves. 271), that if the mortgage were paid off the mortgagor would pay to the mortgagee a commission of 5 per cent. upon the sum advanced, and interest upon that commission from the date of the advance (*Chapple v. Mahon*, 5 I. R. Eq. 225), that the mortgagee shall be receiver of rents with a commission (*Ib.* And see *Langstaffe v. Fenwick*, 10 Ves. 405; *Leeth v. Irvine*, 1 My. & K. 277), that the mortgagee while in possession shall receive a certain sum yearly for management (*Comyns v. Comyns*, 5 I. R. Eq. 583), or that he shall, as auctioneer, receive a commission upon a sale (*Broad v. Selfe*, 11 W. R. (M. R.) 1036; 9 Jur. N. S. 885; *Barrett v. Hartley*, 2 L. R. Eq. 795; *Matthison v. Clarke*, 3 Drew. 3), is invalid. So likewise in *Jennings v. Ward*, 2 Vern. 520, Ward lent money to Neale, and took a mortgage from him to secure 16,000*l.*, with interest at 6*l.* per cent.; and Neale, in another deed executed at the same time, covenanted to convey to Ward, if Ward thought fit, ground rents to the value of 16,000*l.* at the same rate of twenty years' purchase. Upon a bill filed to redeem, the defendant insisted on the agreement, but the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, without regard to the agreement. And he observed, "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

So, if a mortgage be made redeemable upon payment of the mortgage-money at a certain day, but if the money be not then paid, if the mortgagee will pay a further sum to the mortgagor, that then his estate shall be absolute, or that he will make him a further conveyance, or anything to that effect, the estate is, notwithstanding, redeemable after the day of payment, and the mortgagee cannot enforce the mortgagor, after default, to make him an absolute estate, until he forecloses him. And see *Price v. Perrie*, Freem. Ch. Rep. 258; *Willett v. Winnell*, 2 Vern. 488; *Brown v. Edwards*, 1 Ch. Rep. 222. Sed vide *Tasburgh v. Echlin*, 2 Bro. P. C. 265, Toml. edit.; *Re Edwards' Estate*, 11 Ir. Ch. Rep. 367.

We must, however, distinguish the before-mentioned cases, falling within the rule, from the case of a mortgagee agreeing with the mortgagor for a preference of pre-emption in case of sale: for such an agreement will be enforced (*Orby v. Trigg*, 2 Eq. Ca. Ab. 599, pl. 24; 9 Mod. 2); but the terms must be strictly complied with (*Dawson v. Dawson*, 8 Sim. 346; *Cookson v. Cookson*, 8 Sim. 529.) And where a mortgagee agrees [*1049] to take a portion of his debt in lieu of the whole, upon *payment on a given day, the Court will not relieve against the effect of its non-payment on that day: *Ford v. Chesterfield*, 19 Beav. 428.

The rule must be also further distinguished from that class of cases where the Courts have considered a transaction not to amount to, or to be intended as, a mortgage, but to be an absolute sale of an estate, with a proviso for the vendor to repurchase upon certain terms; for it seems, that unless those terms are strictly complied with, the person making the conveyance cannot insist upon the benefit of his contract: *Barrell v. Sabine*,

1 Vern. 268; *Perry v. Medowcroft*, 4 Beav. 197; *Alderson v. White*, 2 De G. & Jo. 97. So, also, where there is an absolute conveyance with a subsequent agreement, that, if the vendor desires it, he may have his estate again upon payment of the money with interest and costs: *Cotterell v. Purchase*, Ca. t. Talb. 61; and see *Brooke v. Garrod*, 3 K. & J. 608, 2 De G. & Jo. 62; and *Ward v. Wolverhampton Waterworks Company*, 13 L. R. Eq. 243.

And there may be a valid sale of the equity of redemption by the mortgagor to the mortgagee, accompanied by a proviso giving the right to repurchase. See *Endsworth v. Griffiths*, 15 Vin. Abr. 468, pl. 8; 2 Eq. Ca. Ab. 595, pl. 6; 5 Bro. P. C. 184, Toml. edit., where Lloyd executed a release of the equity of redemption to Griffiths, who at the same time gave Lloyd a note or memorandum, promising that if he should, within a year, pay to him the purchase-money and all charges of repairs for that time, he (Griffiths) would sell and convey to him the premises. Some years after, Lloyd died without having repurchased, and a bill filed by his wife and son, to whom he had devised the estate, for redemption, was dismissed in the Court of Exchequer, and the decision was, upon appeal, affirmed in the House of Lords. *Davis v. Thomas*, 1 Russ. & My. 506, is a case similar in its circumstances, and the same principle was acted upon: 5 My. & Cr. 307. And see and consider *Floyer v. Lavington*, 1 P. Wms. 268; *Mellor v. Lees*, 2 Atk. 494; *Bulwer v. Astley*, 1 Ph. 422; *Fee v. Cobine*, 11 Ir. Eq. Rep. 406; *Pegg v. Wisden*, 16 Beav. 239.

The authorities upon this subject were fully examined by Lord Cottenham in *Williams v. Owen*, 5 May. & Cr. 303. In that case Williams, by an indenture dated the 14th of June, 1821, reciting that he had contracted and agreed with Owen for the absolute sale of the premises for 550*l.*, conveyed them to him absolutely, with a covenant for peaceable possession and enjoyment, and other covenants usual in conveyances to purchasers; and by an agreement of the same date, between Owen and Williams, which *recited the conveyance, describing it as an absolute conveyance, [*1050] and that, upon treating for the sale, it was mutually agreed, in case Williams should pay to the defendant the sum of 550*l.* within twelve months, and 13*l.* the expense of the conveyance, that then and in such case Owen would reconvey the premises to Williams, or consent to the conveyance being canceled and made void to all intents and purposes; and that Owen should retain the rents from that day to the day of the payment of the sum of 550*l.*, instead of interest, provided he preferred the same to lawful interest. It was also agreed, that the rent should be apportioned from the 4th of August then next, and received from that day by Owen; and Owen engaged, that if the sum of 550*l.* was paid on or before the 4th of August, 1822, the conveyance should be canceled, and the premises reconveyed. Owen took possession immediately after the execution of the conveyance. Williams lived three years after that time, and left the plaintiff his heir, who filed a bill for redemp-

tion; but Lord Cottenham, reversing the decision of Sir L. Shadwell, V. C. (reported 10 Sim. 386), held that he was not entitled to redeem, as the transaction was a sale, with an agreement for a repurchase, which was never acted upon. "That this Court," said his Lordship, "will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a purchase, not acted upon, will not of itself entitle the vendors to redeem.

"From the case of *Barrell v. Sabine* (1 Vern. 268) this appears to have been recognized as a well-known rule of equity above 150 years ago. The question always is, *Was the original transaction a bona fide sale, with a contract for repurchase; or was it a mortgage under the form of a sale?* Trying this case by the principle so long established, and settled upon such high authority, what is there to show that this transaction was in its origin a mortgage, and not a sale, with a provision, under certain conditions, for a repurchase?

"If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment? It appears also, that he, as purchaser, paid for the conveyance, and was at all events to be at liberty to keep the rents. There was, indeed, the want of every circumstance which in other cases has been thought necessary to give a purchase the character of a mortgage, and no proof of any intention having existed that it should be so considered.

"In *Baker v. Wind* (1 Ves. 160), *relied upon by the plaintiff, [*1051] it was proved that the parties had throughout treated the transaction as a mortgage, and had made it assume the appearance of a purchase, to deceive the creditors of the mortgagor.

"I am, for these reasons, and upon these authorities, of opinion that the plaintiff has not established any title to redeem, or to enforce the contract for a repurchase."

Another exception or qualification of the rule is to be found in that class of cases where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement; for then it seems, if the right of redemption is confined to the life of the settlor or mortgagor, his heirs will not be allowed to redeem. See *Bonham v. Newcomb*, 1 Vern. 214, 232, reversing the decision of Lord Nottingham, 1 Vern. 7; *S. C.*, 2 Ch. Ca. 58; 2 Vent. 364. See also *King v. Bromley*, 2 Eq. Ca. Ab. 595, pl. 8; *Wolstan v. Aston*, Hard. 511; and perhaps *Jason v. Eyres*, 2 Ch. Ca. 33, ought to have been otherwise decided, as coming within the principle of this exception.

A mortgage may be given to secure the payment of a larger sum than that actually advanced to the mortgagor, as when it is agreed that a certain sum shall be paid to the mortgagee by way of bonus for the risk he

undergoes in making the advance: *Potter v. Edwards*, 5 W. R. 407; 26 L. J. N. S. (Ch.) 468.

Some difficulty arises occasionally in determining whether a conveyance is intended to be a mortgage or not. Where this is the case, parol evidence will be admitted to show, that, what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only. Thus, in *Maxwell v. Montacute*, Prec. Ch. 526, where a person refused to execute according to agreement a defeasance, after the mortgagor had executed an absolute conveyance, Lord Nottingham admitted parol evidence to show the agreement, and decreed against the mortgagee. See also *Walker v. Walker*, 2 Atk. 99; *Dixon v. Parker*, 2 Ves. 225; *Young v. Peachy*, 2 Atk. 257; *Joynes v. Statham*, 3 Atk. 388; *Francklyn v. Fern*, Barnard. 30; *Cotterell v. Purchase*, Ca. t. Talb. 61; *Spurgeon v. Collier*, 1 Eden, 55; *Holmes v. Matthews*, 9 Moore, P. C. C. 413; *Barnhart v. Greenshields*, Ib. 18; *Langton v. Horton*, 5 Beav. 9; *Murphy v. Taylor*, 1 Ir. Ch. Rep. 92; *Douglas v. Culverwell*, 3 Giff. 251.

Where lands were conveyed upon trust, in case a sum and interest should not be paid by a certain day, to sell, and after payment of principal, interest, and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and there was a covenant to sell without *six months' notice, but the deed contained no proviso for redemption, it was held by Sir J. Romilly, M. R., that this was a [*1052] mere mortgage: *Bell v. Carter*, 17 Beav. 11.

As to the Nature of an Equity of Redemption.—In *Roscarrick v. Barton*, 1 Ch. Ca. 217, it was said, that an equity of redemption was a mere right; and that a right to a bill in equity ought not to be entailed, and was not such an inheritance as could be entailed by the statute de donis; and even so late as the time of Lord Hardwicke, in the principal case of *Casborne v. Scarfe*, where a husband claimed to be tenant by the curtesy of land of his wife's, mortgaged by her previous to marriage, it was insisted, in opposition to his claim, that the equity of redemption was no actual estate or interest in the wife, but merely a right of action, or a suit in a court of equity. Lord Hardwicke, however, held, that an equity of redemption was an estate in the land. "For," said his Lordship, "it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered a mere right only, but such an estate whereof there may be a seizin." However, previous to 3 & 4 Will. 4, c. 105, women were not dowable of an equity of redemption; but this was because they were not entitled to dower of equitable estates: *Dixon v. Saville*, 1 Bro. C. C. 326.

The person entitled to the equity of redemption being considered as the owner of the land, he may not only devise or settle, but in other respects deal with it as land. He may, for instance, mortgage it; but all incumbrances subsequent to the first, if he have the legal estate, having merely

equitable claims, will, according to the maxim, *Qui prior est tempore potior est jure*, be entitled to satisfaction out of the estate, according to priority, though, as we have before seen, an equitable incumbrancer, where the legal estate is outstanding, or in a former mortgagee, may, if he advanced his money without notice of a former incumbrance, obtain priority by getting in the legal estate, or taking a conveyance from the legal mortgagee; in which last case he may tack his own to the legal mortgage, and thus obtain priority over all intermediate incumbrances. See *Marsh v. Lee*, ante, Vol. 1, *611, and note.

So, likewise, upon the principle that the person entitled to the equity of redemption is considered as the owner of the land, on his death intestate the descent of the equity of redemption will be governed either by the general law of the land, or the *lex loci*, according to the tenure of the legal estate. Thus, it has been held, where borough English lands

[*1053] *were mortgaged, that the equity of redemption descended to the youngest son, to whom the lands would descend, and in a mortgage of gavelkind lands, the equity of redemption would descend in the same manner as the lands would: *Fawcett v. Lowther*, 2 Ves. 304.

The mortgagor of an advowson has a right to nominate to the living on a vacancy; and the mortgagee will be obliged to accept of the nominee, even, it seems, although there was a covenant in the mortgage that the mortgagee should present on every avoidance: *Jory v. Cox*, Prec. Ch. 71; *Amhurst v. Dawling*, 2 Vern, 401; *Galley v. Selby*, Stra. 403; and see *Mackenzie v. Robinson*, 3 Atk. 559, overruling *Gardiner v. Griffith*, 2 P. Wms. 403.

In the principal case of *Thornbrough v. Baker*, Lord Nottingham decided a point, ever since firmly established, that although, in the case of a mortgage in fee, the heir must reconvey, on payment of the mortgage-money and interest, the executor, and not the heir, of the mortgagee will be entitled to the money. There is, however, as is there laid down by Lord Nottingham, an important distinction, resulting from the difference between a mortgage and an absolute conveyance, with a collateral agreement for a repurchase; as, in the latter case, if the purchaser dies, and the person who conveyed to him exercises his option to repurchase, on repayment of the purchase-money, the heir, and not the executor, of the purchaser will, it seems, be entitled to the money. See *Saint John v. Wareham*, cited 3 Swanst. 631.

Assignments of Mortgages.—A mortgage may be assigned at any time by the mortgagee alone; but the assignee should always obtain the concurrence of the mortgagor; for, as the assignee stands in the same relation to the mortgagor as mortgagee, he is bound by the equities subsisting between them. Thus, if the mortgagor do not concur in the assignment, the assignee will take subject to the account between the mortgagor and the mortgagee. A leading case upon this subject is *Matthews v. Wallwyn*, 4 Ves.

118. There Lord Loughborough, when the cause came on before him, remarked that a case was referred to, in which it was supposed Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage-deed, without any indorsement upon it, to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage, to the full extent of it, against the mortgagor, who permitted the mortgagee to deal with and make a security upon it. It was also supposed, that, in practice, there was no occasion to make the mortgagor a party; and in some cases *it might not be possible to make him a party to the assignment; and that, to hold that the assignee [*1054] of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. That he had got the best information he could, and the result was, that persons most conversant in conveyancing held it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor, as to the sum really due; that, in fact, it did happen that assignments of mortgages were taken without calling upon the mortgagor; but that the most usual case, when that occurred, was where it was the best security that could be got for a debt not otherwise well secured; and it was not in the course of transferring mortgages, but as raising money upon such securities. But no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due.

So, where a mortgage is transferred, and the transferee fails to give notice of the transfer to the mortgagor, payments subsequently made by him to the original mortgagee are valid as against the transferee: *Matthews v. Wallwyn*, 4 Ves. 126. See also *Earl of Macclesfield v. Fitton*, 1 Vern. 169. And see *Williams v. Sorrell*, 4 Ves. 389; *Chambers v. Goldwin*, 9 Ves. 254; *Bradwell v. Catchpole*, 3 Swanst. 79, n.; 1 Ch. Ca. 68; *Ex parte Monro*, Buck, 300; *Stocks v. Dobson*, 4 De G. M. & G. 11.

And if the mortgage debt was secured by a bond or covenant, if an action were brought upon the bond in the name of the mortgagee, as it must be, the mortgagor would have to pay to the assignee no more than was really due upon the bond: and if an action of covenant were brought by the covenantee, the account must be settled in that action: *Matthews v. Wallwyn*, 4 Ves. 129.

But the mortgagor will not be allowed for payments made to persons not authorized to receive them. Thus in *Withington v. Tate* (4 L. R. Ch. App. 288), Nixon and Thew, who were mortgagees, transferred their mortgage to the plaintiff, who gave no notice to the mortgagors. Afterward the mortgagors, intending to redeem, paid the amount secured by the mortgage to the solicitors of Nixon and Thew, without ascertaining that they were authorized to receive it; the solicitors misappropriated the money. Nixon and Thew executed a deed prepared by their solicitors,

but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, and purported to convey [*1055] the property, *by direction of the mortgagors, to their nominees.

There was no proper receipt indorsed on the deed. The plaintiff filed a bill of foreclosure against the mortgagors. It was held by Lord Chancellor Hatherley, affirming the decision of Lord Romilly, M. R., that the plaintiff was entitled to the usual foreclosure decree.

Where a mortgage is assigned without the privity or consent of the mortgagor, the assignee, who takes it only upon the same terms as the mortgagee, cannot add to what is due, settle the account, or turn principal into interest: *Earl of Macclesfield v. Fitton*, 1 Vern. 169; *Ashenhurst v. James*, 3 Atk. 271; *Matthews v. Wallwyn*, 4 Ves. 128; but "where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest" (*Ashenhurst v. James*, 3 Atk. 271); but interest cannot, even with the consent of the mortgagor, be turned into principal as against subsequent incumbrancers of whom there is notice: *Digby v. Craggs*, Amb. 611; 2 Eden, 200; *Montague v. Ratcliffe*, Amb. 612, n., Blunt's edit.; and see *Walker v. Jones*, 1 L. R. P. C. 50.

Moreover, it is laid down, that, "if a mortgagee *in possession* assigns over his mortgage without the assent of the mortgagor, the mortgagee is bound to answer the profits both before and *after* the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent: 1 Eq. Ca. Ab. 328, pl. 2. But a query is added: "If the mortgagor hides, so that he cannot be served with a subpoena to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment?"

When the interest of a mortgage has been regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer of the mortgage, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him. *In re Radcliffe*, 22 Beav. 201.

Where a stranger gets an assignment of a mortgage for less than is due, he will be entitled, at any rate as against the mortgagor and his heirs, to the whole sum due upon the mortgage: *Phillips v. Vaughan*, 1 Vern. 336; *Williams v. Springfield*, 1 Ven. 476; for, as Lord Jeffries observed, in the latter case, "where the mortgagor or his heir comes to redeem, there is no reason that he should have the benefit of a good bargain made by another man, and ought therefore to pay what is really due on the mortgage, whatever it be, without respect to what the assignee *paid." But in [*1056] the former of those cases he thought that a purchaser without notice of the incumbrance might possibly have an equity to redeem the incumbrance for what was really paid for it; and in the latter case he

distinctly lays it down, that "where there are subsequent incumbrancers or creditors in the case, a man who buys in a prior incumbrance shall be allowed only what he really paid, though there was in truth a much greater sum due:" see *Long v. Clopton*, 1 Vern. 464. This, however, seems to be laid down too generally, and the doctrine has at any rate been much narrowed since, and is now only applicable to purchases of incumbrances made by persons in some fiduciary position, or the heir-at-law: *Morret v. Paske*, 2 Atk. 53, 54.

It is clear, however, that a prior incumbrancer *bonâ fide* purchasing a puisne incumbrance, will be entitled to what is due upon it (*Morret v. Paske*, 2 Atk. 54; *Darcy v. Hall*, 1 Vern. 49; *Bromley v. Holland*, 5 Ves. 620, n.); secus, if with notice of an intervening security: *Long v. Clopton*, 1 Vern. 464.

If a person stands in any fiduciary relation toward the owner of the estate, as trustee, agent, or guardian, he will, as against another incumbrancer, be allowed only what he paid for it, since any purchase by him of an incumbrance at a lower price than is due upon it, is for the benefit of the estate: *Morret v. Paske*, 2 Atk. 54.

An heir-at-law purchasing in an incumbrance, either as against a purchaser (*Long v. Clopton*, 1 Vern. 464) or creditors, even without notice of their debts (*Lancaster v. Evors*, 10 Beav. 164), will only be allowed what he actually gave for the incumbrance; but it seems, that if an heir or trustee buys in an incumbrance for the purpose of protecting an incumbrance to which he is himself entitled, he will be allowed what is due on the security: *Darcy v. Hall*, 1 Vern. 49.

Arrears of rent will not pass by an ordinary assignment of a mortgage: *Salmon v. Dean*, 3 Mac. & G. 344.

Remedies of the Mortgagee.—As we have before seen (ante, p. *635), a mortgagee may pursue his remedies in different courts at the same time; that is to say, he may proceed in a Court of Common Law against the mortgagor *personally*, for the debt, or by ejectment; and also in equity, where his remedy is *in rem* against the mortgaged property, either by foreclosure or sale.

If the mortgagee sues the mortgagor on his covenant to pay, and does not get fully paid, he may still go on and foreclose the mortgage (*Palmer v. Hendrie*, 27 Beav. 351), but after he has once been paid in full, under the covenant, he cannot touch the estate, *and is precluded from all proceedings afterward. *Ib.* [*1057]

If the mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, the Court of Chancery will prevent his suing at law to recover the mortgage money: *Palmer v. Hendrie*, 27 Beav. 349.

It is only, however, when the estate has become forfeited at law by breach of the condition for payment at a certain time (*Bonham v. New-*

comb, 2 Vent. 335), that the mortgagee may file a bill to foreclose the equity of redemption, and if there are prior incumbrances, he must offer to redeem them (*Inman v. Wearing*, 3 De G. & Sm. 729), whereupon directions for an account, payment of principal, interest, and costs, within six months after the chief clerk's certificate, will be decreed, or in default, that the mortgagor shall be foreclosed. The chief clerk appoints a day for payment, and upon a default being made, the mortgagee may obtain a final order for foreclosing, which, when signed and enrolled, will foreclose the equity of redemption; that is to say, absolutely transfer the mortgaged estate to the mortgagee.

A mortgagee who has assigned his mortgage debt, expressly reserving to himself the benefit of the mortgage security, is entitled to the common foreclosure decree: *Morley v. Morley*, 25 Beav. 253.

A sale, even previous to the Chancery Improvement Act (15 & 16 Vict. c. 86), would have been decreed by the Court instead of a foreclosure in certain cases, as in the case of a mortgage of a dry version (*How v. Vigneres*, 1 Ch. Rep. 18; 15 Vin. 475); or if the security were scanty (*Earl of Kinnoul v. Money*, 3 Swanst. 208, n.); or if the bill, praying a sale, were taken pro confesso (*Dashwood v. Bithazey*, Mos. 196). And in *Lucas v. Seale* (2 Atk. 56), Lord Hardwicke said, that where there were several executors, and one of them was indebted to the testator, for which he had given a security upon his estate, if the co-executors were apprehensive that he was insolvent, and that the estate might prove a deficient security, it was improper to bring a bill against him to foreclose, because, the testator having made him an executor, gave him an interest in the mortgage, and the other executors ought to have brought a bill for sale of the estate. And in *Daniel v. Skipwith* (2 Bro. C. C. 154), where the same person was the heir and personal representative of the mortgagor, and had by his answer admitted that the personal estate was small and would be deficient, Lord Thurlow held, that a sale of the mortgaged estate might be directed in the first instance; but he observed, that if the heir and personal representative had been different persons, it would have been necessary, *first, to have had an account of the personal estate.

[*1058] In the case of an infant heir or devisee of the mortgagor, there would, with the mortgagee's consent, even previous to the alteration in the law, have been an inquiry which would be more beneficial for the infant, a sale or foreclosure (*Mondey v. Mondey*, 1 V. & B. 222, overruling *Goodier v. Ashton*, 18 Ves. 83); and an order for sale, without a reference, would be made, if it appeared clearly for his benefit (*Davis v. Dowding*, 2 Kee. 247); and if a decree for sale were obtained subsequently to the infant attaining his majority, he could not, if he omitted, on his attaining his age, to make a new defence, or apply for leave to redeem, object to the decree: *Davis v. Dowding*, 2 Kee. 245. See also *Foster v. Eddy*, 18 L. J. (Chanc.) 151.

It has been said that the right to redeem and the right to foreclose are

co-relative (Jarm. by Byth. vol. v. 234), but this is not strictly accurate, for when property is conveyed to trustees for sale, in order to secure a sum of money, although the mortgagor may be entitled to redeem, the mortgagee is not entitled to foreclosure, but to a decree for sale (*Scweitzer v. Mayhew*, 31 Beav. 37); and mortgagees, in trust, may file a bill for an account and sale, without praying foreclosure, although the mortgage security contains an express power of sale: *Hutton v. Sealy*, 27 L. J. (Ch.) N. S. 263.

Where, in a foreclosure suit, questions as to priorities not affecting the plaintiff are raised between co-defendants, the Court will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several defendants inter se: *Bartlett v. Rees*, 12 L. R. Eq. 395; *Edwards v. Martin*, 7 W. R. (V. C. K.) 30.

The jurisdiction, however, of the Court to direct a sale instead of a foreclosure, has been much enlarged by the 48th section of the Chancery Improvement Act (15 & 16 Vict. c. 86). There it is enacted, "that it shall be lawful for the Court, in any suit for foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct; and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem: Provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any *such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall [*1059] deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

Under this Act the Court may, without the concurrence of the mortgagor, direct a sale instead of a foreclosure to take place at once: *Newman v. Selfe*, 33 Beav. 522.

The money paid into Court by a second mortgagee, in order to obtain an order for sale, under the Act 15 & 16 Vict. c. 86, s. 48, is applicable to indemnify the first mortgagee for his costs in an abortive attempt to sell: *Corsellis v. Patman*, 4 L. R. Eq. 156.

Where, in a foreclosure suit, part of the mortgagor's interest is vested in the Crown, the Court will not decree foreclosure in respect thereof, but will give the plaintiff liberty to apply in Chambers for a sale: *Bartlett v. Rees*, 12 L. R. Eq. 395; *Hancock v. The Attorney-General*, 33 L. J. (Ch.) 661.

So, where a mortgagor was convicted of felony, and the mortgagee filed a bill to realize his security, the Court decreed a sale, an account, pay-

ment of the purchase-money into Court, and payment of the mortgage debt, with liberty to the Attorney-General to apply for payment out of the balance: *Hancock v. The Attorney-General*, 12 W. R. (V. C. K.) 569; 33 L. J. Ch. 661.

As to the principles on which the Court acts in directing a sale of a mortgaged estate, see *Hurst v. Hurst*, 16 Beav. 372; *Smith v. Robinson*, 1 Sm. & Giff. 140; *Laslett v. Cliffe*, 2 Sm. & Giff. 278; *Wickham v. Nicholson*, 19 Beav. 38; *Hewitt v. Nanson*, 28 L. J. (Ch.) N. S. 49; *Phillips v. Gutteridge*, 4 De G. & Jo. 531; *Foster v. Harvey*, 11 W. R. (V. C. W.) 899; 12 W. R. (L. J.) 92; Morgan and Chute's Chancery Acts and Orders, 206, 4th ed.

As to the rights and remedies of a mortgagee of a share in a colliery partnership, see *Redmayne v. Foster*, 35 Beav. 529.

In Ireland, a sale, instead of foreclosure, has always been directed. See 13 Ves. 205; *Hutton v. Mayne*, 3 J. & L. 586.

But although a court of equity will order a foreclosure or sale in order to satisfy the mortgagee, it is nevertheless indulgent to the mortgagor, and will enlarge the time for payment, even after an order absolute of foreclosure has been signed and enrolled (*Thornhill v. Manning*, 1 Sim. N. S. 451), if a proper case can be shown, and the security be not deficient: *Cocker v. Bevis*, 1 Ch. Ca. 61; *Ismoord v. Claypool*, 1 Ch. Rep. 262; *Anon.*, Barnard, 221; *Edwards v. Cunliffe*, 1 Madd. 287; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591; *Holford v. Yate*, *1 J. & K. 677. But [*1060] the order to enlarge the time for payment is by no means of course; and though a strong reason is not required, it will be refused where none is assigned (*Nanny v. Edwards*, 4 Russ. 125), or where the security does not appear ample (*Eyre v. Hanson*, 2 Beav. 479), and even in the case of infant mortgagors, the time will only be extended upon the terms of the immediate payment of the interest and costs: *Coombe v. Stewart*, 13 Beav. 111. In a recent case, the time appointed for redemption was enlarged, pending an appeal to the House of Lords, upon the terms of the mortgagor paying into Court the principal and interest, and the costs of the suit and of the application for enlarging the time, the mortgagee to receive the dividends of the money paid into Court when invested, on his undertaking to repay them should the decree be reversed: *Finch v. Shaw*, 20 Beav. 555.

On bills of foreclosure, where the mortgagor asks to enlarge the time appointed for payment, the Court will accede to the application only on the terms of his first paying the interest and costs already reported due; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid: *Whatton v. Craddock*, 1 Kee. 269; *Brewin v. Austin*, 2 Kee. 211. And although such interest and costs are generally directed to be paid at the time appointed for the payment of the whole (*Edwards v. Cunliffe*, 1 Mad. 212; and see 2 Kee. 212), under particular circumstances a longer time will be allowed, as

when the mortgagee has prevented the mortgagor from receiving the rents (*Geldard v. Hornby*, 1 Hare, 251; *Ellis v. Griffiths*, 7 Beav. 83; *Eyre v. Hanson*, 2 Beav. 478); and if payment be not made, time may be enlarged if a reasonable excuse be given. Thus, in *Jones v. Creswicke* (9 Sim. 304), under a decree in a foreclosure suit, the time fixed for payment of principal, interest, and costs, was the 31st of July. On the 25th, the defendant obtained an order, referring it to the Master to fix a further time, on his paying the interest and costs on the first-mentioned day. The defendant, however, failed to make that payment, and, on the 3d of August following, the plaintiff obtained the usual order for foreclosure absolute; but, owing to the press of business in the Registrar's office, it was not drawn up. On the 16th of August the defendant moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest, and costs, was prevented by illness from coming to London on the 31st of July, and his wife, whom he had deputed to bring the money, was prevented from so doing by the coach being full on the 30th; and Sir L. Shadwell, V. C., [*1061] granted the motion. And see *Nanfan v. Perkins*, 9 Sim. 308. And where the mortgagee varied the account, by receiving the rent between the time of the Master's report and the day fixed for payment, the mortgagee was held not to be entitled to an order absolute for foreclosure, but a further reference and account was directed, and a new day appointed for payment: *Garlick v. Jackson*, 4 Beav. 154; *Alden v. Foster*, 5 Beav. 592; *Ellis v. Griffiths*, 7 Beav. 83.

A foreclosure is not complete, so as to deprive a man of his right to redeem, until the final order has been made (*Buchanan v. Greenway*, 12 Beav. 355; *Flack v. Longmate*, 8 Beav. 420; *Prees v. Coke*, 6 L. R. Ch. App. 645); and a final order cannot be obtained if rents have been received by the mortgagee since the account was taken: *Prees v. Coke*, 6 L. R. Ch. App. 645; *Nanny v. Edwards*, 4 Russ. 124.

A decree for foreclosure has, under peculiar circumstances, been opened after the mortgagee had been in possession sixteen years (*Burgh v. Langton*, 5 Bro. P. C. 213, Toml. edit.; *S. C.*, 2 Eq. Ca. Ab. 619; 5 Vin. Abr. 476, pl. 2); and for fraud, or collusion in getting the decree (*Loyd v. Mansell*, 2 P. Wms. 73; *Gore v. Stockpoole*, 1 Dow, 18; *Harveg v. Tebbutt*, 1 J. & W. 197); or by the mortgagee's proceeding against the mortgagor upon some collateral security, as a bond or covenant after foreclosure (*Dashwood v. Blithway*, 1 Eq. Ca. Ab. 317; 15 Vin. Abr. 476, pl. 3), which he can do as long as he retains the estate in his own hands, though not, it seems, according to the more recent authorities, if he has sold the estate, though for less than the amount due after foreclosure. See *Lockhart v. Hardy*, 9 Beav. 349; ante, p. *635, *636.

The mere overvalue of the estate, or a parol agreement or declaration of the mortgagee to allow redemption (*Whishall v. Short*, 2 Eq. Ca. Ab. 177, pl. 1; 7 Vin. Abr. 298, pl. 15, affirmed Dom. Proc. nom. *Wichalee v.*

Short, 3 Bro. P. C. 558, Toml. edit.); or his filing a bill of revivor and supplement, after a decree (*Birch's Case*, Gilb. Rep. 186); or his devising the estate as money (*Silberschildt v. Schiott*, 3 V. & B. 45; *Stuckville v. Dolben*, cited Sel. Ch. Ca. 10; 15 Vin. Abr. 476, pl. 1); or calling it a debt in his will (*Took v. Bishop of Ely*, 2 Eq. Ca. Ab. 608, pl. 1; 15 Vin. Abr. 476, pl. 1, n.); or an error in a matter of form after long possession (*Jones v. Kenrick*, 5 Bro. P. C. 244, Toml. edit.), will not induce the Court to open a decree of foreclosure. More especially will not a decree be opened after long possession, where the estate has been dealt with in settlements, or alterations have been made in erecting and pulling down buildings: **Took v. Bishop of Ely*, 5 Bro. P. C. 181, Toml. edit.; [*1062] *Lant v. Crispe*, 5 Bro. P. C. 200, Toml. edit.

As to the costs of a disclaiming defendant in suits for foreclosure and redemption, see *Ford v. The Earl of Chesterfield*, 16 Beav. 516; see also *Buchanan v. Greenway*, 11 Beav. 58; *Benbow v. Davies*, *Ib.* 369; *Ford v. Lord Chesterfield*, 16 Beav. 520; *Davis v. Whitmore*, 28 Beav. 617; *Talbot v. Kemshead*, 4 K. & J. 93; *Ballamy v. Brickenden*, 4 K. & J. 670, 672.

It seems that, in a foreclosure suit, it is not competent for the defendant to impeach the mortgage on the ground of fraud, without instituting a cross suit: *Eddleston v. Collins*, 3 De G. Mac. & G. 1.

A debenture holder of a railway company is not entitled to a decree either for a foreclosure or sale, as such companies have public duties to perform, from which nothing but an Act of Parliament can release them: *Furness v. The Caterham Railway Company*, 25 Beav. 614.

It may here be mentioned, that the necessity for a foreclosure is generally obviated by giving the mortgagee a power of sale, but a power of sale does not affect the right to foreclose: *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62.

And now, by the Trustees and Mortgagees Act (23 & 24 Vict. c. 145, ss. 11-16), mortgagees of *hereditaments of any tenure or any interest therein* have under instruments executed after the 28th of August, 1860, in the absence of any express declaration to the contrary, a power of sale under the Act, which, however, it should be remembered, does not apply to *chattels personal*. See Morgan and Chute's Chancery Acts and Orders, p. 300, 4th ed.

After the death of the mortgagor, the mortgagee has the option of filing a bill for administration, or one to enforce his security: *Dighton v. Withers*, 31 Beav. 424. If an administration suit is commenced by another creditor, and the mortgagee who is not made a party comes in, and consents to a sale, after the payment of the costs of the sale he is entitled to his costs in priority to those of the plaintiff: *Dighton v. Withers*, 31 Beav. 423.

A mortgagee, although he may have taken no steps for many years after the death of the mortgagor to realize his security, may nevertheless

be entitled to recover the deficiency arising on the sale of the security against the general assets (*Ridgway v. Newstead*, 2 Giff. 492), but he may, by his laches and acquiescence, lose his right to make the legatees refund: *Id.*

A mortgagee may file a bill for foreclosure after a decree made for the administration of the mortgagor's estate, and if he subsequently comes in and proves in *the administration suit, he is entitled to stay proceedings in his own suit, and to have the costs of it: *Brooksbank v. Higginbottom*, 31 Beav. 35. [*1063]

As to the distinction which exists with regard to costs between a suit to administer a mortgagor's general estate, and a suit by a mortgagee to realize his particular security, see *Wade v. Ward*, 4 Drew. 602, 604; *Wild v. Lockhart*, 10 Beav. 320; *Armstrong v. Storer*, 14 Beav. 535.

Redemption.—As the conveyance of an estate by way of mortgage is merely to secure the debt, persons entitled to certain interests in the equity of redemption, which, as before observed, is considered an estate in the land, may, before foreclosure, and in some cases, as we have seen, even after, come into a court of equity and redeem the estate.

The heir at common law, or the customary heir, according to the tenure of the land, may redeem; and to entitle him to relief, a prima facie title is sufficient (*Pym v. Bowreman*, 3 Swanst. 241, n.; *Lloyd v. Wait*, 1 Ph. 61); or if he be a lunatic, his committee may for him (*Ex parte Grimstone*, Amb. 706). So may the devisee of the equity of redemption, who need not make the heir-at-law of the testator a party to his bill to redeem, unless he claim to have the will established: *Lewis v. Nangle*, 2 Ves. 431; *Philips v. Hele*, 1 Ch. Rep. 190. And a tenant for life, remainderman, or reversioner (*Ranald v. Russell*, 1 You. 9; *Raffety v. King*, 1 Keen, 618; *Aynsly v. Reed*, Dick. 249), dowress (*Palmer v. Danby*, Prec. Ch. 137), tenant by the curtesy (*Jones v. Meredith*, Bunb. 347), jointress (see principal case of *Howard v. Harris*), an assignee (*Anon.*, 3 Atk. 314), assignees in bankruptcy (*Francklyn v. Fern*, Barnard, 30), a subsequent mortgagee making the mortgagor or his heir a party to his bill (*Fell v. Brown*, 2 Bro. C. C. 279), judgment creditors (*Stonehewer v. Thompson*, 2 Atk. 440), tenant by elegit or statute and sequestration (*Jones v. Meredith*, Bunb. 347; 2 Eq. Ca. Ab. 594; *Fawcett v. Fothergill*, Dick. 19); a judgment creditor, whose judgment does not affect the land at the date of a decree in a foreclosure suit, if he acquire a charge on the land by issuing a writ of elegit, and obtain a return from the sheriff, within six months from the date of the decree (*Mildred v. Austin*, 8 L. R. Eq. 220); a plaintiff in a creditor's suit (*Christian v. Field*, 2 Hare, 177), a creditor whose debt subsists in equity, although released at law (*Acton v. Pierce*, 2 Vern. 480; *S. C.*, nom. *Acton v. Acton*, Prec. Ch. 237), the Crown or its grantee, upon forfeiture of the equity of redemption (*Attorney-General v. Crofts*, 4 Bro. P. C. 136, Toml. edit.; *Lovell's Case*, 1 Salk. 85; 1 Eden,

[*1064] *210), the lord claiming the reversion on forfeiture of the equity of redemption of a term (*Downe v. Morris*, 3 Hare, 394), and it seems a tenant (*Keech v. Hall*, Dougl. 22), may redeem. A volunteer, although claiming under a deed fraudulent and void under 27 Eliz., as against the mortgagee quoad his mortgage, as to which he is a purchaser, may nevertheless redeem (*Rand v. Cartwright*, 1 Ch. Ca. 59; *Barthrop v. West*, 2 Ch. Rep. 62; *Thorne v. Thorne*, 1 Vern. 182); as may also persons entitled in default of appointment, where a mortgage is made in execution of a power: *Innes v. Jackson*, 16 Ves. 367. [The general principle would seem to be, that every one who has an interest in the land, and would be a loser if the mortgage were enforced, is entitled to redeem; and in *Averill v. Taylor*, 4 Selden, 44, it was said that this right may be exercised by a lessee for years, and was not confined to those who had a title in fee or of feehold. And when the liability of one of the parties who are bound by or answerable for the payment of a mortgage or other obligation in estate or person, is secondary as between himself and the others, so that he stands virtually in the position of a surety, he will, like other sureties, be entitled to subrogation, and to have an express or implied assignment of the mortgage on payment: *Averill v. Taylor*, ante.]

Any person, in short, interested in the equity of redemption is entitled to redeem, and where, being so entitled, he tenders the mortgage money and interest, he having a part in the equity of redemption, is entitled to the delivery of the title-deeds, and to have a conveyance of the property. Per Lord Hatherley, L. C., in *Pearce v. Morris*, 5 L. R. Ch. App. 229. The form of the conveyance depends upon circumstances. *Ib.*

Thus, if a tenant for life of the mortgaged estate takes a conveyance, provision ought to be made reserving any portion of the equity of redemption that he is not interested in, and giving those who are entitled the opportunity at a proper time of coming themselves and redeeming by paying a portion of their debt. *Ib.*, and see *Smith v. Green*, 1 Coll. 555; *Elisha v. Elisha*, Set. Dec. 3d Ed. 475.

So, after property has been mortgaged, if it is put into settlement, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but he must hold the equity of redemption subject to the trusts of the settlement: *Wicks v. Scrivens*, 1 J. & H. 215. The same principle applies where the security is in the form of a trust for sale: *Ib.*

The tenant for life having a conveyance, and having the deeds, cannot be redeemed by those in remainder, but retains the life estate, and when the remainderman comes into possession of the estate, he can then obtain a redemption of the charge which the tenant for life had acquired. Per Lord Hatherley, L. C., in *Pearce v. Morris*, 5 L. R. Ch. App. 230.

But a mortgagee is not bound to convey the legal estate in the mortgaged property, and to deliver up the title-deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person have only contracted to purchase part of the mortgaged estate, and has

not accepted the title: *Pearce v. Morris*, 5 L. R. Ch. App. 227, varying the decree in *S. C.*, 8 L. R. Eq. 217.

A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that *time (*Brown v. Cole*, 14 Sim. 427). And if he does not pay the debt at the appointed time, six months' [*1065] notice of his intention to do so to the mortgagee is necessary.

But if the mortgagee, after due notice, refuses to accept a tender of a sum sufficient to cover principal, interest and costs, he will be compelled to pay the costs of a suit for redemption: *Grugeon v. Gerrard*, 4 Y. & C. Exch. Ca. 128; *Harmer v. Priestley*, 16 Beav. 569. But a bill for redemption will be dismissed if the mortgagor does not pay what is due to the mortgagee at the appointed time, even although a tender be made before the motion to dismiss: *Faulkner v. Bolton*, 7 Sim. 319.

As to the time within which redemption was allowed previous to the new Statute of Limitations, 3 & 4 Will. 4, c. 27, the rule established was, as stated by Lord Hardwicke, in general analogous to the old Statute of Limitations, 21 Jac. 1, c. 16, viz., "that, after twenty years' possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account, which would be a great hardship:" *Anon.*, 3 Atk. 313.

Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments mentioned as exceptions in the stat. 21 Jac. 1, c. 16, viz., imprisonment, infancy, or coverture, or by having been beyond sea, not having absconded (which is an avoiding and retarding of justice), in all which cases, by analogy to the statute, ten years were allowed after the removal of the impediment, at the expiration of which time the bar was complete: *Jenner v. Tracey*, 3 P. Wms. 287, n.; *Cornel v. Sykes*, 1 Ch. Rep. 193; *Price v. Copner*, 1 S. & S. 347; *White v. Ewer*, 2 Vent. 340; *Belch v. Harvey*, 3 P. Wms. 287, n.; *Beckford v. Wade*, 17 Ves. 99.

Moreover, even in the absence of fraud or oppression, or unfair means, on the part of the mortgagor, to clog the redemption, which would clearly take the case out of the statute (*Spurgeon v. Collier*, 1 Eden, 55; *Ord v. Smith*, Sel. Ch. Ca. 9), a very slight act, on the part of the mortgagee, acknowledging the title of the mortgagor, although not to him or his heirs, as keeping private accounts of the profits of the estate, in which it was treated as redeemable, was sufficient for that purpose (*Fairfax v. Montague*, cited 2 Ves. jun. 84; *Campbell v. Beckford*, cited 4 Ves. 474; *Lake v. Thomas*, 3 Ves. 17, 22. And see *Hansard v. Hardy*, 18 Ves. 455; *Hodley v. Healey*, 6 Madd. 181; *Price v. Copner*, 1 S. & S. 347); *à fortiori* if the accounts were kept with the mortgagor or his heir (*Proctor v. Cowper*, 2 Vern. 377; *Anon.*, 2 Atk. 333); but a receiver's accounts

[*1066] delivered without authority were not sufficient *(*Barron v. Martin*, G. Coop. 189); nor was a mere demand of the debt, without process or acknowledgment: *Hodde v. Healey*, 1 V. & P. 540.

If, however, the mortgagee in any way acknowledged the existence of the equity of redemption, either in a conveyance (*Smart v. Hunt*, 4 Ves. 478, n.; *Price v. Copner*, 1 S. & S. 347), or a devise (*Anon.*, 3 Atk. 314; *Ord v. Smith*, Sel. Ch. Ca. 9; 2 Eq. Ca. Ab. 600), or by entering into a contract with the heir for the purchase of the equity of redemption (*Conway v. Shrimpton*, 5 Bro. P. C. 187, Toml. edit.), the case would be taken out of the statute. And even parol evidence of conversation of the mortgagee was admissible on behalf of the mortgagor seeking redemption (*Perry v. Marston*, 2 Bro. C. C. 397; *S. C.*, cited 2 Cox, 295); but not unless it was clear and unequivocal (*Whiting v. White*, 2 Cox, 290). The case would also be taken out of the statute by the mortgagor or his heir remaining in possession of part of the mortgaged estate; *Rakestraw v. Brewer*, Sel. Ch. Ca. 55; 2 P. Wms. 511; Mos. 189; *Burke v. Lynch*, 2 Ball & B. 426, 527.

Other instances might also be mentioned; but the difficulties which previously arose upon the question, whether the equity of redemption was or was not subsisting, have been, in a great measure, put an end to by the new Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 28, by which it has been enacted, that, "when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be *effectual only as against the party or parties

[*1067] signing as aforesaid, and the person or persons claiming any part of the mortgage-money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or

estates, interest or interests, shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

The 28th section of 3 & 4 Will. 4, c. 27, is retrospective; therefore, although, previous to that Act coming into force, there may have been a sufficient acknowledgment of the title of the mortgagor under the old law, if it be not sufficient under that section, the mortgagor will be barred from the benefit of such acknowledgment: *Batchelor v. Middleton*, 6 Hare, 75.

But time will not, under this Act, run against the mortgagor while the possession of the mortgagee may be referred to another title, and is not adverse. Thus, in *Hyde v. Dallaway*, 2 Hare, 528, where a person to whom an estate was mortgaged by the tenant for life and remainderman, purchased the interest of the tenant for life, after having been in possession, without any acknowledgment of the mortgagor's title for six years, and then continued in possession for twenty years, it was held by Sir James Wigram, V. C., that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Will. 4, c. 27, s. 28, was not, therefore, a bar to any suit for redemption by the remainderman or reversioner. See, also, *Rafferty v. King*, 1 Keen, 601; *Price v. Copner*, 1 S. & S. 347.

As we have before seen (p. *1065), before the passing of 3 & 4 Will. 4, c. 27, a very slight act or admission, even by parol, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title, so as to save his right to redeem. That statute now requires that the acknowledgment should be made *in writing*. No particular form of acknowledgment is, however, necessary, and *it is not essential that the amount actually due should be stated (*Trulock v. Robey*, [*1068] 12 Sim. 402; 2 Ph. 396; *Lord St. John v. Broughton*, 9 Sim. 219; *Stansfield v. Hobson*, 16 Beav. 236; 3 De G. Mac. & G. 620; *Prance v. Sympton*, Kay, 678); and it may be made by an answer in Chancery (*Goode v. Job*, 1 Ell. & Ell. 6), an affidavit in a suit, or in a schedule to a deed, or in the Insolvent Debtors' Court (*Blair v. Nugent*, 3 Jo. & L. 658), as well as by a letter or other writing: *Stansfield v. Hobson*, 16 Beav. 236; 3 De G. Mac. & G. 620. An acknowledgment will not be inferred from equivocal expressions, especially if coupled with a denial of the mort-

gagor's claim: *Thompson v. Bowyer*, 9 Jur. N. S. 863; 11 W. R. (M. R.) 975.

It may appear singular, that the mortgagee should not be allowed to make an admission (in writing signed by himself) of his mortgage title to a third person of which the mortgagor may have the benefit; but the statute requires that the admission should be made to the mortgagor himself, or to those who claim his estate; and by that the Court is bound (see *Batchelor v. Middleton*, 6 Hare, 83; *Lucas v. Dennison*, 13 Sim. 584); but it seems that an admission in writing of the right of the mortgagor, made to his agent, will be sufficient: *Trulock v. Robey*, 12 Sim. 402; 2 Ph. 396. And see *Stansfield v. Hobson*, 3 De G. Mac. & G. 620; there, more than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of a meeting, unless some one is ready with the money to pay me off." It was held by the Lords Justices, affirming the decree of Sir John Romilly, M. R. (16 Beav. 236), that the letter of the mortgagee was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations.

Although, if a mortgagor be a party to an assignment of the mortgage, this may be a sufficient acknowledgment of his title (*Batchelor v. Middleton*, 6 Hare, 75), a mere recital of the mortgage, and an assignment subject to the equity of redemption, when the mortgagor or the claimant under him is not a party to the deed, will not be sufficient, inasmuch as the transferee cannot be considered as claimant of the mortgagor's estate, but of his mortgagee's (*Lucas v. Dennison*, 13 Sim. 584).

In *Baker v. Wetton*, 14 Sim. 426, the point was raised, whether, since the new Statute of Limitations, the bar created by twenty years' possession by a mortgagee was defeated by his having kept accounts of the [*1069] rents received by *him; it was not, however, decided; but it seems that it would not have that effect unless they were communicated in writing to the mortgagor, or perhaps his agent.

It is not necessary that an acknowledgment should be given within twenty years after the mortgagee took possession, inasmuch as before and after the passing of 3 & 4 Will. 4, c. 27, an acknowledgment was sufficient to revive the right of redemption: *Stansfield v. Hobson*, 3 De G. Mac. & G. 620; *Pendleton v. Routh*, 1 Giff. 35; 1 De G. F. & Jo. 81.

The mortgagee's acknowledgment will also bind his lessee: *Ball v. Lord Riversdale*, Beat. 550.

An admission of the title of the mortgagor by a tenant in tail under the will of a mortgagee in fee in possession, will bind those in remainder. Thus, in *Pendleton v. Routh*, 1 De G. F. & Jo. 81, a mortgagee in fee entered into possession of the mortgaged estate, and held it for more than twenty years, and then died in 1805, having by his will devised it to his eldest son in tail, with remainders over. The son acknowledged the title

of the owners of the equity of redemption, and purchased it from them. It was held by the full Court of Appeal, affirming the decision of Sir J. Stuart, V. C. (1 Giff. 35), that notwithstanding the mortgagors had been out of possession for more than twenty years, their title was revived by the acknowledgment of the tenant in tail, and that by taking the conveyance of the equity of redemption he had acquired the absolute ownership as against the devisees in remainder.

Suppose several persons are interested as mortgagees, how far will the acknowledgment of one of such persons in writing enable a mortgagor to redeem after possession of the mortgagees for more than twenty years? This question was considered in the case of *Richardson v. Younge*, 10 L. R. Eq. 275, 280, by Sir R. Malins, V. C., who came to the conclusion that the proper construction of the words of the 28th section of 3 & 4 Will. 4, c. 27, "that where there is more than one mortgagee, the acknowledgment of one of such mortgagees shall be effectual only against the party signing the acknowledgment," are directed to the case of *Several Mortgagees*, where an account taken against one will bind his interest, but not the interest of any other person. But where the mortgage is to secure money to two or more persons *jointly*, there must be an acknowledgment by all. This decision was on appeal affirmed by the Lords Justices (6 L. R. Ch. App. 478), Lord Justice James observing, "our decision is confined to the case of mortgagees who are trustees, and are shown to be such on the face of the deed."

* By 3 & 4 Will. 4, c. 27, it is enacted that after the 31st of December, 1833, no action, suit, or other proceeding shall be [*1070] brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given. Sect. 40.

It is also thereby enacted that "after the 31st December, 1833, no arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent, . . . shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. Provided, nevertheless, that where any prior mortgagee or other incum-

brancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." Sect. 42.

By 3 & 4 Will. 4, c. 42, s. 1, it is enacted that "all actions . . . of covenant or debt upon any bond or specialty, and all actions of debt or scire facias upon any recognizance, . . . shall be sued and brought within *twenty years* after the cause of such actions or suits" (sect. 3); and after extending the remedies of persons under disabilities or beyond the seas (sect. 4), there is a saving clause which provides that "if any acknowledgment shall have been made either *by writing signed by the party liable*, [*1071] by virtue of an indenture, specialty, or recognizance, *or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, it shall be lawful for the person or persons entitled to such actions to bring his or their action within *twenty years* after such acknowledgment by writing, part payment or part satisfaction, or within twenty years after any disability has ceased" (sect. 5).

As to the nature of the acknowledgment to be made under sections 40 and 42 of 3 & 4 Will. 4, c. 27, see *Holland v. Clark*, 1 Y. & C. C. C. 151; *Blair v. Nugent*, 3 Jo. & L. 658, 677; *Hill v. Stawell*, 2 Jebb & S. 389, and in this respect differing from section 28; the acknowledgment under these sections may be made by an agent (*St. John v. Boughton*, 9 Sim. 219); it may also be made by a devisee in trust of the debtor (*St. John v. Boughton*, 9 Sim. 219), or a trustee appointed by the Court: *Tofts v. Stephenson*, 1 De G. Mac. & G. 28.

Payment of interest on an Irish mortgage made by a person appointed a receiver under 11 & 12 Geo. 3, c. 10 (Ir.), over the estates mortgaged, is within the terms of the 40th section of the 3 & 4 Will. 4, c. 27, payment by "an agent" of the party liable: *Chinnery v. Evans*, 11 Ho. Lo. Ca. 115.

And where there are several persons entitled to the equity of redemption, the part payment or payment of interest by one of such persons will have the effect not only of preserving the right of entries against such persons, but also against all other parties liable on the specialty: *Pears v. Laing*, 12 L. R. Eq. 41, 54; and see *Roddam v. Morley*, 10 Hare, 228, 1 De G. & Jo. 1.

Payment of interest by a tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder: *Roddam v. Morley*, 1 De G. & Jo. 1; and see *Tofts v. Stephenson*, 1 De G. Mac. & G. 40;

Pears v. Laing, 12 L. R. Eq. 55, 56, and remarks there on *Coope v. Cresswell*, 2 L. R. Ch. App. 112.

Payment of interest by the widow of the mortgagor entitled to dower, who had entered into possession, has been held to prevent the Statute of Limitations running so as to bar the claims of the mortgagee against the heir-at-law: *Ames v. Mannering*, 26 Beav. 583.

A solicitor who pays off a mortgage debt due from his client must be taken to act as the agent of his client, and not on his own behalf; and if he receives the rent of the mortgaged property, the possession is that of his client, and the solicitor cannot be charged with willful default, nor will the statute run against the client: *Ward v. Carttar*, 1 L. R. Eq. 29. Payment, however, of interest by a stranger would not be an acknowledgment within section 40; **Chinnery v. Evans*, 11 Ho. Lo. Ca. 115.

Upon the construction of 3 & 4 Will. 4, c. 27, s. 42, it has [*1072] been decided that the only arrears of interest that are a *charge upon land*, although there be a covenant in the mortgage deed to pay interest, are arrears of six years: *Shaw v. Johnson*, 1 Drew. & Sm. 412; *Round v. Bell*, 30 Beav. 121.

Money to arise from the sale of land is within the 42d section of 3 & 4 Will. 4, c. 27, and upon a mortgage thereof six years' arrears of interest only are recoverable. See *Bowyer v. Woodman*, 3 L. R. Eq. 313. There a married woman entitled, after the death of a tenant for life, to a share of a fund arising from moneys, the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage containing a covenant by husband and wife to pay full interest. It was held by Sir W. P. Wood, V. C., that the wife's estate was money payable out of land within the 42d section of 3 & 4 Will. 4, c. 27, and that the mortgagee could not recover more than six years' arrears of interest on the mortgage of such estate. "I put the covenant," said his Honor, "entirely aside, it being the covenant of a married woman."

And a mortgagee is not entitled thereunder to recover, as against a second mortgagee and subsequent incumbrancers, the arrears of interest due for more than six years, by reason of an acknowledgment in writing by the mortgagor of the sum due in respect of interest, inasmuch as the words in the 42d section, "by whom the same is payable," denote not merely those who are legally bound by contract to pay the interest, but all against whom payment of such arrears may be enforced by any action or suit. See *Bolding v. Lane*, 1 De G. J. & Sm. 122, 133, reversing the decision of Sir J. Stuart, V. C., 3 Giff. 561.

If, however, there were a trust term created (*Cox v. Dolman*, 2 De G. Mac. & G. 592; *Hunter v. Nockolds*, 1 Mac. & G. 640; *Lewis v. Duncombe*, 29 Beav. 175), or agree to be assigned (*Shaw v. Johnson*, 1 Drew. & Sm. 412), or a trust for sale (*Locking v. Parker*, 20 W. R. (M. R.) 737), for payment of principal and interest, inasmuch as this would bring the case within the exception of express trusts provided by the 25th section of

3 & 4 Will. 4, c. 27, the amount of arrears recoverable will not be limited to six years. But see *Mason v. Broadbent*, 33 Beav. 296, and the comments thereon in *Edmunds v. Waugh*, 1 L. R. Eq. 418.

In the case of *Edmunds v. Waugh*, 1 Law Rep. Eq. 418, certain premises had been mortgaged to secure a sum and interest at 5*l.* per cent., with a covenant to pay principal and interest, and a power of sale in default of payment, under which the mortgagee was to stand possessed of the proceeds of the sale upon trust to *pay himself his principal, interest, and costs, and the residue to the persons entitled to the equity of redemption. A sale took place under the power, and the proceeds thereof were paid into Court in a suit for the administration of the mortgagee's estate, and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in Court, the trustees of the mortgage petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the petition. It was held by Sir R. T. Kindersley, V. C., that the petition was not a "suit" to recover arrears of interest within the 42d section of the statute 3 & 4 Will. 4, c. 27, and therefore, that the mortgagee's trustees were entitled to more than six years' arrears of interest; and the fund was ordered to be paid over to them. "In the case," said his Honor, "of *Mason v. Broadbent*, (33 Beav. 296), which was a suit by a mortgagor to recover the surplus money, the decision appears to have been that the mortgagee should only retain six years' arrears of interest. . . . I am bound to say, that, with all deference, I cannot concur in the conclusion, that a bill by a mortgagor to recover the surplus comes within the terms of the 42d section, as being a suit by which arrears of interest are sought to be recovered. Moreover, it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness. The intention of the legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the legislature intended that a mortgagor, who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid, less culpable than the omission of the mortgagee to demand and enforce payment of it?"

Where, however, there is a bond or covenant to pay the interest, arrears on the mortgage debt can be recovered as against the mortgagor or his heirs for twenty years before the institution of the suit, their *personal* liability under 3 & 4 Will. 4, c. 42, not being affected by 3 & 4 Will. 4, c. 27, s. 42; see *Du Vigier v. Lee*, 2 Hare, 326, and cases there cited.

*And under the doctrine of tacking in order to avoid circuitry of action (see Vol. 1, p. *629), the heir of a mortgagor who has [*1074] covenanted for himself and his heirs to pay the mortgage debt and interest, cannot redeem without paying arrears of interest to the extent of twenty years, the mortgagee being entitled to tack the arrears of interest to the debt as against the heir: *Elvy v. Norwood*, 5 De G. & Sm. 240. See Vol. 1, p. *629.

The same result will follow in case of a bill of foreclosure, but the question as to whether the mortgagee is entitled to tack should be raised on the pleadings: *Sinclair v. Jackson*, 17 Beav. 405.

As to a suit for the redemption of land in Canada, see *Smith v. Simpson*, 7 Moore, P. C. C. 205.

It should be remembered that by 4 & 5 Will. & M. c. 16, intituled "An Act to prevent Frauds by Clandestine Mortgages," a person mortgaging lands or tenements without discovering to the mortgagee any former mortgage or mortgages in writing under his hands, forfeits his right to redeem. See *Stafford v. Selby*, 2 Vern. 591; *Kennard v. Futvoye*, 6 Jur. N. S. 312.

By the Common Law Procedure Act (15 & 16 Vict. c. 76), in ejectment by the mortgagee upon the mortgagor's paying principal, interest, and costs, it shall be deemed a full satisfaction on his part, and the Court may compel the mortgagee to reconvey (sect. 219). But the Act is not to extend to cases where the right to redemption is controverted, or the money due not adjusted (sect. 220), or to prejudice any subsequent mortgage: *Id.*

Accounting between Mortgagor and Mortgagee.—The mortgagor is not bound to account for rents and profits while he is in possession: *Colman v. Duke of St. Alban's*, 3 Ves. 25; *Ex parte Wilson*, 2 V. & B. 252. Nor will his agent or any person claiming under his voluntary revocable deed: *Hele v. Lord Bexley*, 20 Beav. 127.

The mortgagee, however, must account, from the time he takes possession, for the rents and profits of the mortgaged estate; and he will be charged an occupation rent for any portion of it held by himself (*Smart v. Hunt*, 1 Vern. 418; *Trulock v. Robey*, 15 Sim. 237, 265; 2 Ph. 396); and annual rests will be directed by the Court, if there be no interest due at the time he takes possession, and the annual rents exceed the amount of the annual interest payable on the mortgage, in order that the excess of rent may be applied in sinking the principal (*Shepherd v. Elliott*, 4 Mad. 254; *Gould v. Tancred*, 2 Atk. 533); and annual rests will be directed in an account of occupation rent as well as in an account of rents and profits *received: *Wilson v. Metcalf*, 1 Russ. 530. See also [*1075] *Morris v. Islip*, 20 Beav. 654.

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agree-

ment come to between the mortgagor and the mortgagee: *Scholefield v. Lockwood*, 32 Beav. 439.

But it is a general rule not to direct annual rests to be made in the accounts of a mortgagee in possession, when the interest is in arrear at the time when he takes possession: *Wilson v. Cluer*, 3 Beav. 140.

In the case of a mortgage of leasehold house property, where there is no reasonable certainty that the ground rent and insurance will be duly paid, the houses kept in repair, and the property secured against forfeiture, the mortgagee is entitled to enter into possession, although there is no interest in arrear, and an account will not be directed against him with annual rests: *Patch v. Wild*, 30 Beav. 100, per Sir John Romilly, M. R.

But the burden of proof, that such was the reason that induced him to enter, lies on the mortgagee, and on failure of proof an account will be directed against him with annual rests: *Patch v. Wild*, 30 Beav. 99.

And accounts will be directed with rests against a person who has entered into possession under a contract for purchase (subject to mortgages) which afterward goes off, although he afterward obtains a transfer of the mortgage: *Patch v. Wild*, 30 Beav. 99.

As to circumstances under which the accounts of a mortgagee in possession will not be taken with rests, see *Horlock v. Smith*, 1 Coll. 287.

If, however, a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable when the arrear of interest is paid off (*Davis v. May*, G. Coop. 238; 19 Ves. 383; *Latter v. Dashwood*, 6 Sim. 462; *Finch v. Brown*, 3 Beav. 70; but see *Thornycroft v. Crockett*, 2 H. L. Ca. 239; *Morris v. Islip*, 20 Beav. 654), nor till after the whole of the mortgage debt has been paid off by the receipt of the rents, although from the time when the debt is ascertained to be paid off annual rests will be decreed, though none were ordered previously: *Wilson v. Cluer*, 3 Beav. 140.

So, where a mortgagee in possession comes to an account with the mortgagor, whereby all arrears of interest are converted into principal, leaving thereby no arrears, the rents being more than sufficient to keep down the interest, he will be dealt with as a mortgagee who takes possession without any interest being in arrear, and annual rests will be directed; and he continues in possession: *Wilson v. Cluer*, 3 Beav. 136.

[*1076] *A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first in payment of interest and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage; and in taking an account against the mortgagee, who has retained sale moneys beyond the interests and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are

held by the same person, who sells one of the mortgaged estates: *Thompson v. Hudson*, 10 L. R. Eq. 497.

Where a mortgagee takes possession, and a tender is made to him, he refuses it at his peril, and in a bill for redemption caused by such refusal the Court will direct that, in case it turns out that the money due is less than the tender, the defendant shall pay all the costs of the suit, being allowed all sums laid out for necessary repairs, and being charged with an occupation rent: *Hoskin v. Sincock*, 13 W. R. (V. C. K.) 487.

And a mortgagee in possession, holding over after payment of his principal and interest, will be charged with the balance, and generally with simple interest at 4l. per cent. (*Quarrel v. Beckford*, 1 Madd. 269), and with costs (*Binnington v. Harwood*, T. & R. 485; *Archdeacon v. Bowes*, McClel. 149; *Lloyd v. Jones*, 12 Sim. 491), unless the decree to account contains no reservation of costs (*Lord Trimleston v. Hamill*, 1 B. & B. 377, 388). The Master was not at liberty to make rests, unless directed to do so by decree (*Webber v. Hunt*, 1 Madd. 13); but the Court may order it to be done on further directions: *Wilson v. Metcalf*, 1 Russ. 530; *Horlock v. Smith*, 1 Coll. 294.

Where a decree for redemption has been made against a mortgagee in possession without directing annual rests, a direction to take the account with rests cannot be made at Chambers under 15 & 16 Vict. c. 86, s. 54, or under the General Orders of 16th Oct. 1852; *Nelson v. Booth*, 3 De G. & Jo. 119.

In accounting, the mortgagee in possession is only liable for the fair rents and profits, and is only liable for willful default in not receiving them; if, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was underlet, takes a new tenant, another person to whom there is no objection offering more (*Hughes v. Williams*, 12 Ves. 494; *Parkinson v. Hanbury*, 2 L. R. Ho. Lo. 1); but the mortgagor cannot lie by, not giving notice that a greater rent may be *had, and afterward, by way of penal inquiry, charge the mortgagee with the effect of his own negligence: *Id.* 495, 496. It [*1077] is said, in *Blacklock v. Barnes*, Sel. Ch. Ca. 53, "that if the mortgagor makes proof that the estate was let at such a price, while in the hands of the mortgagee, that shall be deemed the rate at which it was let the whole time, unless he shows the contrary, which is in his power, as being let by him."

A mortgagee in possession acting on the advice of an agent, in not letting the property, is not liable for willful default (*Brandon v. Brandon*, 10 W. R., V. C. K., 287); but he was held to be liable where he had suffered a tenant to remain for several years in possession paying no rent, and without demanding any: *Ib.*

In *Horlock v. Smith*, 1 Coll. 287, it seems to have been assumed that a sum of money in court, and rent in the hands of the receiver at the time the mortgagee took possession, were to go in discharge of the interest then due to him.

Although a mortgagee who takes possession of the mortgaged estate is on a bill of redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his willful default (*Parkinson v. Hanbury*, 2 L. R. Ho. Lo. 1), nevertheless, where persons who, though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established: *Parkinson v. Hanbury*, 2 L. R. Ho. Lo. 1, affirming *S. C.*, 2 De G. Jo. & Sm. 450; 1 Drew. & Sm. 143.

A mortgagee in possession is liable to account for any damage done to the property, as by pulling down buildings improperly (*Sandon v. Hooper*, 6 Beav. 246; 14 L. J., N. S., 120); or destroying (*Hornby v. Matcham*, 16 Sim. 325); or losing the title deeds (*Brown v. Sewell*, 11 Hare, 49; and see *Lord Middleton v. Eliot*, 15 Sim. 531; *Woodman v. Higgins*, 14 Jur. 846); and if he assign the mortgaged estate to an insolvent person, without the concurrence of the mortgagor, he will, as he in some measure stands in the position of a trustee, be liable for the rents, after as well as before the assignment (1 Eq. Ca. Ab. 328, pl. 2).

A mortgagee in possession of part of the mortgaged estate, and allowing the mortgagor to retain possession of the rest, will not, at the suit of a subsequent incumbrancer, be charged constructively as if he had been in possession of the whole: *Soar v. Dalby*, 15 Beav. 156.

Many allowances, however, will, in taking accounts, be made to [*1078] the mortgagee in possession; such repairs, for instance, as are necessary for the support of the property, he will be allowed for: *Sandon v. Hooper*, 6 Beav. 246; *Neesom v. Clarkson*, 4 Hare, 97. And he will not only be allowed for repairs, but also for doing that which is essential for the protection of the title of the mortgagor: *Sandon v. Hooper*, 6 Beav. 248; *Pelly v. Wathen*, 7 Hare, 373.

Thus, where a mortgagee has been put to expense in defending the title to the estates, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate (*Parker v. Watkins*, Johns. 133); but if his title to the mortgage only be disputed, the costs of his defence should not be borne by the estate, as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation. *Ib.*

In *Blackford v. Davis*, 4 L. R. Ch. App. 304, a mortgage deed provided that it should be a security not only for the principal sums advanced, and interest, but also for the costs which might be incurred by the mortgagee in selling the property, or in any actions or suits relating to it. The mortgagor filed a bill to redeem, and a decree was made directing an account of what was due to the defendant for principal and interest under the mortgage deed, and an account of sale-moneys, rents, and profits received by the defendant. In taking the accounts the defendant carried in

a claim for costs incurred in legal proceedings relating to the property, which the chief clerk refused to entertain, and the defendant then appealed from the decree. It was held by Lord Justice Selwyn, affirming the decree of Sir John Stuart, V. C., that the decree was right, for that all costs properly incurred in the actions might be claimed under it as "just allowances;" and by Lord Justice Giffard, that the costs might be claimed under the decree as principal moneys due under the deed.

A mortgagee in possession has been held not to be chargeable for willful default, in declining to defend an action of replevin brought by the owner of property which was on the premises and seized under a distress for rent levied by the mortgagee: *Cocks v. Gray*, 1 Giff. 77.

Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property (*Lord Trimblestone v. Hamill*, 1 Ball & B. 385; *Sandon v. Hooper*, 6 Beav. 248); but he has no right to lay out money in what he may suppose increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem. [*Moore v. Cable*, 1 Johnson, Ch. 387; *Quin v. Brit-* [*1079]
tain, 1 Hoffman, Ch. 353; *Mickles v. Dillage*, 17 New York, 80.] This is what has been termed "improving a mortgagor out of his estate." *Sandon v. Hooper*, 6 Beav. 248. Nor is he bound to engage in any speculation or adventure for the benefit of the mortgagor, such as opening mines or quarries, which must be at his own cost and hazard (*Hughes v. Williams*, 12 Ves. 493; *Thornycroft v. Crockett*, 16 Sim. 445); nor, if they are opened, will it be prudent for him to improve them by a large expenditure; at the utmost he is not bound to advance more than a prudent owner: *Rowe v. Wood*, 2 J. & W. 553, 556. And it is not a matter of course to direct an inquiry, whether any money has been laid out in lasting improvements, when there is no evidence in proof of their having been made: *Sandon v. Hooper*, 6 Beav. 246.

Where a mortgaged estate is of an insufficient value to pay the mortgage, a mortgagee, on entering into possession, may open mines and cut timber, and he will be charged only with the net profits (*Millett v. Davy*, 31 Beav. 470).

But where the estate is sufficient, a mortgagee in possession has no such right, and if he opens and works mines he will be charged with the gross receipts, and will be disallowed the expenses of working (*Ib.*).

A mortgagee who holds property in pledge is responsible for it in its integrity, therefore a mortgagee of lands containing underneath unopened coal-fields, who allowed the owners of adjacent coal-mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal-owners, was held responsible, and beside the common decree the Court directed an account of all coal worked by the defendants, or either of

them, and of the proceeds thereof: *Hood v. Easton*, 2 Giff. 692; Aff. 20 Jur. 729, or 2 Jur. N. S. 729.

Formerly a mortgagee of houses, who was not by express contract with the mortgagor entitled to insure the premises against fire at the mortgagor's expense, nor to require the mortgagor so to insure them, was not entitled to add to his mortgage debt, and charge upon the property, the premiums which he might have paid for such an insurance effected by him without the privity of the mortgagor: *Dobson v. Laud*, 8 Hare, 216; *Bellamy v. Brickenden*, 2 J. & H. 137. By a recent act, however, he can now do so. 23 & 24 Vict. c. 145. s. 11.

A mortgagee in possession of a ship is not chargeable if, in the prudent exercise of a fair discretion, he abstains from selling her, but if the sale cannot reasonably be effected, though he is entitled to employ the ship at the risk of the mortgagor in the ordinary course of business, and in such a manner as a prudent owner would use her if she were his own property, yet if he employs her imprudently, *or in a trading speculation, [*1080] he is chargeable with the value of the ship at the time when he took possession of her: *Marriott v. The Anchor Reversionary Company*, 2 Giff. 457; 30 L. J. Ch. (N. S.) 571; and see the remarks there of Lord Campbell, C., 3 De G. F. & Jo. 185, on *The European Company v. The Royal Mail Company*, 4 K. & J. 676, as to whether any additional power is conferred on the mortgagee by the 70th sect. of the Merchant Shipping Act, 1856 (17 & 18 Vict. c. 104).

Where a lower rate of interest than that agreed upon in the mortgage-deed has been paid by mistake, the mortgagee may claim the difference. See *Gregory v. Pilkington*, 5 W. R. 57; 26 L. J. (Ch.) 177, where a sum of money having been lent on mortgage at the rate of $4\frac{1}{2}$ per cent., the mortgagor paid, and the mortgagee accepted, interest at 4 per cent. This was done under the mistake of both parties. After several years the mortgage-deed, which had been mislaid, was found. It was held by the Lords Justices, reversing the decision of Sir R. T. Kindersley, V. C., that the mortgagee was entitled to the arrears of the difference of the interest.

A mere agreement by the mortgagor with the mortgagee, not acted upon during a long period by the parties, to release his equity of redemption, has been held not to disentitle the mortgagor to the surplus after a sale: see *Rushbrook v. Lawrence*, 5 L. R. Ch. App. 3. There, in July, 1853, an action of ejectment brought by the first and second mortgagees against the mortgagor in possession was settled upon the following terms. The mortgagor was to remain in possession until the 29th of September following, and then to give up possession to the mortgagees; the mortgagor, if required, to release to the mortgagees all his right, claim, and interest in the mortgaged property, the said release to be prepared at the expense of the mortgagees; the mortgagees to forego all claims in respect of the costs of the action, but in case default should be made by the mortgagor in giving up possession, or in the execution of such release (if re-

quired), the mortgagees were to be entitled to the costs. The mortgagor was not required to execute a release, and he remained in possession of the property until 1865, when the second mortgagee, whose mortgage was in the form a trust for sale, sold the property under the trust for sale, and paid out of the proceeds of the sale the principal, interest, and costs due to the first mortgagee, including his costs of the action of ejectment. It was held by Lord Chancellor Hatherley, affirming the decision of Lord Romilly, M. R. (reported 8 L. R. Eq. 25), that the agreement of 1853 was an agreement in **fieri*, which had been abandoned by all parties, and could not be set up twelve years afterward by the second mortgagee against the mortgagor as a release of his right to the surplus proceeds of the sale, after payment of principal, interest, and costs to both mortgagees. See, also, *Howells v. Wilson*, 34 Beav. 573. [*1081]

WHEN RIGHT OF REDEMPTION EXISTS.—A deed which is in fact a security for an antecedent debt, or for an advance made at the time, is a mortgage in the contemplation of a court of equity, and the grantor will be entitled to a reconveyance on payment. His right is merely equitable, and not only independent of the agreement between the parties, but one which they cannot control, and that may be enforced without regard to the form of the conveyance, and even in opposition to its terms. It is established under this doctrine that where an absolute deed is executed as a security, and conditioned to be void if the debt be paid at the day, a chancellor will look beyond the letter of the instrument to the subject which the parties had in view, and regard a subsequent payment of principal and interest as a substantial performance of the condition, rendering it incumbent on the grantee to reconvey; *McIntier v. Shaw*, 6 Allen, 83; *Campbell v. Dearborn*, 109

Mass. 131; *Hassam v. Barrett*, 115 Id. 256; *Richardson v. Barrick*, 16 Iowa, 407; *Holliday v. Arthur*, 25 Id. 19; *Wilson v. Patrick*, 34 Id. 362; *Baughner v. Merryman*, 32 Maryland, 186; *Moore v. Wade*, 8 Kansas, 381; *Anthony v. Anthony*, 23 Arkansas, 480; *Guthrie v. Kahle*, 10 Wright, 331; *Houser v. Lamont*, 5 P. F. Smith, 312; *Harper's Appeal*, 14 Id. 315; *Sweetzer's Appeal*, 21 P. F. Smith, 264; *Danzeisen's Appeal*, 23 Id. 65; *Vanderhaise v. Hugues*, 2 Beasley, 244, 411; *Sweet v. Parker*, 7 C. E. Green, 453; *Judges v. Rees*, 9 Id. 387; *Tillson v. Moulton*, 23 Illinois, 648; *Reigard v. McNeil*, 38 Id. 400; *Ewart v. Walling*, 42 Id. 453; *Hunter v. Hatch*, 45 Id. 178; *Church v. Cole*, 36 Indiana, 35; *French v. Burns*, 35 Connecticut, 359; *Holton v. Meigher*, 15 Minnesota, 69; *Van Dusen v. Worrell*, 4 Abb. App. Dec. 473.

The right of redemption is founded in a policy which is superior to agreement, and which regulates

every conveyance intended to take effect as a security for a debt. Hence, although, in general, every one may renounce a right conferred for his benefit, an express waiver of this equity will not preclude the mortgagor from subsequently exercising it himself or transferring it to others; *Skinner v. Miller*, 6 Littell, 184; *Walling v. Aiken*, 1 McMullin, Eq. 1; *Youle v. Richards*, Saxton, 534; *Wilcox v. Morris*, 1 Murphy, 117; *Heister v. Madera*, 3 Watts & Serg. 384, 388; *Stover v. Bounds*, 1 Ohio, N. S. 107; *Wilson v. Drumrite*, 21 Missouri, 325; *Rogan v. Walker*, 1 Wisconsin, 527; *Henry v. Clark*, 7 Johnson, Ch. 40; 2 Cowen, 324; *Jaques v. Weeks*, 7 Watts, 261, 275; *Woods v. Wallace*, 10 Harris, 171; *Cheney v. Bowser*, 4 Sneed, 415; *Barrow v. Henson*, 2 Id. 650. "The principle is well settled," said Savage, C. J., in *Clark v. Henry*, 2 Cowen, 324, "that chancery will not suffer any agreement in a mortgage to prevail which shall change it into an absolute conveyance upon any condition or event whatever (*Howard v. Harris*, 1 Vern. 190; *James v. Oades*, 2 Id. 402). 'Once a mortgage, always a mortgage.' In *Newcomb v. Banham* (1 Vern. 7), where an absolute conveyance was given with a defeasance upon payment of 1000*l.* during the life of the grantor, and the grantor covenanted that it should never be redeemed after his death, yet redemption was decreed."

It is accordingly established that an attempt to bind or fetter the right of redemption will be unavailing; *Robinson v. Farelly*, 16 Ala-

bama, 472; *Vanderhaise v. Hugues*, 2 Beasley, 244, 411; *Pierce v. Robinson*, 13 California, 125; and that the grantor may redeem at any time, notwithstanding a stipulation that the deed is not to take effect as a mortgage, and that the grantee's estate shall be absolute if the money be not paid at the day; *Rankin v. Mortimere*, 7 Watts, 372; *Clark v. Condit*, 3 C. E. Green, 358.

The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent agreement tending to preclude the exercise of the right of redemption; *Henry v. Davis*, 7 Johnson, Ch. 40; *Clark v. Henry*, 2 Cowen, 324; *Wright v. Bates*, 13 Vermont, 341; *Dougherty v. Colgan*, 6 Gill & John. 275; *Mills v. Mills*, 26 Conn. 213; *Vanderhaise v. Hugues*, 2 Beasley, 244. The burden is, therefore, on the mortgagee to show that a sale or release of the mortgagor's equity was made deliberately and for an adequate consideration; *Dougherty v. Colgan*; *Mills v. Mills*; *Perkins v. Drye*, 3 Dana, 174; *Hyndman v. Hyndman*, 19 Vermont, 9; *Locke v. Palmer*, 26 Alabama, 312, 323; *Brown v. Gaffney*, 28 Illinois, 150; *Baughner v. Merryman*, 32 Maryland, 185. "The law upon the subject of the right to redeem," said Swayne, J., in *Villa v. Rodriguez*, 12 Wallace, 323, "where the mortgagor has conveyed to the mortgagee the equity of redemption, is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where

a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

In *Holdridge v. Gillespie*, 2 Johnson, Ch. 30, one to whom a leasehold had been mortgaged took a release from the mortgagor and effected a renewal of the lease, and it was held that the term inured to the use of the mortgagor, and must be assigned to him on the payment of the debt. So in *Reitenbaugh v. Ludwig*, 7 Casey, 171, the mortgagor was allowed to show by parol that a release of the equity of redemption was subject to a re-

sulting trust, and did not vest the estate absolutely in the mortgagee.

For like reasons, and because one whose duty it is to dispose of property to the best advantage cannot buy at his own sale, if a mortgage be assigned as a security for a debt, and the assignee proceeds to sell under a power to that effect in the instrument, and becomes the purchaser, the mortgagee will be entitled to redeem from him, while the mortgagor will have the same right as against both; *Slee v. The Manhattan Co.*, 1 Paige, 48; *Hyndman v. Hyndman*, 19 Vermont, 9; *Benham v. Rowe*, 2 California, 287; *Dobson v. Racey*, 4 Selden, 216; *Hoyt v. Martin*, 16 New York, 231. But a purchase of the premises at a sale by a third person, or by the sheriff under an execution, will vest the estate absolutely in the mortgagee (*Bergen v. Bennett*, 1 Caine's Cases, 1; *Williams v. Townsend*, 31 New York, 407; vol. 1, 245, 361), although he will not be allowed to gain an undue advantage through a collusive agreement with the bidders at such a sale to depress the price, or obtain the property for less than it is worth; see *Jencks v. Alexander*, 11 Paige, 620; *Tripp v. Cook*, 26 Wend. 143.

There is, however, no rule or policy that precludes the mortgagee from entering into an agreement with the mortgagor for the purchase of the land, or even from taking it in satisfaction of the debt, and a court of equity will not, therefore, set aside a release of the equity of redemption where it appears to have been freely made and for an

adequate consideration; *McKinstry v. Conly*, 12 Alabama, 678; *Trull v. Skinner*, 17 Pick. 213; *Hicks v. Hicks*, 5 Gill & John. 75; *Ramson v. Hay*, 2 Edwards, Ch. 631; *Wyncoop v. Cowing*, 21 Illinois, 570.

In like manner the right of redemption cannot be subjected to a condition in restraint of alienation, or confining it to a particular line of descent. It is not a demand or chose in action, but an estate, and therefore necessarily attended with the incidents which are legally inseparable from property. See *Johnston v. Gray*, 16 Serg. & Rawle, 361; *Asay v. Hoover*, 5 Barr, 21, 35; *ante*, 1957. Hence, it will be bound by the lien of a judgment, and is subject to levy and sale under an execution. In the recent case of *Stoddart v. Whiting*, 46 New York, 632, an equitable right of redemption was, nevertheless, held to be effectually transferred by an instrument not under seal, but executed for a valuable consideration; it being considered that the estate thereby assigned was not a grant of the land itself, and hence not within the provision of the Revised Statutes, that such grants shall be by deed.

It results from what has been said, that whether an absolute deed will take effect as a mortgage, depends primarily, if not exclusively, on the nature of the consideration; *Ring v. Franklin*, 1 Hall, 1; *Morris v. Nixon*, 1 Howard, 118; *Wyman v. Babcock*, 19 Id. 289; *Baldwin v. Jenkins*, 1 Cushman, 206. If the grantee is entitled to demand the return of the purchase money, there is a corresponding

right on the part of the grantor to demand a reconveyance upon payment of the amount. So, payment is necessarily a defeasance of a deed which has been executed as a security for an antecedent debt. This ordinarily appears from the deed or the bond to which that refers, but may equally well be shown by extrinsic evidence, whether oral or otherwise. Hence a defeasance given subsequently to the deed, a letter conceding that the conveyance was executed as a security, an admission to that effect in the answer to the bill, or a like statement made verbally, is equally admissible, and, if sufficiently full and explicit to satisfy the conscience of a chancellor, will entitle the complainant to a decree. Such evidence does not contradict the instrument, or prevent it from passing the legal title, but simply establishes the existence of a superior equity which the grantee is not at liberty to disregard; *ante* 965, notes to *Woolam v. Hearn*; *Dey v. Dunham*, 2 Johnson, Ch. 182; 15 Johnson, 355; *Jackson v. Green*, 4 Id. 186; *Strong v. Stewart*, 4 Johnson, Ch. 167; *Henry v. Davis*, 7 Id. 40; *Slee v. Manhattan Co.*, 1 Paige, 48; *Van Buren v. Oldstead*, 5 Id. 9; *Palmer v. Gurnsey*, 7 Wendell, 248; *Roach v. Cosine*, 9 Id. 227; *Walton v. Cronly*, 14 Id. 63; *Clark v. Henry*, 2 Cowen, 324; *Bloodgood v. Zailly*, 2 Caine's Cases, 124; *Hodges v. The Tennessee Ins. Co.*, 4 Selden, 416; *Cooper v. Whitney*, 3 Hill, 95; *Horn v. Keteltas*, 46 New York, 605; 42 Howard Pr. 138; *Brown v. Clifford*, 7 Lansing, 46; *Carr v. Carr*, 52 New York,

251; *Wharff v. Howell*, 3 Binney, 499; *Stoever v. Stoever*, 9 Serg. & Rawle, 434; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Heister v. Madera*, 3 Watts & Serg. 384; *Hamet v. Dundas*, 4 Barr, 178; *Reitenbaugh v. Ludwig*, 7 Casey, 131; *Wilson v. Shoenberger*, Id. 295; *Pattison v. Horn*, 1 Grant's Cases, 801, 304; *Sweetzer's Appeal*, 21 P. F. Smith, 264; *Eldridge v. Jenkins*, 3 Story, 181, 293; *Taylor v. Luther*, 2 Sumner, 228; *Taylor v. Weed*, 5 Mass. 109; *Lanfair v. Lanfair*, 18 Pickering, 299; *Nugent v. Riley*, 1 Metcalf, 117; *Delahoy v. McConnell*, 4 Scammon, 156; *Purvi-ance v. Holt*, 3 Gilman, 394; *Miller v. Thomas*, 14 Illinois, 428; *Davis v. Hopkins*, 15 Id. 519; *Smith v. Siske*, Id. 528; *Shaver v. Woodward*, 28 Id. 277; *Sutphen v. Cushman*, 35 Id. 186; *Stemper v. Johnson*, 3 Texas, 14; *Carter v. Carter*, 5 Id. 93; *Hanway v. Thompson*, 14 Id., 142; *Mann v. Falcon*, 25 Id. 271; *Kemp v. Earl*, 7 Iredell, Eq. 167; *Hanser v. Lash*, 2 Dev. & Bat. Eq. 212; *McBrayer v. Roberts*, 2 Devereux, Eq. 75; *Hamilton v. Marlborough*, 2 Woodbury & Minot, 168; *Hughes v. Edwards*, 9 Wheaton, 489; *Morris v. Nizon*, 1 Howard, 118; *Russell v. Southard*, 12 Id. 139; *Babcock v. Wyman*, 19 Id. 289; 2 Curtis, 386; *Blaney v. Bearce*, 2 Maine, 132; *Binnock v. Whipple*, 12 Id. 346; *Howe v. Russell*, 36 Id. 115.

"Parol evidence," said Field, J., in *Pierce v. Robinson*, 13 California, 116, "is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and the restriction of the evidence

to cases of fraud, accident or mistake, in the creation of the instrument, is unsound in principle and unsupported by authority. * * * As the equity upon which the courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. It is against the policy of the law to allow irredeemable mortgages, just as it is against the policy of the law to allow the creation of inalienable estates. Under no circumstances will equity permit this end to be effected, either by express stipulation or the absolute form of the instrument. The rule which refuses the admission of parol evidence to contradict or vary written instruments is directed to the language employed by the parties. That language cannot be qualified, but must be left to speak for itself. The rule does not exclude inquiry into the objects and purposes of the parties in executing the instruments. It may be shown, for instance, that a deed was made to defraud creditors, or a release given to render a witness competent. The purposes and objects of the parties are considered by a Court of Chancery, and constitute a large

ground of its jurisdiction, which will be exercised to restrain or to effectuate them, as may best promote justice. Thus, a deed executed for a fraudulent purpose will be set aside; and, as it is the settled policy of equity, admitting of no departure, never to permit a security to be converted by any contemporaneous agreement into a sale, the purposes of the parties in giving and taking an absolute conveyance will be inquired into; and when the rights of third persons have not intervened, a Court of Chancery will control the use of the instrument intended as security in the hands of the grantee, so as to effectuate its object. Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the court, and rest in the simple good faith of the creditor. A mortgage, as I have observed, is, in form, a conveyance of the conditional estate, and the assertion of a right to redeem from a forfeiture involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. The conveyance upon condition, by its terms, purports to vest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without ref-

erence to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident." And to the same effect are *Breckinbridge v. Hull*, 1 Robinson, 148; *English v. Lane*, 1 Porter, 328; *Harrison v. Lemon*, 3 Blackford, 51; *Cross v. Hipner*, 7 Indiana, 359; *Smith v. Parks*, 22 Id. 59; *Crane v. Buckaman*, 29 Id. 571; *Wright v. Bates*, 13 Vermont, 341; *Biglow v. Topliff*, 25 Id. 235; *Baxter v. Wiley*, 27 Id. 276; *Hills v. Loomis*, 42 Id. 564; *Rogan v. Walker*, 1 Wisconsin, 527; *Plato v. Rice*, 14 Id. 453; *Sweet v. Mitchell*, 15 Id. 641; *Kent v. Agard*, 24 Id. 378; *Stepp v. Phelps*, 7 Dana, 296; *Brainerd v. Brainerd*, 15 Conn. 573; *Mills v. Mills*, 26 Id. 213; *Johnston v. Huston*, 17 Missouri, 38; *Wilson v. Dumrit*, 21 Id. 325; *Tibean v. Tibean*, 22 Id. 70; *Baldwin v. Jenkins*, 23 Id. 206; *Vasser v. Vasser*, Id. 378; *Yarborough v. Newell*, 10 Yerger, 375; *Streator v. Jones*, 3 Hawks, 423; *McLanahan v. McLanahan*, 6 Humphreys, 99; *McGan v. Marshall*, 7 Id. 261; *Prewett v. Dobbs*, 13 Smedes & Marshall, 440; *Cottrell v. Long*, 20 Ohio, 464; *Bank v. Whyte*, 1 Maryland, Ch. 556; *Dougherty v. Crady*, 6 Gill & John., 275; *Emerson v. Atwater*, 7 Mich. 12; *Saunders v. Stewart*, 7 Nevada, 200; *Key v. McCleary*, 25 Iowa, 191; *Moore v. Wade*, 8 Kansas, 380; *Sweet v. Parker*, 7 C. E. Green, 453; *Lodge v. Truman*, 24 California, 385; *Cunningham v. Hawkins*, 27 Id. 603; *Gay v. Hamilton*, 33 Id. 686; *Farmer v. Gross*, 42 Id. 169.

It is established, in accordance

with these decisions, that where the consideration is an antecedent debt, which subsists notwithstanding the conveyance, or where the grantor enters into a written or verbal engagement for the repayment of the consideration, he may redeem whether the deed is or is not absolute; *O'Neill v. Capelle*, 62 Missouri, 202, 207; *De Wolf v. Strader*, 26 Illinois, 225; *Sutphen v. Cushman*, 35 Id. 186, 197; *Hamet v. Dundas*, 4 Barr, 178; *Todd v. Campbell*, 8 Casey, 250; *Morris v. Nizon*, 1 Howard, 118; *Hickox v. Lowe*, 10 California, 197; *Lodge v. Truman*, 24 Id. 385; *Farmer v. Gross*, 42 Id. 169; *Crassen v. Swoneland*, 22 Indiana, 427; *Wells v. Morrow*, 38 Alabama, 126. So, a like decree may be made where it appears from the evidence that the grantee took advantage of the grantor's necessities to obtain an absolute conveyance, or where such a deed is substituted fraudulently for the mortgage which the grantor intended to execute, or where the inadequacy of the consideration is such as to justify the belief that the transaction was a loan and not a sale; and in doubtful cases retention of possession by the grantor is a circumstance of much weight in favor of treating the conveyance as a security; *Hodges v. Tennessee Ins. Co.*, 4 Selden, 416; *Chester v. Kingston*, 16 New York, 336; *Bishop v. Williams*, 15 Illinois, 553; *Hamet v. Dundas*, 4 Barr, 178; *Todd v. Campbell*, 8 Casey, 250; *Fuller v. Paush*, 3 Michigan, 217; *Beasley v. Phelps*, 2 Woodbury & Minot, 427; *McLaurin v. Wright*, 2 Iredell, Eq. 94; *Kelly v. Bryan*, 6 Id. 283;

Selks v. Seacup, 7 Id. 13; *King v. Earp*, Id. 167; *Russell v. Southall*, 12 Howard, 154; *Davies v. Stonehart*, 4 Indiana, 101; *Brantley v. West*, 27 Alabama, 542; *Farmer v. Bean*, 10 Maryland, 217; *Arts v. Glover*, 21 Id. 456; *Emerson v. Atwater*, 7 Michigan, 24; *Chickering v. Hatch*, 3 Sumner, 474; *Tibean v. Tibean*, 22 Missouri, 70; *Daubenspeck v. Platt*, 22 California, 330; *Wilson v. Patrick*, 34 Iowa, 362; *Ruffier v. Womack*, 30 Texas, 341; *Campbell v. Dearborn*, 109 Mass. 145.

In *Kelly v. Bryan*, Pearson, J., said, "In equity plaintiffs are allowed, by making the proper preliminary allegations, as that a certain clause was intended to be inserted in a written instrument, but was omitted by the ignorance or mistake of the draughtsman, or by some fraud or circumvention of the opposite party, or some oppression or advantage taken of the plaintiff's necessities, or when an unlawful trust was designedly omitted to evade the law, to call for a discovery on the oath of the defendant. If the fact is confessed, the plaintiff can have relief. If it be denied, although it was for a long time questioned, it is now settled, that, provided the matter can be established, not merely by the declarations of the parties, or the unaided memory of the witnesses, but by facts and circumstances *dehors the instrument*, such as are more tangible and less liable to be mistaken than mere words, equity will give relief, by considering the clause thus shown to have been omitted, as if it had been set out in the instrument; *Streator v. Jones*, 3

Hawks, 423. The facts and circumstances '*dehors*' relied upon in that case were gross inadequacy of price, the possession being retained by the plaintiff, and the payment of interest; and there was the preliminary allegation of oppression, to account for the clause of redemption not being inserted. The plaintiff was a man hard pressed for money, and was forced to consent to the omission of this clause, the matter being cut short by the defendant's saying, 'Here, take the money you want, and trust my word.' Many other cases fully settle this law, that, 'provided it appear to have been the real intent of the party to have the clause inserted, and the instrument was put in the form of an absolute deed by ignorance, mistake, fraud, or undue advantage,' equity will treat the instrument as if the clause was inserted; *McDonald v. McLeod*, 1 Iredell, Eq. 221."

The principle is the same whether real or personal property is in question; *Parks v. Hall*, 2 Pick. 206; *Craft v. Bullard*, Smedes & Marshall, Ch. 366; *Hayworth v. Worthington*, 5 Blackford, 361; *Scott v. Haney*, 8 English, 112; *Despard v. Welbridge*, 15 New York, 374; *Dabney v. Green*, 4 Hen. & Mun. 101; *Bloodgett v. Bloodgett*, 1 Law & Eq. Rep. 490 (May, 1876); and it may accordingly be shown by parol evidence that a bill of sale, or other instrument purporting to convey the title as an absolute transfer, was given as a security, and may therefore be avoided by payment of the debt; *Ring v. Franklin*, 1 Hall, 1; *Weber v. Simpson*, 6 Duer, 358; *Caswell v. Keith*,

12 Gray, 351; *Howard v. Odell*, 1 Allen, 85; *Carlyon v. Lannan*, 4 Nevada, 156; *Myers v. Willis*, 17 Com. Bench, 77; 18 Id. 886.

The equity results, not from an agreement at variance with the deed, but from the circumstances by which it is controlled, and where such circumstances do not exist an absolute deed cannot be converted into a mortgage by parol, except on clear proof of fraud or mistake taking the case out of the rules of evidence and the statute of frauds; *Watkins v. Stockett*, 6 Harris & John. 435; *Bend v. Susquehanna Bridge Co.*, Id. 128; *Bank v. Whyte*, 1 Maryland, Ch. 539; *Ing v. Brown*, 3 Id. 522; *Artz v. Glover*, 21 Maryland, 456, 494; *Thompson v. Patton*, 5 Littell, 74; *Thomas v. McCormack*, 9 Dana, 108; *Green v. Ball*, 4 Bush, 586; *Brown v. Dewey*, 2 Barbour, 28; *Cook v. Eaton*, 16 Id. 439; *Taylor v. Baldwin*, 19 Id. 582; *Russell v. Kenney*, 1 Sandford, Ch. 137; *Webb v. Rice*, 1 Hill, 606; 6 Id. 219; *Sloway v. McMurray*, 27 Missouri, 113; *Allen v. McRaie*, 4 Iredell, Eq. 325; *Kelley v. Bryan*, 6 Id. 283; *Elliott v. Maxwell*, 7 Id. 246; *King v. Kincer*, 1 Id. 187; *Clement v. Clement*, 1 Jones, Eq. 193; *Briggs v. Morris*, Id. 193; *Storch v. Carr*, 4 Casey, 135; *Conway v. Alexander*, 7 Cranch, 218; *Freeman v. Baldwin*, 13 Alabama, 246; *Phillips v. Croft*, 42 Id. 477; *Jordan v. Fenno*, 8 English (Ark.), 593; *Belote v. Morrison*, 8 Minnesota, 87; *Corbit v. Smith*, 7 Clarke (Iowa), 60; *Lokerson v. Stillwell*, 2 Beasley, 357; *Nickson v. Toney*, 3 Head, 655; *Chaires v. Brady*, 10 Florida, 133; *Henley v. Hotaling*,

41 California, 22; *Shays v. Norton*, 48 Illinois, 100; *Price v. Kaines*, 59 Id. 276; *Kent v. Lasley*, 24 Wisconsin, 654; *Campbell v. Dearborn*, 109 Mass. 130; *Anding v. Davis*, 38 Mississippi, 574; *Green v. Butler*, 26 California, 595.

The appropriate remedy for a mortgagor who seeks to convert an absolute deed into a mortgage, or to set aside a forfeiture incurred by a want of punctual payment is in equity, although the answer of the defendant becomes evidence in his own favor, which cannot be overcome without something more than the testimony of a single witness; *Webb v. Rice*, 1 Hill, 606; 6 Id. 219; *Cook v. Gudger*, 2 Jones, Eq. 172; *Vandegrift v. Herbert*, 3 C. E. Green, 467; *Bryan v. Cowart*, 21 Alabama, 22; *Thomas v. McCormack*, 9 Dana, 108; *Farley v. Goocher*, 11 Iowa, 571; *Bingham v. Thompson*, 4 Nevada, 224; *McClare v. White*, 5 Minn. 179. "When," said Ruffin, C. J., in *Franklin v. Roberts*, 2 Iredell, Eq. 560, "the answer denies the right of redemption, the proofs must be clear, consistent and cogent, composed of circumstances incompatible with the idea of an absolute purchase, and leaving no doubt on the mind."

We have seen that in determining whether a conveyance should take effect as a mortgage, a court of equity will look beyond the writings to the understanding and agreement of the parties, and if it appears that the grantee is entitled to demand the return of the consideration, the grantor will have a corresponding right to redeem; *Flagg v. Mann*, 2 Sumner, 486; *Edring-*

ton v. Harper, 3 J. J. Marshall, 353; *Bacon v. Brown*, 19 Conn. 29; *Jarvis v. Woodruff*, 22 Id. 548; *Russell v. Southard*, 12 Howard, 139; *Wharf v. Howell*, 5 Binney, 499; *Robinson v. Farely*, 16 Alabama, 432. If money is lent and a deed executed as a security, it is not less clearly a mortgage because the borrower does not give a note or bond, and there is no written evidence of the debt; *Page v. Foster*, 7 New Hamp. 392. But it is equally well settled that a mortgage may exist where there is no debt, and it rests with the grantor to say whether he will repay. Thus, it may and not unfrequently does happen that an application for a loan is met by the reply that the lender does not require the personal obligation of the borrower, but will make the advance on the security of his real estate, the express or implied understanding being that if the money is repaid on or before a certain day the premises shall be reconveyed. In such cases, and others of a like kind, a court of equity will not suffer the policy which forbids an irredeemable mortgage to be frustrated by the form of the transaction, but will, on the contrary, hold that one party is entitled to a decree of foreclosure, and that the other may maintain a bill to redeem; *Cram v. Bonnell*, 1 Green, Ch. 264; *Marshall v. Stewart*, 17 Ohio, 356; *Wharf v. Howell*, 5 Binney, 499; *Johnston v. Gray*, 16 Serg. & Rawle, 361; *Colwell v. Woods*, 3 Watts, 188; *Heister v. Medara*, 3 Watts & Serg. 384; *Yarborough v. Newell*, 10 Yerger, 376; *Hudson v. Isbell*, 5 Stewart & Por-

ter, 67; *Smith v. The People's Bank*, 24 Maine, 185; *Rice v. Rice*, 4 Pick. 349; *Clark v. Henry*, 2 Cowen, 324; *Skinner v. Miller*, 5 Littell, 84; *Dow v. Chamberlin*, 5 McLean, 281; *De Camp v. Crane*, 4 C. E. Green, 166; 6 Id. 414; *Horn v. Ketaltas*, 46 New York, 605; 42 Howard, Pr. 138; *Moore v. Wade*, 8 Kansas, 380. Such a decree may be disadvantageous to the grantee, because the grantor may choose whether he will redeem, while the grantee has no right of recourse against him, and must submit to the loss if the property is inadequate to satisfy the debt; but he ought not to complain of a result which is attributable to his own folly in putting the transaction in a form calculated to deceive third persons and mislead the court. See *Pearson v. Searey*, 38 Alabama, 647; *Carpenter v. Snelling*, 97 Mass. 452; *Stephenson v. Haines*, 16 Ohio, N. S. 478; *Sears v. Dixon*, 33 California, 326.

"A mortgage is a conditional conveyance designed as a security for the payment of money, the fulfillment of some contract, or the performance of some act, to be void upon such payment, fulfillment, or performance;" see *Mitchell v. Barnham*, 44 Maine, 286, 299; *Moore v. Wade*; *Wing v. Cooper*, 37 Vermont, 169, 180; and it is not essential that the mortgagor should be under an obligation to do the act, fulfill the contract, or pay the money. In *Wing v. Cooper*, Kellogg, J., said, "There was no debt existing from Briggs to the defendants, but there was a debt which was capable of being enforced against the prop-

erty which Briggs conveyed to them, and the absence of any personal liability on the part of Briggs to pay the money advanced or to be advanced by them in satisfaction of the levies, is not a conclusive test whether the conveyance was intended to be absolute or a security merely. It was not necessary that there should be a liability on the part of Briggs to pay, as well as on the part of his grantees to release or reconvey on being paid, to constitute the transaction a mortgage; yet the want of this mutuality is proper to be considered in determining whether the transaction was a mortgage or not, though it is not of itself decisive.

"If a debt, capable of being enforced in any way against either the person or the property of Briggs, was purposely kept on foot, and if the conveyance by him was intended to secure the payment of that debt, the transaction was, in fact, a mortgage, and the estate was defeasible and redeemable, although there was no covenant or other personal obligation on his part to pay the money; *Flagg v. Mann*, 2 Sumn. 534; *Brown v. Dewey*, 1 Sandf. Ch. R. 56; 1 Washburn, on Real Property, 481; *Graham v. Stevens*, 34 Vermont, 166. If the land conveyed by Briggs was to be held by Cooper Russell, and Whipple, as 'indemnity and security,' it is apparent that there was, in the contemplation of the parties to the deed and bond, an existing debt, for which the land was to be held as such indemnity and security, and that the relation of principal and surety between Briggs and

these defendants was expected still to continue."

It results from these decisions that if A. borrows money and B. conveys his estate as a security, it is a mortgage although B. is not personally liable; and the case is the same in principle where a loan is made on the faith of the pledge or conveyance of a particular fund, with an express or implied agreement that the lender shall look exclusively to it for payment.

In general a deed upon condition is not a mortgage unless the act provided for is of such a nature that a Court of Equity will set aside the forfeiture occasioned by a breach, on the tender of performance within a reasonable time; *Bethlehem v. Annis*, 40 N. Hamp. 34; *Hihn v. Peck*, 30 California, 280. But in the absence of evidence, a deed and cotemporaneous defeasance are generally considered to constitute a mortgage; *Clark v. Lyon*, 46 Georgia, 203; *Peterson v. Clark*, 15 Johnson, 205; *Watkins v. Gregory*, 6 Blackford, 113; *Copeland v. Yoakum*, 38 Missouri, 349; *Sharkey v. Sharkey*, 47 Id. 543; *Hill v. Edwards*, 11 Minnesota, 22; *Enos v. Sutherland*, 11 Michigan, 538; and in some States there are statutory provisions to this effect; *Clark v. Condit*, 3 C. E. Green, 358; *Warren v. Lovis*, 53 Maine, 464; although to raise this presumption the deed and defeasance must be between the same persons; *Flagg v. Mann*, 14 Pickering, 479; *Shaw v. Erskine*, 43 Maine, 479; *Warren v. Lovis*, 53 Maine, 463; *Carr v. Rising*, 62 Illinois, 19. Hence, under the registry acts,

when the written defeasance is not recorded, the conveyance simply amounts to an unrecorded mortgage, and, as such, is postponed to *bond fide* purchasers and subsequent lien creditors without notice; *Friedley v. Hamilton*, 17 Serg. & Rawle, 70; *Jaques v. Weeks*, 7 Watts, 261; *Manufacturers' Bank v. Bank of Pennsylvania*, 7 Watts & Serg. 335; *Luch's Appeal*, 8 Wright, 519; *Edward v. Trumbull*, 14 Id. 509; *Clark v. Condit*, 3 C. E. Green, 358; *Kline v. McGuchin*, 9 Id. 414; *ante*, 207.

CONDITIONAL SALE.—A vendor may, notwithstanding, decline to part with his property absolutely, or except on the terms of having a right to repurchase it within a definite time. Such a transaction comes very near, both in form and effect, to a mortgage, and yet is so far diverse that if the condition be not punctually fulfilled, a subsequent tender will be too late and the vendor cannot come into equity to redeem; *Conway v. Alexander*, 7 Cranch, 218. In this instance the bill was filed to redeem land which had been conveyed by the complainant to a third person in trust to reconvey if the purchase money should be repaid before a day named in the deed, and if not, then to convey to the defendant, and it was held that in the absence of a bond, note, or other evidence of indebtedness, the transaction must be regarded as a conditional sale, and as the complainant had not tendered the money at the proper time, the bill should be dismissed. Marshall, C. J., said: "The question to be decided is, whether

Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of 700*l.* with interest on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

"To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided as mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the

repayment of money or an actual sale.

"In this the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence in this case is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law, for the recovery of the money, certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced, to justify a decree against him.

"That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons who are perfect strangers to the transaction, for no other conceivable

purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the 700*l.* on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case if the instrument was really a security for money advanced and to be repaid.

"It is also a circumstance which, though light, is not to be entirely disregarded, that the 20 acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it at least possible that a division might be useless. Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage. It is certain this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting the loan of money; no proposition ever made respecting a mortgage."

It is established, in accordance with this doctrine, that where the transaction is a conditional sale in fact as well as in form, the vendor cannot redeem after the appointed time; *ante*, 1954; *Holmes v. Grant*, 8 Paige, 243; *Glover v. Payn*, 19 Wendell, 518; *Brown v. Dewey*, 2 Barbour, 28, 172; *Ransome v. Frayser*, 10 Leigh, 592; *Flagg v. Mann*, 14 Pickering, 467; *Johnson v. Clark*, 5 Arkansas, 340; *Holmes v. Trash*, 9 Missouri, 206; *Moss v.*

Green, 10 Leigh, 251; *King v. Kincey*, 1 Iredell, Eq. 187; *McDonald v. McLeod*, Id. 221; *McLaurin v. Wright*, 2 Id. 94; *Kelly v. Bryan*, 6 Id. 283; *Hackman v. Cantrell*, 9 Yerger, 172; *Lane v. Dickerson*, 10 Id. 673; *French v. Sturdervant*, 8 Greenleaf, 246; *McKinstry v. Conley*, 12 Alabama, 678; *Pearson v. Seay*, 35 Id. 612; 38 Id. 643; *Cornell v. Hall*, 22 Michigan, 377; *Merritt v. Brown*, 4 C. E. Green, 287; *Rich v. Doane*, 35 Vermont, 125; *People v. Irwin*, 14 California, 428; 18 Id. 117; *Henley v. Hotaling*, 41 Id. 22; *Pitts v. Cable*, 44 Illinois, 103; *Carr v. Rising*, 62 Id. 14; *Haines v. Thomson*, 20 P. F. Smith, 434.

But the authorities are not less explicit that a court of equity will not allow the right of redemption to be defeated by putting that which is really a mortgage in the form of a conditional sale, and will, on the contrary, when the real nature of the transaction is doubtful, incline to the former interpretation, as better calculated to attain the ends of justice; *Russell v. Southard*, 12 Howard, 139; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Dougherty v. Colgon*, 6 Gill & John, 275; *Arts v. Glover*, 21 Maryland, 456; *Baugh v. Merryman*, 32 Id. 185; *Hamet v. Dundas*, 4 Barr, 178; *Scott v. Henry*, 13 Arkansas, 112; *Hickox v. Lowe*, 10 California, 197; *Turnipseed v. Cunningham*, 16 Alabama, 501; *Looke v. Palmer*, 26 Id. 312; *McNeill v. Noworthy*, 39 Id. 156; *Miller v. Thomas*, 14 Illinois, 428; *Bishop v. Williams*, 15 Id. 353; 18 Id. 101; *Heath v. Williams*, 30 Indiana, 496; *McKinney v. Miller*, 19

Michigan, 142; *Trucks v. Lindsey*, 18 Iowa, 504.

In *Conway v. Alexander*, Chief Justice Marshall seems to have thought that as a mortgage is essentially a security, so a deed cannot well be a mortgage where nothing is due by the grantor, and the same opinion has since been frequently asserted; *Flagg v. Mann*, 14 Pickering, 467; *Glover v. Payn*, 19 Wendell, 518; *Lund v. Lund*, 1 New Hamp. 39; *Galt v. Jackson*, 9 Georgia, 151; *Henley v. Hotaling*, 41 California, 22. "Where," said Bronson, Justice, in *Glover v. Payn*, "there is no debt and no loan, it is impossible to say that an agreement to re-sell will change an absolute deed into a mortgage." But this argument may obviously be pushed too far. The question is not whether the sum which constitutes the consideration of the conveyance is loaned on the faith of the grantor's undertaking to repay out of his estate, but whether it is a loan, for if it be, the deed is necessarily a mortgage; *Sears v. Dixon*, 33 California, 327; *Dwen v. Blake*, 44 Illinois, 135; *Smith v. Doyle*, 46 Id. 451; *Tibbs v. Morris*, 44 Barbour, 139; *Marvin v. Prentice*, 49 Howard Pr. 385; *Fiedler v. Darrin*, 50 New York, 441; 59 Barbour, 651; *Crews v. Threadgill*, 35 Alabama, 334; *Phillips v. Hulsizer*, 5 C. E. Green, 308; *Knowlton v. Walker*, 13 Wisconsin, 264; *Plato v. Roe*, 14 Id. 453; *Leahigh v. White*, 8 Nevada, 147; *Montgomery v. Chadwick*, 7 Clarke (Iowa), 114; *Richardson v. Barrick*, 16 Iowa, 407; *Sweetzer's Appeal*, 21 P. F. Smith, 264, *ante*, 1992.

It is obvious that a conveyance in satisfaction of a pre-existing debt cannot take effect as a mortgage, because the object which the parties have in view requires that the estate should vest absolutely in the grantee; *Poindexter v. McCannon*, 1 Devereux, Eq. 373; *McKinstry v. Conly*, 12 Alabama, 678; *Slee v. The Manhattan Co.*, 1 Paige, 48; *Holmes v. Grant*, 8 Id. 243; *Conway v. Alexander*, 7 Cranch, 237; *Sloway v. McMurray*, 27 Missouri, 113, 116; *Hoopes v. Bailey*, 28 Mississippi, 328; *Mason v. Moody*, 26 Id. 184; *Carter v. Williams*, 23 La. An. 281; *Pitts v. Cable*, 42 Illinois, 105, 106.

When, therefore, land is conveyed unconditionally in consideration of an amount due by the grantor, the burden is on him to rebut the presumption arising from the terms of the deed, that it was given in payment and not by way of security or mortgage; *Hogarty v. Lynch*, 6 Bosworth, 138; *Ford v. Irwin*, 18 California, 117; 14 Id. 428.

A conveyance which is absolute in terms, and in view of the facts existing at the time, will not be converted into a mortgage by a subsequent agreement that the grantor may redeem on or before a certain day; *Robinson v. Cropsey*, 2 Edwards, Ch. 138; 6 Paige, 480; *Freeman v. Baldwin*, 13 Alabama, 241; *Mason v. Moody*, 26 Mississippi, 184, 480; *Hassam v. Barrett*, 115 Mass. 256; *ante*, 1955. The law was so held in the case first cited, although the deed had been made in satisfaction of an antecedent debt; and the principle is the same where a creditor promises to sell, and which he

has taken absolutely in payment, and pay the surplus to the grantor; *Holmes v. Grant*, 8 Paige, 243. These decisions are entirely consistent with the rule that where the case is doubtful on the evidence the court should incline to construe the transaction as a mortgage rather than a conditional sale; *Glover v. Payn*, 19 Wend. 518; *Poindexter v. McCannon*, 1 Devereux, Eq. 373; *Russell v. Southard*, 12 Howard, 139; *Scott v. Henry*, 13 Arkansas, 112; *Turnipseed v. Cunningham*, 16 Alabama, 501; *Pensoulan v. Pulliam*, 47 Illinois, 58; *Pearson v. Seary*, 35 Alabama, 612; *Holton v. Merghen*, 15 Minnesota, 69.

A mortgage is a security for a debt, while a conditional sale is a purchase accompanied by an agreement to resell on particular terms. When the consideration is a loan, the deed is necessarily a mortgage; *ante*, 1991. But when the consideration is an antecedent debt, the material subject of inquiry is whether the land was conveyed as a security or in satisfaction. If the debt subsists, the grantor is entitled to redeem upon payment, while if it be extinguished the deed will not be construed as a mortgage by reason of a cotemporaneous obligation authorizing the grantor to repurchase within a specified period, and time will be of the essence of the contract. The underlying question in both instances is one of fact, from which, when ascertained, the law deduces the inference; *Henry v. Davis*, 7 Johnson Ch. 40; *Clark v. Henry*, 2 Cowen, 324; *Rice v. Rice*, 4 Pickering, 349; *Hamet v. Dundas*, 4

Barr, 278; *Todd v. Campbell*, 8 Casey, 250; *Goulding v. Bunster*, 9 Wisconsin, 513; *Honore v. Hutchings*, 8 Bush, 688; *Sutphen v. Cushman*, 35 Ill. 197; *Hickox v. Lowe*, 10 California, 197; *Ruffier v. Womack*, 30 Texas, 332; *Turner v. Kerr*, 44 Missouri, 429; *Robinson v. Wiloughby*, 65 N. Car. 520.

In *Henry v. Davis*, the complainant, who sought to have a mortgage for \$1065 which he had assigned to the defendant retransferred, alleged that the assignment was made as a security for a debt of \$225, which he was ready and willing to pay. This allegation was controverted by the answer, which maintained that the assignment was absolute in satisfaction of the debt, and that the agreement on the defendant's part to reconvey on receiving the amount within a year, was not in the nature of a defeasance but a distinct contract. But this defence was overruled by the chancellor, who said: "It is clearly established by the answer and the proofs that the bond and mortgage were assigned by the plaintiff to the defendant by way of mortgage, to secure the payment of \$225 by a given day; and any agreement that the assignment was to be an absolute sale, without redemption upon default of payment on the day, was unconscientious, oppressive, illegal, and void. The equity of redemption still existed in the plaintiff, notwithstanding any such agreement. There is no principle in equity better settled than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of

the parties, tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, are void. If the conveyance, or assignment, was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement. Though the conveyance be absolute in terms, yet if the intention appears to make it a redeemable estate, it will continue so until foreclosure; for the maxim of equity is, that an estate cannot be a mortgage at one time, and an absolute purchase at another. This is an elementary rule on this subject, and the object of it is to prevent imposition and fraud upon the mortgagor."

In like manner, where land was conveyed absolutely, with a covenant to reconvey on receiving back the price, the deed was held to be a mortgage, on proof that the grantor owed the grantee a sum equaling the amount of the purchase money; *Rice v. Rice*, 4 Pickering, 349.

The distinction was clearly stated in *Robinson v. Cropsey*, 2 Edwards, Ch. 143, where it was said: "If a deed or conveyance be accompanied by a condition or matter of defeasance, expressed in the deed or even contained in a separate instrument, or exist merely in parol, let the consideration for it have been a pre-existing debt or a present advance of money to the grantor, the only inquiry necessary to be made is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties; for if it does, then the conveyance must be regarded as a security for the

payment, and be treated in all respects as a mortgage; *Slee v. Manhattan Company*, 1 Paige Ch. 56. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be purchase money, and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property."

It may be inferred, from the language held in some instances, that where an application for a loan on the security of real estate results in an absolute conveyance, with a stipulation that the premises shall be reconveyed on the repayment of the purchase money within a given period, a court of equity will hold that time is not of the essence of the contract, and allow the grantor to redeem after the day. See *Bentley v. Phelps*, 2 Woodbury & Minot, 427; *Colwell v. Wood*, 3 Watts, 188; *Kerr v. Gilmore*, 6 Id. 405; *Crane v. Bonnell*, 1 Green, Ch. 264; *Erland v. Radford*, 7 Alabama, 724; *Turnipseed v. Cunningham*, 16 Id. 504. Such transactions should doubtless undergo a rigid scrutiny, and if there is reason to believe that advantage was taken of the grantor's necessities to compel

him to put a mortgage in the form of conditional sale, or to part with his property without receiving an equivalent, relief may be afforded as in other cases of constructive fraud; see *Locke v. Palmer*, 26 Alabama, 312, 322; *Dougherty v. Colgan*, 6 Gill & Johnson, 275; *Artz v. Glover*, 21 Maryland, 456. It is, notwithstanding, obvious that one who is asked to lend money on mortgage may decline, and propose to buy, and if the opposite party agrees to sell the same or other land conditionally, he will be bound, although his original intention was to borrow. See *Holmes v. Tresh*, 9 Missouri, 206; *McDonald v. McLeod*, 1 Iredell, Eq. 221; *Lewis v. Deven*, 1b. 290; *Flagg v. Mann*, 14 Pickering, 467; *Turner v. Kerr*, 44 Missouri, 429. In *Flagg v. Mann*, proof that a loan had been solicited and refused, and that the complainant then made a conditional sale, was accordingly held insufficient to convert the deed into a mortgage, or raise an equity in opposition to its terms. Hence, when no prior indebtedness exists between the parties, the question whether a conveyance, with a cotemporaneous agreement by the grantee to resell, operates as a conditional sale or as a mortgage, will depend upon the intention of the parties, to be ascertained by their acts and declarations, with the aid of such light as can be derived from the circumstances; *Cornell v. Hall*, 22 Michigan, 377; *Rich v. Doane*, 35 Vermont, 124; *Preschbaker v. Feaman*, 32 Illinois, 476; *Ewart v. Walling*, 42 Id. 453. And proof of retention of possession by the grantor subsequent to the delivery of

the deed will be strong evidence from which to infer an intention to create a mortgage; *Wilson v. Patrick*, 34 Iowa, 362; *Daubenspeck v. Platt*, 22 California, 330; *Todd v. Campbell*, 8 Casey, 250; *Steel v. Baker*, 3 Jones Eq. 427; *Ruffier v. Womack*, 30 Texas, 341; *ante*, 1989.

In *Rich v. Doane*, 35 Vermont, 125, the bill set forth that, on the 25th of January, 1859, the defendants were the owners of three undivided fifths of a farm in Shoreham, of which the orator owned one fifth, being the farm of Reuben Doane, deceased; that on that day the defendants, in consideration of \$2200, sold and conveyed by deed to the orator their interest in such farm; that on the same day the orator executed to the defendants a bond in the penal sum of four thousand dollars, conditioned that if the orator should, on the payment of \$2200 by the 15th of February, 1859, with interest thereon from January 25th, 1859, convey to the defendants the said three-fifths of said premises so conveyed to them by him, the bond should be void; and further conditioned that if the defendants should fail to make such payment by the 15th of February, 1859, but should procure for the orator a sufficient lease of that part of the land of Reuben Doane which was set off to his widow, Martha Doane, as dower, or in default of procuring such lease, should give the orator sufficient security that he should occupy such part during Martha Doane's life, and should also pay the orator \$2200 by the 1st of December, 1859, and the interest thereon from



January 25th, 1859, and \$800 in addition thereto, and if in such case the orator should convey to the defendants the said three-fifths of the said premises so conveyed to him, and also one undivided fifth part of the same premises besides, and should also pay them \$100 per annum as rent of the said lease, then also the said bond should be void. The bill further averred that immediately after the execution of such conveyance and bond, the orator entered into possession of the premises, and had made improvements thereon, claiming to hold the same as upon a conditional purchase subject only to the condition mentioned in said bond, and not upon a mortgage, and that the transaction was intended only as a conditional sale, and that the relation of debtor and creditor was not thereby created and did not exist between the defendants and the orator, and that the defendants had not performed any of the acts stipulated to be done by them in the condition of the said bond, but that nevertheless they claimed that the aforesaid transaction constituted only a mortgage of the premises to secure the payment of \$2200 and interest, and that they would, at some future time, take measures to enforce their right of redemption of the premises, and that therefore, it had become important for the interest of both parties that the nature and extent of the orator's interest in the premises should be determined by the court. The orator prayed that the court would decree the aforesaid agreement to be a conditional sale of the premises, and declare the

estate of the orator therein absolute.

Poland, C. J., said, "The single question to be determined in this case is, whether the conveyance from the defendants to the orator, and the orator's bond for a reconveyance, constitute a mortgage for the security of a debt or loan, or an absolute conveyance, with a right of repurchase in the defendants. Upon the face of the papers it is clearly the latter, and as the law allows and upholds conveyances of this character, this apparent character must be considered as the true and real one, unless the evidence establishes that it was in fact different. It is perfectly well settled, however, that whatever may be the form of a conveyance, evidence is admissible to show that in fact it was intended merely as a security for a debt or loan of money, and when that is made out, equity will wholly disregard the form of the conveyance, and preserve and protect the right of the debtor or borrower to redeem his estate. And in such cases, courts of equity have followed the rule which has been applied to all cases of transactions between mortgagor and mortgagee, of regarding the mortgagor as the weaker party, dealing at a disadvantage, and needing protection; so that such cases have been watched with jealousy, and if enough was proved to render it fairly doubtful whether the conveyance was a mere security for a debt, or an absolute conveyance with a right of repurchase, the premises have been held to be redeemable. * * * *

"In all this class of cases one prin-

ciple has universally been recognized, that in order to convert a conveyance absolute upon its face into a mortgage, or security merely, there must be a debt to be secured. Some of the cases go so far as to hold that there must be a debt in such form that it can be enforced by action against the debtor, while others have denied it. We have no occasion now to decide whether the debt must be such that it could be enforced by action against the debtor; the tendency of the latter case seems to be against it. But all agree that there must be a debt or loan to be secured; that the relation of debtor and creditor must exist between the grantor and grantee, in order to lay the foundation for converting an absolute deed in form into a mere security. In this case there was no note or bond or other evidence of debt executed by the defendants, and though this is by no means conclusive, still it is a circumstance favorable to the orator, as, if the parties intended the conveyance merely as a security for a loan or debt, it would have been natural that the ordinary evidence of a debt should have been required and given. * * *

"We are inclined to believe that the sale to the orator was for somewhat less than the fair value of the premises, but the inadequacy was not so great as to furnish very strong evidence that the conveyance was only a mortgage in disguise. * * *

The conduct of the parties since the conveyance seems to be entirely in harmony with the idea that when the defendants allowed the time to

expire without repurchase, they had no further right. The orator so treated it; he has sold a part of the premises, and remained in possession of the residue, making no call for payment on the defendants. The defendants appear to have made no objection to these acts of absolute ownership by the orator, and no effort or offer of payment, as if they were the orator's debtors, and the conveyance but security. * * *

"But what is most satisfactory to us that this conveyance was not understood by the parties to be but a security for the money advanced by the orator, are the various provisions in the bond executed by the orator to the defendants, of the same date with the deed, and the other bond from the defendants to the orator. The defendants contracted that the orator should have a lease, or the undisputed possession of the widow's dower, by paying one hundred dollars yearly for the same. The orator contracted to convey his fifth part of the farm to the defendants, for eight hundred dollars, in case they repaid the twenty-two hundred dollars he had paid for the farm, and the defendants are not entitled to make such repurchase without becoming purchasers of the orator's share of the farm. Now it is not pretended that all these various stipulations were not *bonâ fide*, and intended to be fully carried out. But they are wholly inconsistent and incompatible with what the defendants now claim, that the deed was a mortgage to secure the sum advanced by the orator."

In *Henley v. Hoteling*, 41 Cali

fornia, 22, 27, it was said in like manner to be obvious, "That one may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may, at the same time, contract to reconvey upon the payment of a fixed sum, without any intention on the part of either party, that the transaction shall be in effect a mortgage. There is no absolute rule that such a covenant shall be regarded, either in law or equity, as a defeasance. The covenant to reconvey, it is true, may be one fact taken in consideration with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone it is not sufficient to work that result. The owner of the land may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal, and courts would depart from the line of their duties, should they declare such a transaction to be a mortgage in disregard of the real intention of the parties."

The better opinion is, in accordance with these decisions, that a conveyance attended with a contemporaneous or subsequent agreement to reconvey, is not a mortgage unless the consideration is a loan or debt, or the real object is to secure the payment of a sum of money, or the performance of some other collateral act.

It has been held in some instances that where the parties agree contemporaneously with the execution of the deed that the grantor may redeem the land by paying back the purchase money, the transaction will be regarded as a mortgage, unless the grantee can show *aliunde* that it is a conditional sale; see *Peterson v. Clark*, 15 Johnson, 205; *Watkins v. Gregory*, 6 Blackford, 113.

The weight of authority is that this presumption does not arise unless the writings appear on their face to be a security for a debt. Such an instrument cannot be varied by parol, except on the ground of fraud or mistake; *Palmer v. Gurnsey*, 7 Wend. 248; but parol evidence is admissible to strengthen the natural presumption that an agreement to resell is what it purports to be, and not a mortgage. See *Robinson v. Cropsey*, 2 Edwards Ch. 138; 6 Paige, 480; *Holmes v. Grant*, 8 Id. 243, 255; *Baker v. Thresher*, 4 Denio, 493; *Quirk v. Rodman*, 5 Duer, 485; *Glover v. Payn*, 19 Wend. 518, 520.

A different view was, notwithstanding, taken in Pennsylvania, and the presumption arising from a covenant to reconvey held to be one that could not be rebutted by proof that the parties did not hold the relation of debtor and creditor, and that the covenant was an afterthought which formed no part of the contract as originally made; *Colwell v. Woods*, 3 Watts, 88; *Kerr v. Gilmore*, 6 Id. 405; *Brown v. Nickle*, 6 Barr, 390; *McClintock v. McClintock*, 3 Brewster, 76; and a

similar view was taken in *Snyder v. Griswold*, 37 Illinois, 217.

But these decisions, in construing every conditional sale to be a mortgage, and rejecting all evidence of the intention of the parties to the contrary, obviously extend the doctrine beyond all reasonable bounds, and are subject to the qualification engrafted by later cases, that this rule is only applicable when the deed and defeasance, or agreement to resell, bear even date. If they are dated apart, testimony is admissible to prove the true nature of the transaction; *Reitenbaugh v. Ludwig*, 7 Casey, 132; *Wilson v. Shoenberger*, Id. 299; *Harper's Appeal*, 14 P. F. Smith, 315; *Haines v. Thomson*, 20 Id. 434.

In the latter case, husband and wife being seized of certain premises in right of the wife, agreed, in 1858, to sell them to the defendant for \$22,500, to be paid partly by the husband's indebtedness to the defendant and partly in cash, and a deed dated May 31, 1858, was duly tendered to the defendant, but, for some reason, declined. In 1859 an agreement was executed between the same parties, which, after reciting the deed of the preceding year, provided that if the grantors should pay the sum of \$24,030.75 to the grantee, on or before May 1st, 1863, the latter would reconvey the premises, if not previously sold; and it was further provided that if the payment should be made before the stipulated time, the grantee should remain in possession until that date at a fixed rent, the premises to be delivered up in good order, reasonable wear and tear ex-

cepted. And it was also recited that the indenture of 1858 was delivered at the date of the execution of this agreement. In 1865 the devisees of the wife filed a bill to redeem, but it was held by the Supreme Court, reversing the decision of the court below, that as the deed and subsequent agreement were of different date, evidence was admissible to prove the intention of the parties, and from the facts found, the transaction was declared to be a conditional sale, and the bill was accordingly dismissed.

"The case is peculiar," said Agnew, J., in delivering the opinion, "having no exact counterpart in any found in our books. The master thought that the bill and answer neutralized each other, and being thus counterpoised, the case must be decided on the face of the deed and the so-called defeasance. Having arrived at this conclusion, he then pronounced the transaction to be a mortgage on the face of the papers, as a security for advances by Mr. Thomson to Mrs. Hanson, with a power of sale on the part of the former. The master says expressly, the only evidence before him touching the deed and agreement are the papers themselves. If this were the whole case, his conclusion would be justified by *Colwell v. Woods*, 3 Watts, 188; *Kerr v. Gilmore*, 6 Id. 405, and other cited cases. In *Brown v. Nickle*, 6 Barr, 390, this court, commenting on *Colwell v. Woods*, and *Kerr v. Gilmore*, remarked: 'In the first of them it was determined that a conveyance and simultaneous covenant to reconvey on payment of the purchase money before a

given day, must be construed to be a mortgage, though it appear by parol that the party did not intend it to be so; and in the second, that it is not competent to the parties to prove by parol that the defeasance was a subsequent and independent agreement. These cases, said the court, are not to be resisted, yet we must suppose that there may be, in some shape and under some circumstances, such a thing as a conditional sale. But the proof proposed in this instance was not of distinctive acts which constitute it, but of the understanding of the parties. Their understanding, however, must be gathered from the writing, and if that be ambiguous on the face of it, it cannot be gathered from the parol proof.' The court also remarked that *Kerr v. Gilmore* 'pushed the doctrine to its utmost verge.' Now, if we turn to *Kerr v. Gilmore*, we find that the deed and defeasance were dated on the same day, and executed by the parties at the same time and before the same persons, and the offer was to prove that the deed was first executed; and then, at the suggestion of one of the parties, that it would be a benefit to have the privilege of repurchasing, the agreement was put in writing and executed after the deed had been executed, and the parties then spoke of it as a sale. Such is the nature of the evidence held in *Kerr v. Gilmore* to be incompetent, and it is clear its true character was an attempt to prove the mere understanding of the parties against the legal character of the papers as it appeared on their face. Hence, it is said by Judge

Huston, in the opinion, 'that it has become impossible to draw any conveyance, nay, to make any contract by which property shall be redeemable, for a certain period, and cease to be so after that period has elapsed.' Yet, in the same opinion, we find qualifications which evidence the extent of the decision. In connection with his statement, that the two instruments—a deed and a defeasance of the same date—are necessarily a mortgage, he also says, 'that all the cases show that all the circumstances of the whole transaction are inquired into in chancery and in our own courts.' In another part of the opinion he qualifies what he had said, in these words: 'If a case can occur where such conveyance and defeasance do not constitute a mortgage, it must be one in which some time has elapsed, some circumstance has occurred, to satisfy the court and jury that the contracts were wholly separate; that the first was always intended as a real, actual sale, and the second bargain a real, distinct agreement to purchase again property which *had once been actually sold*; but the two bargains cannot be made in the same hour and day, nor evidenced by instruments executed, as these were, *before the parties separated, and before the witnesses to the first instrument left the room, or any new information had been communicated.*' That a case can arise wherein the first instrument can be shown to be a real sale, and the second an unconnected resale, is proved by *Spering's Appeal*, 10 P. F. Smith, 199, where the first instrument was an actual sale under

a power contained in a former pledge of stock, for the very purpose of conversion to redeem the pledge, and the second was an independent agreement to resell the same kind of stock, in order to give the former owner the rise of the market for a stipulated time. *Reitenbaugh v. Ludwig*, 7 Casey, 132, shows also that even in a common-law action evidence will be received to prove the true nature of the transaction when the deed and alleged defeasance are dated apart from each other. There Woodward, J., submitted the question of a sale or a security to the jury, and the judgment was affirmed. *Harper's Appeal*, 14 P. F. Smith, 315, relied on by the appellee as ruling the case before us, is another proof of the practice to hear the whole transaction where the deed and defeasance are not simultaneous in date. In all the cases it will be seen that the *distinctive acts*, as they are called in *Brown v. Nickle*, which characterize the transaction, have been treated as the proper subject of evidence, and not the mere understanding of the parties, or their belief as to the legal effect of their acts; and in all, the sum of the matter has been to determine by the true nature of the transaction whether the conveyance was an actual sale, or a mode of securing money lent, or a debt. The only exception is, where the instruments are of even date on their face, and where, being in terms a conveyance and a contract to reconvey on payment of the money passing between them, they are in legal contemplation a mortgage. In that case, being a mort-

gage on their face, parol evidence will not be received to convert them into a conditional sale."

An absolute deed may be shown to be a mortgage not only between the parties, but as against third persons (*ante*, notes to *Basset v. Nosworthy*; see *Walton v. Cronly*, 14 Wend. 63; *Cabe v. Ballerd*, 10 Harris, 431; *Eldridge v. Jenkins*, 3 Story, 181, 293; *McLaughlin v. Shepherd*, 32 Maine, 143), although not after the property has been attached or taken in execution by creditors, or has passed into the hands of one who has given value for it in good faith; see *Coniell v. Pierson*, 4 Halsted, Ch. 478; *Jaques v. Weeks*, 7 Watts, 261, 279; *Stoddart v. Rotton*, 5 Bosworth, 378; *Hogerty v. Lynch*, 6 Id. 138; *Purrlington v. Pierce*, 38 Maine, 447; *Crane v. Buchanan*, 29 Indiana, 571; *Enos v. Sutherland*, 11 Michigan, 538. The plaintiff in an action on a policy of insurance may, consequently, show that a conveyance which is relied upon as a defence was a security for a debt, and did not divest his insurable interest; 2 American Leading Cases, 819, 5 ed.; *Hodges v. The Tennessee F. & M. Co.*, 4 Selden, 416; *Summers v. Insurance Co.*, 13 La. An. 504; *Smith v. Insurance Co.*, 50 Maine, 96; *Day v. Insurance Co.*, 51 Id. 91. So evidence that the paper title to a vessel is subject to a parol defeasance may be given in a suit against the owners for supplies; *Ring v. Franklin*, 1 Hall, 1; *Weber v. Sampson*, 6 Duer, 358; *Horne v. Pritchitt*, 22 Texas, 201; *Carlyon v. Lanning*, 4 Nevada, 156; *Grove v. Rentch*, 26 Maryland, 368; and it does not vary the case that the bill

of sale appears on the registry as *ab o'ute*. In *Walton v. Cronly*, the assignee of a lease was in like manner permitted to defend an action which had been brought against him for the rent, by proof that his assignor, the lessee, was entitled to redeem and therefore answerable in equity to the lessor; see notes to *Keech v. Hall*, 1 Smith's Lead. Cases, 892, 7 Am. ed.; *Calvert v. Bradley*, 16 Howard, 580; *Astor v. Hoyt*, 5 Wendell, 603. Such evidence is admissible in a court of equity, or on equitable principles, but cannot be received by a tribunal which proceeds according to the strict course of the common law, and only takes cognizance of the legal title; *Abbott v. Hanson*, 4 Zabriskie, 493; *Webb v. Rice*, 6 Hill, 219; *Bank v. Bridge Co.*, 6 Har. & John. 128; *Reading v. Weston*, 8 Conn. 117; *Hall v. Jewell*, 7 Greenleaf, 435; *Bryant v. Crosby*, 36 Maine, 562; *George v. Morris*, 23 Arkansas, 121; *Bragg v. Massie*, 38 Ala. 89.

In general, every one may redeem who would have an interest in or lien upon the land if it were reconveyed; *Averill v. Taylor*, 4 Selden 44; and hence the right of redemption may be exercised by a lessee, by a judgment creditor, or by an assignee, although the deed under which he claims is voluntary, or for an inadequate consideration (*Anonymous*, 3 Atkins, 313; *Chanland v. Boerum*, 23 Barb. 201; *Basley v. Myrick*, 36 Maine, 58), by a dowress, (*Bell v. The Mayor of New York*, 10 Paige, 49; *Mills v. Van Voorhis*, 23 Barb. 125; *Jackson v. Dewett*, 6 Cowen, 316; *Cunningham v. Knight*, 1 Barb. 399), or by one who, hav-

ing paid the debt as a surety, is entitled to subrogation; *Averill v. Taylor*; vol. 1, p. 136, notes to *Dering v. Earl of Winchelsea*.

The American authorities concur with the English that where the lapse of time would preclude a recovery in ejectment, it will be an answer to a bill to redeem; *Hughes v. Edwards*, 9 Wheaton, 489; *Sheer v. The Bank of Pittsburgh*, 16 Howard, 571; *Montgomery v. Chadwick*, 7 Clarke (Iowa), 114; *Halesy v. Jackson*, 66 Illinois, 140. Hence the statute of limitations is taken as a guide, and when it prescribes fifteen years as the period beyond which an entry shall not be made, a mortgagor who does not come forward within that time will be barred; *Skinner v. Smith*, 1 Day, 124; *Jarvis v. Woodruff*, 22 Conn. 548; and it was held in the case last cited that a feme covert who has been invested with the *jus disponendi* by statute must, so far as her property is concerned, be regarded as if she were sole.

ESTATE OF MORTGAGEE.—Although the mortgagee holds the land as a security, he still has the legal title, and may use it in any way that is not inconsistent with the equity of the mortgagor; see *Ewer v. Hobbs*, 5 Metcalf; *Conrad v. The Atlantic Ins. Co.*, 1 Peters, 441. A mortgagee is consequently entitled to enter upon or bring ejectment for the premises, as against the mortgagor and those claiming under him subsequently to the mortgage; *Keech v. Hall*, Douglas, 21; 1 Smith's Leading Cases, 889, 7th Am. ed.; *Blaney v. Bearce*, 2 Maine, 132; *Brown v.*

Cram, 1 New Hamp. 169; *Erskine v. Townsend*, 2 Mass. 493; *Reed v. Davis*, 4 Pick. 216; *Mayo v. Fletcher*, 14 Id. 525; *Simpson v. Ammons*, 1 Binney, 176; *Smith v. Shuler*, 12 Serg. & Rawle, 243; *Bagley v. Wallace*, 16 Id. 245; *Knaub v. Essik*, 2 Watts, 282; *Henshaw v. Wells*, 9 Humphreys, 568; *Stoney v. Shultz*, 1 Hill, Ch. 464; *The Trustees of Jefferson College v. Dickson*, 1 Freeman, Ch. 474), and may, as assignee of the reversion, demand and recover the rent accruing under an antecedent lease; see 1 Smith's Lead. Cases, 926, 7 Am. ed.; *Moss v. Gallimore*, Douglas, 279; *Burden v. Thayer*, 3 Metcalf, 76; *Babcock v. Kennedy*, 1 Vermont, 457; *Massey v. The U. S. Bank*, 4 Alabama, 735. But a mortgagee not in possession cannot maintain an action of trespass; *Woodward v. Prichett*, 8 Gray, 617; and when in actual or constructive possession is chargeable with the duty of accounting, not only for the rents and profits actually received, but for all that might have been made or collected with reasonable care and diligence; *Saunders v. Frost*, 5 Pick. 260; *Moore v. Cable*, 1 Johnson, Ch. 385; *Van Buren v. Olmstead*, 5 Paige, 9; *Bell v. The Mayor of New York*, 10 Id. 49; *Rawling v. Stewart*, 1 Bland 22.

Although the legal title is confessedly in the mortgagee, yet a court of equity will preclude him from using it, except as a security (*In the matter of Bellows*, 3 Story, 428, 439; *Hughes v. Edwards*, 9 Wheaton, 499; *Maynard v. Hunt*, 5 Pick. 243; *Winslow v. The Merchants' Ins. Co.*, 4 Metcalf, 306; *Butler v.*

Page, 7 Id. 40; *The Northampton Paper Mills v. Ames*, 8 Id. 1; *Tucker v. Keeler*, 4 Vermont, 161; *Morey v. McGuire*, Ib. 327; *Pettingill v. Evans*, 5 New Hampshire, 54; *Smith v. Moore*, 11 Id. 55; *Smith v. Goodwin*, 2 Maine, 173; *Frothingham v. McKusick*, 24 Id. 403; *Noyes v. Sturdivant*, 18 Id. 104; *Henshaw v. Wells*, 9 Humphreys, 568); and it is not less well settled that the mortgagor is equitably the owner as it regards third persons, who cannot allege the outstanding legal estate as a reason why he should not enter, or maintain ejectment or partition; 1 Smith's Leading Cases, 890, 7 Am. ed., notes to *Keech v. Hall*; *Fenwick v. Macey*, 1 Dana, 276; *Glass v. Ellison*, 9 New Hamp. 69; *Willington v. Gale*, 7 Mass. 138; *Groton v. Roxborough*, 6 Id. 50; *Snow v. Stevens*, 15 Mass. 279; *Hitchcock v. Harrington*, 6 Johnson, 295; *Doe v. McLoskey*, 1 Alabama, 708; *Ellison v. Daniels*, 11 New Hampshire, 274; *White v. Whitney*, 3 Metcalf, 81; *Wilkins v. French*, 20 Maine, 111; *Kline v. McGuckin*, 9 C. E. Green, 411.

In some States the mortgagee's right of entry has been abrogated by statute, and he has a mere lien, which does not entitle him to possession; *Runyan v. Mersereau*, 11 Johnson, 534; *Jackson v. Craft*, 18 Id. 110; *Astor v. Milloy*, 2 Paige, 68; *Chase v. Peck*, 21 New York, 581; *Feidler v. Darrin*, 50 Id. 441; 59 Barb. 651; *Carr v. Carr*, 52 New York, 251; *Porter v. Green*, 4 Clark (Iowa), 71; *Kidd v. Temple*, 22 California, 255; *Cunningham v. Hawkins*, 27 Id. 606; *Smith v. Parks*, 22 Indiana, 59; *Jackson v. Carswell*,

34 Georgia, 279; *Chick v. Willetts*, 2 Kansas, 384.

Agreeably to the authorities in the United States, the estate of the mortgagee ceases on the payment or satisfaction of the debt, and the legal title is thenceforth in the mortgagor without a reconveyance; *Ackla v. Ackla*, 6 Barr, 228; *Waring v. Smyth*, 2 Barb. Ch. 119; *Headly v. Chapin*, 11 Paige, 245; *Ruckman v. Astor*, 9 Id. 517; *Johnson v. Sherman*, 15 California, 287.

RIGHTS OF ASSIGNEE.—As the mortgagor's equity is patent, it is necessarily binding on an assignee of the mortgage, who takes subject to the account with the mortgagor and will have no right that could not have been enforced by the mortgagee; *The Ipswich Man. Co. v. Story*, 5 Metcalf, 310; *McGIVEN v. Wheelock*, 7 Barbour, 22; *Emerson v. Atwater*, 7 Michigan, 12; *Decker v. Leonard*, 6 Lansing, 264; *ante*, 1671, notes to *Ryall v. Rowles*. Hence, an assignment of the debt though merely by parol, will draw the mortgage with it and enable the assignee to avail himself of the remedies incident to the legal title (*Betz v. Hubner*, 1 Penrose & Watts, 280; *Donley v. Hays*, 17 Serg. & Rawle, 400; *Jackson v. Blodget*, 5 Cowen, 202; *Emmanuel v. Hunt*, 2 Alabama, 190; *Fisher v. Otis*, 3 Penney (Wisconsin), 78; *Martineau v. McCallum*, *Ib.* 455); while nothing will pass under an assignment which is limited in its operation to the estate, and does not confer a right to the amount which the mortgage was intended to secure (*Bell v. Morse*, 6 New Hamp. 205; *Ellison v. Daniels*, 11 Id. 274; *Dearborn v. Tay-*

lor, 18 Id. 153; *Jackson v. Bronson*, 19 Id. 325; *Wilson v. Troup*, 2 Cowen, 195; *Merritt v. Bartolick*, 36 New York, 44; *Bailey v. Gould*, Walker, 478; *Hill v. Edwards*, 11 Minn. 22; *Johnson v. Lewis*, 13 Id. 364; *Johnson v. Cornett*, 29 Indiana, 59), although a conveyance of the land may inure as a transfer of the debt, and consequently of the mortgage, where such is the design (*Dorkray v. Noble*, 8 Maine, 278; *Hunt v. Hunt*, 14 Pick. 374; *Freeman v. McGaw*, 15 Id. 82; *ante*, 1667, notes to *Ryall v. Rowles*); and the rule is different where the mortgagee has entered into possession for breach of condition; *Ruggles v. Barton*, 13 Gray, 506.

For like reasons, the proper method of taking the mortgagee's interest in execution is through an attachment, and a levy and sale of his estate under a *fiery facias* will be inoperative in equity, and, agreeably to the view generally prevailing in the United States, at law. Conversely, the mortgagor is regarded as having an estate which, if not legal, is so far actual that it will be bound by the lien of a judgment, and may be taken in execution or sold by the sheriff, although this is an administration of equitable principles through the medium of the common law, and technically infeasible; see *Thornhill v. Gilmer*, 4 Smedes & Marshall, 153; *Mordecai v. Parker*, 3 Devereux, 425; *Van Ness v. Hyatt*, 13 Peters, 294; *Bank v. Upmann*, 12 Wisconsin, 499; *Street v. Sprout*, 5 Watts, 272; *Gano v. Thompson*, 7 Id. 416; *Taylor v. Cornelius*, 10 P. F. Smith, 187.

It has been held in some instances

that as the assignment of a debt does not imply a warranty that it will be paid, so where one of several notes or bonds secured by the same mortgage is transferred to a third person, the assignor will be entitled to share equally with the assignee if the proceeds of the land are not sufficient to satisfy both, and as a consequence, that one claiming subsequently under the assignor will stand in his shoes and be entitled to the same privilege; *Mohler's Appeal*, 5 Barr, 418; *Donley v. Hays*, 17 Serg. & Rawle, 400; *Henderson v. Herrod*, 10 Smedes & Marshall, 631; *Cooper v. Ullman*, Walker, Ch. 251; *Moore v. Ware*, 38 Maine, 496; *Stevenson v. Black*, Saxton, 338; *Page v. Pierce*, 6 Foster, 317.

Agreeably to the view taken in some of the other States, a mortgagee who assigns one of the demands which the mortgage was intended to secure has no claim on the fund until the assignee is paid, and hence the latter will also be entitled to a preference over one to whom the remaining demands are subsequently transferred; see *Gnathnals v. Ragland*, 1 Randolph, 466; *Cullen v. Erwin*, 4 Alabama, 452; *The Bank of Mobile v. The Planters' Bank*, 9 Id. 645; *Nelson v. Dunn*, 15 Id. 501; *Grigsby v. Hare*, 25 Id. 327. Others, again, hold that the right to priority depends, under such circumstances, not on the date of the assignment, but on the time at which the demands respectively mature; *The State Bank v. Tweedy*, 8 Blackford, 447; *Stanley v. Beatty*, 4 Indiana, 134; *The United States Bank v. Covert*, 13 Ohio, 248; see *The Bank of Eng-*

land v. Tarleton, 1 Cushman, 173; *Wright v. Parker*, 2 Aiken, 212; *Wood v. Trask*, 7 Wisconsin, 566; *The Marine v. The International Bank*, 9 Id. 57; *Lyman v. Smith*, 21 Id. 674. The books, nevertheless, agree that the question is one of intention, and when the right of priority is fixed by agreement at the time of the assignment, subsequent purchasers will be bound as well as the parties. See *The Mechanics' Bank v. The Bank of Niagara*, 9 Wend. 410, 413, *ante*.

It has been stated that the assignee of a mortgage is subject to every defence that would have been valid against the mortgagee, unless the assignment is sanctioned by the mortgagor (*ante*, 1672, notes to *Ryall v. Rowles*; see vol. 1, 876-880). If his assent be given by parol, it will not operate as an estoppel without proof that the assignee gave value on the faith of the omission. On the other hand, a covenant that the debt is due, or that the mortgagor has no set off, is *prima facie* conclusive; and if the mortgagor should show that the covenant was obtained fraudulently or unduly by the mortgagee, the assignee may still reply that he is a *bona fide* purchaser. Such a stipulation should, therefore, always be required where a mortgage is assigned.

The case of *Twitchell v. McMurtrie*, 27 P. F. Smith, 383, might seem to be at variance with these principles, but really turned upon a point of pleading. The suit was on a mortgage against a feme covert, and the plaintiff filed, as part of his case, a certificate of no offset, sealed and acknowledged by her. She alleged

that she had not given any *such* acknowledgment, and it was held by the court below, that as she did not show in what the acknowledgment thus tacitly admitted was deficient, nor wherein it differed from that set forth by the plaintiff, he was entitled to judgment. This decision was reversed by the Supreme Court, on the ground that the denial was sufficient, and raised an issue which should have been submitted to a jury.

LIABILITY OF MORTGAGEE IN POSSESSION.—In general, a mortgagee in possession, without foreclosure under an ordinary mortgage, is chargeable with the gross amount of rents received or which might have been collected with reasonable care and diligence (*Freytag v. Holland*, 8 C. E. Green, 41; *Pierce v. Robinson*, 13 California, 116), from which, however, is to be deducted the amount expended for necessary expenses and repairs (*Quin v. Brittain*, 1 Hoffman, Ch. 353; *Moore v. Cable*, 1 Johnson, Ch. 387; *Clark v. Smith*, Saxton, 125, 139); or if, by reason of personal occupancy or otherwise, no rents have been received, then he will be charged with a fair occupying rent; *Montgomery v. Chadwick*, 7 Clarke (Iowa), 134. Nor will such mortgagee be allowed for the value of permanent improvements made during his occupation, unless erected with the consent and approbation of the mortgagor (*Dougherty v. McColgan*, 6 Gill & John. 275; *Quin v. Brittain*, 1 Hoffman, Ch. 353; *Bell v. The Mayor*, 10 Paige, Ch. 49; *Russell v. Blake*, 2 Pickering, 505), or

even for clearing wild land and thus adding to its value (*Moore v. Cable*, 1 Johnson, Ch. 385; *Givens v. McCalmont*, 4 Watts, 460); although where the value of the improvements is disallowed, the mortgagee will not be charged with the rent derived solely from such improvements; *Moore v. Cable*; *Bell v. The Mayor*, 10 Paige, 49. "When a mortgagee in possession," said the chancellor, in *Clark v. Smith*, Saxton, 121, 138, "undertakes, without the consent and approbation of the mortgagor, to make improvements on the property, though they be of a beneficial and permanent character, he does it at his peril, and has no right to look for an allowance at the hands of the mortgagor. It would be unjust that a mortgagee, or a voluntary purchaser under him, getting possession of the mortgaged premises, should be at liberty to improve it as he thought most beneficial to himself, and thereby, perhaps, deprive the mortgagor of the power of redeeming. The improvements may be beneficial in themselves, but if the mortgagor does not choose to have them, the mortgagee has no right to impose them upon him. * * * There certainly can be no hardship in this rule. A mortgagee is no more bound to improve the estate than the mortgagor is. If the mortgagor make improvements on the premises after giving the mortgage, the whole of them shall go to satisfy the mortgage if it be necessary. He cannot say to the mortgagee, these improvements were not embraced originally under your lien, and, therefore, you are

not to have the benefit of them. And so, if the improvements are made by the mortgagee, they are voluntarily made, and he cannot turn around and claim allowance for them. They will inure to the benefit of the estate, and if he should suffer a loss the maxim will well apply, '*Volenti non fit injuria*,''' *ante*, 917.

But a different and much more liberal rule prevails, when, by the laches of the mortgagor, the improvements have been made under a mistaken impression that the equity of redemption had been barred by lapse of time; *Benedict v. Gilman*, 4 Paige, 58; *Mickles v. Dillaye*, 17 New York, 80; *Montgomery v. Chadwick*, 7 Clarke (Iowa), 114; *Troost v. Davis*, 31 Indiana, 34; *Roberts v. Fleming*, 53 Illinois, 198; or where, by the terms of the conveyance, the grantee is entitled to consider himself as seized of an absolute estate; *Vanherhaise v. Hughes*, 2 Beasley, 410; *Barnard v. Jennison*, 27 Michigan, 230; *Bacon v. Cottrell*, 13 Minnesota, 194; *Harper's Appeal*, 14 P. F. Smith, 315.

In the case last cited an absolute deed was delivered to the defendant, who thereupon entered into possession, and executed a cotemporaneous agreement to reconvey the premises to the grantor at any time within three years, upon payment of a stipulated sum. Upon a bill filed by the devisees and heirs of the grantor, nearly nine years after the original transaction, it was held by the court below that the defendant was but a mortgagee in possession (*ante*, 2002), and while chargeable with the rents,

should not be allowed any credit for repairs or permanent improvements. But on appeal to the Supreme Court the latter portion of the decree was reversed. "There was no error in the decree to account," said Sharwood, J., in delivering the opinion, "but we do not concur in the view taken by the learned president of the court below as to the principles upon which the account should be settled. We think that, under the facts and circumstances of the case, the defendant should have been allowed the credits claimed and reported by the master for the repairs and improvements made upon the premises during his possession. However it might be, if he were a mortgagee under an ordinary formal mortgage, the rule ought not, we think, to be the same where, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner. There is a manifest distinction between the two cases in reason and justice, which are controlling guides in a court of equity, where no positive rule of law intervenes. It may be politic, wise and just to adopt a strict rule of accountability in regard to one who holds the property of another confessedly as a pledge merely. He ought not to be allowed for permanent and costly additions and improvements made without the consent of the mortgagor, but only for such repairs as were proper and necessary to preserve the estate from dilapidation and decay, not even here, however, holding him to the proof of absolute necessity. There is reason to say that the real beneficial owner shall not be sub-

jected to heavy charges, and in effect perhaps improved out of his estate by one who has no interest in it beyond that of security for his loan, and thus indefinitely prolong the period of final redemption, if not destroy it entirely. Chancellor Kent remarks, indeed, that "all the cases agree that the mortgagee is to be allowed the expense of necessary repairs, and beyond that the rule is not inflexible; but it is subject to the discretion of the court, regulated by the justice and equity arising out of the circumstances of each particular case." 4 Kent's Com. 167, note. The only case in this State in which the question appears to have been discussed and considered is *Givens v. McCalmont*, 4 Watts, 460. The rule is not laid down there very positively, although Judge Huston states that 'in the better opinions it would seem the allowance has been confined to repairs;' and from the judgment we may conclude that the mortgagee is not to be credited for permanent improvements, but at the same time he is not to be charged with the increased rents received in consequence of his expenditure of that character. But that was the case of a mortgagee in possession under an ordinary mortgage, with the clear understanding that the equitable interest was in the mortgagor. Upon the evidence in this case, however, it is indisputable that both parties understood and agreed that the transaction was not a mortgage, but an absolute sale. The admission of Harper, given in evidence against him by the complainants, shows that he so understood it. Gubbings declared the same thing

on various occasions to Banet, a witness of defendant, and to Wilson and Cooper, witnesses produced on behalf of the complainants. It is true, that in construction of law it mattered not what their understanding was—it was a mortgage. But when the mortgagor comes into a court of equity, asking its aid and interposition, it is certainly an element to be taken into consideration in determining the equity, which he shall be required to do as the price of its assistance, that the defendant, with his express assent, took possession of the estate, with an agreement to reconvey it to him at a certain fixed time and for a certain sum, and with no agreement to account in the meantime.

"A well-read lawyer would have informed Mr. Harper that, notwithstanding all this, he was only a mortgagor; but not one layman out of a hundred is acquainted with the refined distinction between an agreement to reconvey, cotemporaneous with the deed, and a distinct and independent contract to the same effect made subsequently. Gubbings, in effect, authorized Harper to act as absolute owner; he should be held to have consented to his acts as such; and, therefore, in the settlement of the account, Harper should be treated as the general agent of Gubbings, to act in the premises according to his best discretion. There is not a single spark of evidence to show any fraud, oppression, or want of good faith, in Harper, which should induce a court of equity to withhold from him its protection as an honest trustee, acting prudently and for the best.

The improvements he made were not capricious, costly, and extravagant, but reasonable, proper, and beneficial, increasing the actual value of the estate to the full extent of their cost, if not much beyond. The learned judge below relied upon *Gregg v. Patterson*, 9 Watts & Serg. 197, where a tenant in common, though believing himself sole owner, had made lasting and valuable improvements, yet he was held not to be entitled to credit for them against his co-tenant. But that was a case where one of two tenants in common, both claiming an equitable title under a vendee, paid the balance of the purchase money, took a deed to himself, went into possession and made the improvements. That case was rightly decided under its circumstances, but it is questionable whether the decision would not have been different had it appeared that he had taken the deed to himself and gone into possession as sole owner with the knowledge and consent of his companion; in other words, if the mistake had been mutual. Cases more apposite to that in hand are *Dilworth's Lessee v. Sinderling*, 1 Binney, 488, and *Beeson v. Beeson*, 9 Barr, 279. In the former, a sum of money was raised for the benefit of a poor clergyman and his family, and placed in the hands of trustees, 'to be by them laid out in the purchase of a small piece of ground, or in such other manner as to them should seem best.' The trustees bought a tract of about sixty-three acres and built a house upon it. In an ejectment by the *cestuis que trust* they were allowed a credit for their expendi-

tures. Tilghman, C. J., said: 'If he (the trustee) had laid out the money in improper buildings, it would have been but reasonable to throw part of the expenses on him. But that was not the case. He made no other than plain, solid buildings, very necessary for the land, and by which its value has been greatly increased.' *Beeson v. Beeson* was the case of a purchase by an executor at an Orphans' Court sale, which was held not to be void, but voidable by the devisees or heirs, and to fasten upon the purchaser the character of a trustee. Mr. Justice Bell, after referring to the distinction between positive fraud, which by way of punishment deprives the purchaser of the land bought without remuneration, and the effect attributed by policy to legal fraud, adds, 'Indeed, courts of equity have not confined the doctrine of remuneration or lien for repairs and improvements to cases of agreement or purchase. It is of general application, and is extended to all cases where the party making the repairs and improvements has acted *bonâ fide* and innocently, and substantial benefit has been conferred on the owner; so that *ex æquo et bono*, he ought to pay. As where—and the illustration is directly apposite now—a party lawfully in possession, under a defective title, has made improvements, if relief be asked in equity by the true owner, he will be compelled to allow for the improvements; Story's Eq. § 1237; *Robinson v. Ridley*, 6 Medd. 2; *Attorney-General v. Baliol College*, 9 Mod. Rep. 411. Of this *Dilworth*

v. Sinderling, 1 Binney, 488, furnishes a signal instance.' And see *Jackson v. McGinness*, 2 Harris, 334, where *Beeson v. Beeson* is cited and approved. The equity of the executor, who took the estate supposing himself absolute owner, but was converted into a trustee by construction of law, was no stronger than was that of the defendant here, who took possession under an absolute deed with an agreement to reconvey, but who, by a similar construction of law, was converted into a mortgagee. If anything, Harper's equity is better; for Gubbings, the mortgagor, was *sui juris* competent to contract and manage his own business, and agreed that he should take the estate as absolute owner. It is only upon the ground of a gen-

eral policy for the protection of needy debtors from the oppressive demands of their grasping creditors, that the principle has been established that such a transaction shall be regarded in equity as a mortgage, and that once a mortgage, always a mortgage. Will it be equitable, under such circumstances, to decree a reconveyance of the property increased in value by substantial and valuable improvements and repairs, at a large expenditure of money, in the most perfect good faith, without any allowance therefor? Such a result would, in our judgment, be in the highest degree inequitable, and not in accordance with the liberal principles upon which courts of equity proceed in analogous cases."

[*1082] *SIR HARRY PEACHY *v.* THE DUKE OF SOMERSET.

TRINITY TERM, 7 GEO. 1.¹

REPORTED 1 STRA. 447.

PENALTIES AND FORFEITURES.]—*A. having incurred a forfeiture of copyhold, by making leases contrary to the custom of the manor, without license of the lord, and by felling timber, digging stones, and grubbing up hedges, although he offered by his bill to make a recompense, was held not entitled to relief in equity.*

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money; and the Court can give, by way of recompense, all that was expected or desired.

THE plaintiff brought his bill to be relieved against a forfeiture of his copyhold, by making leases contrary to the custom of the manor, without license of the lord, felling timber, digging stones.

¹ *S. C.*, Prec. Ch. 568; 2 *Eq. Ca. Ab.* 227, 228.

and grubbing up hedges, offering to make a recompense; and on the pleadings, the case was this:—Sir Harry, being seized of a copyhold estate of inheritance of 90*l.* per annum, held of the manor of Petworth, of which the Duke of Somerset is lord, made a lease of part of it for seven years, without license, at 13*l.* per annum. The Duke, upon this, brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his infant son's name, for relief. The Duke, in his answer, insisting on other causes of forfeiture besides the making the lease without license, Sir Harry brought a supplemental bill of discovery and relief against those other forfeitures. Upon the plaintiff's giving judgment *in ejectment, subject to the order of the Court, an injunction [*1083] was granted; and now, upon the hearing, the case came out to be this:—

Upon Sir Harry's marriage, in 1693, all the copyhold lands were surrendered to the use of Sir Harry for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose: but no admittance was ever taken upon that surrender. Before Sir Harry came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir Harry's time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father. The plaintiff had topped those trees that were on the copyhold part of the avenue, by which, from timber, they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed: but whether they were boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without license, or any custom of the manor to warrant it.

Upon this it came in question, whether any and which of these several acts are forfeitures at law: and if so, whether any and which of them are relievable in equity; and if not, whether the son's case is to be distinguished from the father's.

First, whether these are forfeitures at law, which were of four sorts: the digging the quarry, the topping the timber trees, the destroying the boundaries, and making the lease without license.

As to the quarry, the plaintiff's counsel insisted it was opened, even upon the copyhold, in his father's time, and so purged by the admittance; and his digging it since was but like the case of a lessee, who may dig quarries and *mines that were [*1084] open at the time of his lease, though he cannot open any new ones.

As to the topping of timber trees, which the plaintiff insisted was done only for the uniformity of his walk, and without design

to injure the lord, it was answered, that it was voluntary waste, and the motives for doing it are not material to the lord.

As to the destroying of the fences, a case was cited out of Litt. Rep. 264, &c., where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without distinguishing between the outward boundaries and those within the copyhold, as it tends to the destroying of the evidence relating to the lord's interest in the estate; and it was said, it is on this foundation laid down, 1 Inst. 53, that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making of the lease without license, it was acknowledged on all sides to be a forfeiture at law.

Secondly, the next question was, whether, supposing all these to be forfeitures, relief was proper in this Court, either upon the general case of this sort of forfeitures, or any particular equitable circumstances that may be in the present case.

For the particular equitable circumstances of this case, one was, that the steward's deputy engrossed and was a witness to the lease. This was compared to the lord's being privy to or witness to such lease, which would be held in equity as permission, or kind of license; and it has been held, that license granted by a deputy steward was good. But answered, that this rather aggravated the injury, by making the lord's servant a party in the confederacy to injure him.

Another circumstance was the plaintiff's not having notice of this custom. But this is not material, for the tenant comes in under the customs of the manor, and is bound to take notice of them; and besides, this is common law.

But if those circumstances were not sufficient to *ground [*1085] a relief upon, whether the general nature of those forfeitures will not admit of relief.

In favor of the plaintiff it was argued, that it is a sort of maxim, that all forfeitures are odious. That copyholds are now become a more fixed and established estate than they were formerly, and the law itself has been altering these hundred years very much in their favor: and therefore, a Court of equity ought to go as much in their favor, to keep them out of that vassalage and subjection which the original nature of their estates laid them under, and which their present fixed condition seems inconsistent with. That the forfeitures are intended only to secure the lord's rents and services, and, therefore, it was very proper for a Court of equity to interpose and prevent his having more than that security. And this is agreeable to the common cases of relief against the penalty of a bond, and upon mortgages and conditions of re-entry on non-payment of a rent, and nomine pœnæ: in which cases this Court will not allow the parties to take any other advantage of the forfeitures than what is necessary to satisfy the original intent of the agreement. The law has annexed these conditions in the case of copyholds instead of the parties; but as

it had something else in view by them than the gaining of the land to the lord, this Court may make amends to the lord, and fulfill the design of the law, and save the estate to the party. In the case of making a lease without license, the intent of the law in making that a forfeiture is to prevent the lord's being disinherited of his interest in the copyhold, and to secure the fine due on a license; both which may be easily secured by obliging the tenant either to accept a license, or make surrender and admittance, and pay the fine; which will be a complete recompense for any injury the lord may have suffered: and then it comes within the common rule, that this Court will relieve against forfeitures, wherever a complete satisfaction can be made for the injury which is the cause of the forfeiture.

Several cases were cited: *Shelley v. Mason*, in Lord Coventry's time, 5 Car. 1, where a copyholder came into *this Court [*1086] to be relieved against a forfeiture by making a lease without license: the lord was decreed to account for the profits he had received since his entry, and pay the costs; 1 Ch. Rep. 51, where a copyholder was relieved by Lord Coventry for non-payment of fine on admittance; *Cox v. Higford*,¹ by Lord Harcourt. The bill was to be relieved against a forfeiture by suffering a copyhold tenement to fall to ruin, and refusing to repair it for thirty years together, though frequently ordered to do it by the lord; the Chancellor refused to grant relief on two accounts—his obstinacy, and the lord's having been in possession nine years after his entry, in which case great stress was laid on the obstinacy of the copyholder; case of *Rowland v. Dean of Exon*, where relief was granted against a forfeiture by cutting timber. In *Nash v. Lord Derby*,² the decree of which was now read in Court, the plaintiff having a copyhold tenement that wanted repair, applied to the defendant, the lord of the manor, to have some timber assigned for that purpose, but the lord refused to assign any; upon which the plaintiff, hearing that there was a custom in the manor for two tenants to assign timber for the purpose of repair, did get two tenants to make such assignment, and then cut the trees down; upon which ejectment was brought, and a verdict for the lord, there being no such custom: the plaintiff brought his bill for relief, which was granted on his paying the value of the timber and costs at law and in equity: *Cudmore v. Raven*,³ where a Quaker, being tenant of a copyhold, refused to take an oath of fealty, and the lord entered for the forfeiture, and the tenant was relieved. *Cox v. Brown*, 1 Ch. Rep. 170, a lease being made on condition not to assign it without license, the tenant did assign; but relief was granted on search of precedents; it being the case of an assignee of an executor makes no favorable circumstance, because there were assets without it. *Thomas v. Porter*,⁴ tenant

¹ 2 Vern. 664.

² 2 Vern. 537.

³ Cited 2 Vern. 664.

⁴ 1 Ch. Ca. 96; 1 Eq. Ca. Abr. 121, pl. 8.

of a copyhold *durante viduitate*, cut down timber upon one copyhold in order to repair another, which was a forfeiture, but yet relief was granted in this Court.

[*1087] *If it is a difficult matter to ascertain damages in any of these cases of forfeiture, it is because there really is no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

For the defendant, these distinctions, as to relief against forfeitures, were insisted on:—Whether the forfeiture was for nonfeasance or malfeasance—whether the condition was annexed by law or the party—whether there were any particular circumstances of equity or not.

As to the difference between nonfeasance and malfeasance, as where tenant refuses to pay a fine upon admittance, this Court will relieve on doing that which he ought to have done. The difference is only as to the circumstance of time, which this Court easily supplies. So, where there is only permissive waste, the Court has relieved; but if, by obstinate refusal, this forfeiture is aggravated, the Court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox v. Higford*.

All these instances of forfeiture in the present case are of voluntary acts. One is making a lease without license, which is a disseizin of the lord (4 Co. 21 b), and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract if you give them everything they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on non-payment of rent, &c. But even in conditions of the parties, where the ascertaining of the damage is not plain and clear, the Court will not relieve against such conditions or penalties. It was never known that this Court relieved against a *nomine pœnæ* for ploughing up ancient meadow. It was denied in the duchy of Lancaster: *Eyre v. Hatton*.

But in case of forfeitures on conditions in law, this Court seldom relieves. If tenant for life makes a feoffment, *or [*1088] levies a fine *sur conusance de droit come ceo*, &c., it was never pretended this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitations of the estate of the party: and though the intent of the party is never so plain, equity will not alter the legal construction of the words; as where by will one gives an estate to A. for life, remainder to the heirs male of A., equity will not give the son of A. a remainder, and confine A.'s to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the Court has granted relief, it is upon some such cir-

cumstances as where the party who is to take advantage of the condition is himself the means of its being broke. It was said by Somers, in the case of *Bertie v. Falkland*,¹ that conditions precedent are not relievable, unless some indirect means are used by the party to prevent the performance. So, in the case of *Hammond v. Ainge*, before the present Chancellor,² where a lord of a manor tells one that had a freehold held of his manor, that it was copyhold, and he must be admitted by copy of court roll, and pay a fine, the lord was, in this Court, obliged to erase the admittance, and repay the fine.

The third question relates to the infant plaintiff—whether he is in any better condition than the father.

It was admitted on all hands, that, if an admittance had been taken pursuant to the surrender upon the marriage, the son, being remainderman, could not be prejudiced as to his estate by the forfeiture of the tenant for life: only in that case the bill was too early for the son, whose interest was not concerned till the death of the father.

But though the son had no legal right, yet there being a surrender to his use, and this pursuant to a marriage agreement, it shall be considered in a Court of equity as *if it had been executed; and the infant would be very proper to [*1089] bring a bill in this Court against the father and the lord, in order to admit his father, pursuant to the surrender, that he might in law be entitled to the remainder.

On the other side it was said that Sir Harry, not being admitted upon that surrender, continued tenant under his former admittance: and the lord was no party to or concerned in the marriage settlement: his title was paramount to that, and consequently the forfeiture affected the inheritance, and should not be subject to or limited by the private trusts or transactions of the parties.

LORD CHANCELLOR MACCLESFIELD.—This is a point of so great consequence, that if relief could be given in this Court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecility of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been, indeed, very favorable constructions for the copyholder in that particular, because he is called tenant at will, *secundum consuetudinem manerii*; it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words, *secundum consuetudinem manerii*, was not to bound the lord's pleasure in the determination of his will, but that the tenant, as long as he continued tenant, was to hold his land under those terms and conditions which the custom had established.

¹ 3 Ch. Ca. 134.

² Lord Macclesfield.

These matters, which are mentioned as forfeitures, are indeed limitations of the estate; such as determine it when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right he had before, and yet he does no damage to the remainderman. So, tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate; [*1090] *the law has made it so; and what is there in this case to ground relief upon, and require me to set aside the law?

It is a hard law, and therefore the party must not be subject to it; but is not this directly repealing the law?

In an action of waste for recovery of the place wasted, it is certain and admitted this Court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I see any difference, whether the statute makes this condition or the common law makes it.

It is not sufficient to say, here is no damage in this case, and therefore it is there can be no recompense given by this Court; for it is the recompense that gives this Court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expects or desired; but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose; as for non-payment of rent or fines, which are only by way of security of the rent or fine; and, therefore, when these are paid afterward, with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases.

Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures. But what equitable circumstances are there peculiar to this case?

[*1091] It is certain there may be circumstances *which may make it fit and equitable for this Court to relieve, either in these cases or in actions on the Statute of Waste. If the lord should give the tenant encouragement, by *parol* only, to pull down a messuage, and he did it accordingly, this might induce the Court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making of the lease, and advised it, relief might be reasonable; but the steward's standing by, or even engrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping of the trees, and the destroying of the boundaries, there does not enough appear to determine whether they are legal forfeitures or not;¹ but if they are, I think they are all, as the making of the lease, under the same consideration in this Court, and not proper for relief.

As to the infant, his case does not seem as yet ripe for this Court; but it may be a question how far his equitable interest will entitle him to be secured against these forfeitures.

I am apprehensive the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

Suppose one lets a trustee be admitted for him, who commits a forfeiture; no doubt the estate would be forfeited, and the cestui que trust would have no equity against the lord.

Suppose the trustee should die without heir, the lord would be entitled by escheat, without being subject to the trust.²

The person who is the legal tenant is subject, with regard to that estate, to all the imbecilities of that estate; if not, by the means of a trust, a copyhold would be entirely discharged from all those imperfections it labors under, and the lord's interest be taken away; for the lord can take advantage of nobody's acts but those of his *tenant. He is not at all concerned with the private agreements or trusts of the parties. [*1092]

In the present case, suppose Sir Harry admitted according to the surrender, the infant is then tenant in remainder, and the father's act cannot prejudice the son, who is now admitted as a distinct tenant. But till admittance the son is no tenant; and suppose, when he comes of age, he should release to his father, there would be no occasion for any admittance at all, but Sir Harry would continue tenant upon his old admittance. The lord is not bound to take notice of anything but what appears on the Court rolls.

I am, therefore, apprehensive it will be a hard case to relieve the son. But I agree that, if the lord's fine for admittance be paid, though there was no actual admittance, since the lord received all the advantage that could be had from the admittance, it might be a good reason for relieving the son; and then it might be proper, perhaps even now, for the son to bring a bill against his father and the lord, in order to have his father admitted pursuant to the surrender. But it does not appear whether the fine was paid.

I should, therefore, for these reasons, dismiss the bill absolutely. But, since the points of law are disputed as to all the forfeitures, excepting the making of the lease, which concern other parts of the copyhold, and since judgment in ejectment is given, which would take in other lands as well as those comprised in the lease, I think the bill should be retained till the points of law are tried

¹ See *Dearden v. Evans*, 5 Mee. & W. 11; *Hoyle v. Coupe*, Id. 450.

² But see now, 4 & 5 Will. 4, c. 23, ss. 2, 3.

at law upon the ejectment, which the plaintiff shall immediately receive declarations in, and plead to trial.

As to costs, they shall wait the event of the trial; and, as to them, I think the equity of them will depend upon the issue of that; if the plaintiff recovers there, he should pay costs here, because he had no occasion to come into this Court, excepting as to the discovery. If the Duke gets the better, I think, as this is a point of equity that has not been fully settled before, and in such case it is natural for a man to struggle the most to retain his [*1093] estate, *it would be too hard to make him lose his estate and pay costs likewise.

As to the infant, I will not dismiss the bill absolutely, but without prejudice, because, being an infant, he may not have made the best of his case.

[*1094]

*SLOMAN v. WALTER.

1 BRO. C. C. 418.

PENALTY WHEN RELIEVED AGAINST.]—*Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery of it, and an issue quantum damnificatus, to try the real damage.*

UPON showing cause why an injunction should not be dissolved, the case appeared to be thus: That the plaintiff and defendant were partners in the Chapter Coffee-house, and, upon entering into the partnership, it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And, in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of 500*l*. After some time, the defendant demanded the use of the room, and being refused brought an action for the penalty of the bond. Plaintiff filed this bill, praying an issue to try quantum damnificatus, and an injunction in the meanwhile. He obtained an injunction till answer or further order; and the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was, whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. Scott and Mr. Harvey, for the defendant, contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon

an issue of quantum damnificatus, *could assess any other damages than those already assessed by the parties themselves. [1095] They referred to the case in the House of Lords, where 5*l.* per acre penalty for plowing up meadow land was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed: *Rolfe v. Peterson*, 2 Brown's Parl. Cases, 470, Toml. edit., and also cited, *Roy v. The Duke of Beaufort*, 2 Atk. 190, and *Tall v. Ryland*, 1 Ch. Ca. 183.

LORD CHANCELLOR THURLOW said, the only question was, whether this was to be considered as a penalty or as assessed damages. The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.

Lord Macclesfield, in the principal case of *Peachy v. Duke of Somerset*, puts the jurisdiction of equity to give relief, in cases where forfeitures or penalties may be insisted upon at law, on the only foundation upon which it can properly be maintained, viz., that the true ground of relief is from the original intent of the case, and the Court can give a party, by way of recompense, all that he expected or desired. He, however, seems to confine the cases in which equity interferes, to those in which the penalty is only designed to secure a sum of money. The principal case, however, of *Sloman v. Walter* shows that the jurisdiction of equity is not of so limited a nature, but is extended to cases where the penalty is inserted, not merely to secure the payment of money, but the performance of some collateral act. The origin of the doctrine, indeed, as Lord Eldon has remarked, is probably to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time; the Court holding that, by the payment of interest, the party was put in just the same state as if the principal had been paid at the time stipulated; though he adds, *in condemnation of the doctrine, [1096] "The failure of the payment at the time may be attended with mischievous consequences, that never can be cured in a rational sense by subsequent payment, with the addition of interest:" *Reynolds v. Pitt*, 19 Ves. 140.

The most familiar, and perhaps earliest case, in which equity gave relief against penalties, was in the case of a penalty to a common bond, the meaning of inserting which is evidently to secure the payment of the

principal and interest; but the interference of equity in relieving from the penalty in such case was rendered unnecessary by 4 & 5 Anne, c. 16, ss. 12 & 13, by which the contract was in effect rendered incapable of being enforced, even at law, to the extent of the penalty; but the debtor was discharged on paying principal, interest, and costs.

Upon the same principle, when an estate at law becomes the absolute property of the mortgagee, in consequence of the non-payment of the mortgage money at the appointed time, Courts of equity at an early period, looking at the original intention of the parties, and considering that payment of principal, interest, and costs, was an adequate compensation to the mortgagee, decreed that the mortgagor might redeem on making such payment. See ante, p. *1046.

Where, as in the principal case of *Sloman v. Walter*, the intent of the insertion of a penalty in an instrument is merely to secure the performance of some collateral act or undertaking, the bill will be retained, and an issue quantum damnificatus directed, and relief will be granted upon payment of the damages as assessed by a jury. Thus, in *Hardy v. Martin*, 1 Bro. C. C. 419, n., the plaintiff and defendant had been partners as brandy merchants; and on the plaintiff's quitting the business, and selling the lease and good-will of the shop to the defendant for 300*l.*, he entered into a bond in 600*l.* penalty not to sell for nineteen years any quantity of brandy less than six gallons, within the cities of London and Westminster, or five miles thereof, or to permit any person so to do in his name. Upon an action being brought, and a verdict obtained for the penalty, the plaintiff filed his bill, praying that an account might be taken of the actual damage sustained by the defendant, and an issue directed for that purpose; and that, on payment of the damages, the defendant might be restrained from taking out execution for the penalty of the bond. Lords Commissioners Loughborough, Ashurst, and Hotham, upon a motion to dissolve the injunction, and cause shown, continued the injunction, and directed an issue, when the jury gave a verdict for the plaintiffs at law (defendants in equity), with 1*s.* damages: *S. C.*, 1 Cox, 26; *Benson v. Gibson*, 3 Atk. 395; *Errington v. Aynesley*, 2 Bro. C. C.

[*1097] 341. *Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time

it is due, as a penalty and a forfeiture against which equity will relieve. Per Lord Hatherley, C., in *Thompson v. Hudson*, 4 L. R. Ho. Lo. 15.

The reservation, however, of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty; therefore, where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance: *Thompson v. Hudson*, 4 L. R. Ho. Lo. 1, reversing *S. C.*, 2 L. R. Eq. 612; 2 L. R. Ch. App. 255; and see *Ex parte Bennet*, 2 Atk. 527; *Davis v. Thomas*, 1 Russ. & My. 506; *Ford v. Chesterfield*, 19 Beav. 428.

A contract in a certain event, not that the amount of the debt should be increased, but that the time of its payment should be accelerated, will not fall within the principle of the cases before discussed. Thus, in *Sterne v. Beck*, 11 W. R. (L. J.), 791, where a mortgage provided for the payment of sums by installments, and contained a stipulation for payment of the whole sum due, in default of payment of any such installments, it was held by the Lords Justices, reversing the judgment of Sir John Stuart, V. C. (*Ib.* 587), that such proviso was binding, and was not in the nature of a penalty: and see *Sanhope v. Manners*, 2 Eden, 197. But such stipulation may be waived: *Langridge v. Payne*, 2 J. & H. 423.

Although at common law the plaintiff on proof of a breach of an *agreement could recover the full amount of the penalty for its non-performance (*Betts v. Burch*, 4 H. & N., 510), by the statute [*1098] 8 & 9 Wm. 3, c. 11, s. 8, which relates to actions upon any bond, or on any penal sum for non-performance of any covenant or agreement contained in any indenture, deed, or writing, no more than the actual damages are recoverable at law: see *Beckham v. Drake*, 2 H. L. Ca. 579, 598, 628; *Betts v. Burch*, 4 H. & N. 506, and the authorities there cited, with regard to which Bramwell, B., observes, *Ib.* p. 511, "That it is remarkable that from the first to the last the statute (8 & 9 Will. 3, c. 11) is not mentioned. It seems as if, by some singular instinct, the Courts have been right, though without referring to the statute by which they ought to have been governed. I believe that the reason is, that the judges have considered when equity would have relieved:" see 1 Wms. Saund. 58, note 1.

From a very early period, equity would, at any indefinite time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him, upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle, that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the

same situation as if the rent had been paid to him when it was originally due. This principle was recognized by the legislature, which, however, remedied a palpable injustice, by limiting the time within which the lessee might obtain relief by filing a bill in equity to six calendar months after execution executed. This was effected by the statute 4 Geo. 2, c. 28, sections 2, 3, & 4, repealed by 30 & 31 Vict. c. 59, after having been previously, with a few unimportant variations, re-enacted and in effect superseded by 15 & 16 Vict. c. 76, which enacts, that "in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such *writ in ejectment shall stand in the place [*1099] and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and *without proceeding for relief in equity within six months after such execution executed*, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be non-suited therein, then in every such case such defendant shall have and recover his costs: provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall *not be in possession*, so as such mortgagee shall and do, within *six months* after such judgment

obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part or behalf of the first lessee, are and ought to be performed." Sect. 210.

In case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within *forty days* next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money as the *lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also [*1100] the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bond fide*, without fraud, deceit, or willful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands. Sect. 211.

A lessee applying to redeem a lease, which has become forfeited at law by non-payment of rent, is not required before the hearing to pay into court the arrears of rent or costs at law, if no injunction is granted until the hearing, and the lessor is in possession: *Bowser v. Colby*, 1 Hare, 109.

Where, however, the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given, tending to show that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the plaintiff that he should personally pay into Court the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession: *Bowser v. Colby*, 1 Hare, 109.

If the lessee is proceeding at law, not merely on account of the non-payment of rent, but also for the breach of other covenants, against the breach of which equity does not relieve, he will only be restrained from proceeding for a breach of covenant for non-payment of rent, but he will be allowed to proceed on any other covenant against the breach of which the

Court does not relieve: *Wadman v. Calcraft*, 10 Ves. 67; *Davis v. West*, 12 Ves. 475; *Swanton v. Biggs*, Beat. 170.

If the lessor can prove any breaches of covenant by the lessee other than that for the payment of rent, if breaches of such other covenants were proved, for which the lessee might have been ejected, the Court will not relieve against the breach of covenant for payment of rent: *Bowser v. Colby*, 1 *Hare, 109; *Horne v. Thompson*, 1 Sausse & Scul. [†1101] 615.

A Court of equity will relieve a lessee from a forfeiture by non-payment of rent, where there is a proviso that in that case the lease *shall be void*, as well as where there is a *mere power of re-entry*. The legal effect in one case is, that if the landlord re-enters, the lease is determined; in the other case it is determined without his re-entry. The contract of the parties is, that in one case the lease shall not be at an end by the mere non-payment of rent, unless the landlord shall re enter, and then it shall be at an end; and in the other case, that the non-payment of rent alone shall determine the lease. In both cases, the same consequence is to follow, though from different acts. In both the contract is the same, in this sense, that there are certain acts to take place, which are to determine the lease altogether: *Bowser v. Colby*, 1 Hare, 128, 129.

Under the old law, when a lease was forfeited for non-payment of rent, the Court used to consider that the only way relief could be given was by creating a new lease (*Taylor v. Knight*, 4 Vin. Abr., Chanc. Y. pl. 31, p. 406; *Bowser v. Colby*, 1 Hare, 130); and where the mesne lessor forfeited his lease for non-payment of rent, and afterward took a new lease from the lessor, he might compel his under lessee to take a new lease for so much of the term as was unexpired, with the same covenants as in the old lease.

This form of relief, however, is rendered unnecessary by the 212th section of 15 & 16 Vict. c. 76 (in effect re-enacting the 4th section of 4 Geo. 4, c. 2, s. 28), which enacts that, "If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease."

Recently, the jurisdiction of Courts of common law with regard to granting relief in the case of forfeiture for non-payment of rent has been enlarged and assimilated to that exercised by Courts of equity. This has been effected by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), whereby it is enacted "that in case of any ejectment for a forfeiture

brought for non-payment of rent, the Court or a judge shall have power, upon rule or *summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, *up to and within the* [*1102] *like time after execution executed*, and subject to the same terms and conditions in all respects, as to payment of rents, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease," (sect. 1).

But equity will not relieve against forfeiture arising from the breach of covenants where compensation cannot be made; for instance, where a forfeiture has been incurred by a breach of a covenant to repair: *Gregory v. Wilson*, 9 Hare, 683, 689.

But acquiescence in the breach may occasion to the lessor the loss of his legal rights: *Whitehead v. Bennet*, 9 W. R. (V. C. K.) 626; 6 Jur. N. S. 419.

In *Bargent v. Thompson*, 4 Giff. 473, where a lessor brought ejectment for breach of covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with and fourteen completed, that the works had been partially delayed by the weather, and that no further remonstrance had been made by the lessors, Sir J. Stuart, V. C., restrained the action, and directed an inquiry whether the covenants had been performed.

A breach, however, of a covenant to repair is not excused because the covenantor has *bond fide* employed persons to repair, for if the covenantor's agents have in fact not repaired, the breach is not such as equity will relieve against: *Nokes v. Gibbon*, 3 Drew. 681.

A breach of covenant to make a roadway in front of a particular house is not to be relieved against in equity, because, if made before the roadway in front of adjacent houses is made, it would be continually cut up and useless: *Nokes v. Gibbon*, 3 Drew. 681.

With regard, however, to covenants to repair, a distinction has been taken between covenants to repair *generally* and covenants to lay out a *specific sum* in a given time; it seems, however, whatever might have been formerly the practice, that Courts of equity will, in neither case, in the absence of special circumstances, give relief. Lord Macclesfield indeed, in *Hack v. Leonard*, 9 Mod. 90, relieved a tenant against a verdict obtained against him in ejectment, for breach of a general covenant to repair, observing, he could not apprehend what damage the landlord could sustain, if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term: therefore it *was referred to the Master to see what damage was done (if any) by non-performance of the [*1103] covenants, and at what time. And see *Webber v. Smith*, 2 Vern. 103; S. C., 1 Eq. Ca. Ab. 115, pl. 14; and Lord Erskine, in *Sanders v. Pope*, 12

Ves. 282, 290 (where, however, the question was as to a covenant to lay out a specific sum), seems to have thought that equity would relieve even in the case of a general covenant to repair merely, though he said that it might be a case of very complicated consideration and much detail, as to what would put the party in the same situation, though even in such cases Courts of equity have gone a great way. The authority, however, of *Webber v. Smith* and *Hack v. Leonard* has been denied most strongly, both by Lord Eldon and Baron Richards. See *Hill v. Barclay*, 16 Ves. 406; 18 Ves. 61; *Bracebridge v. Buckley*, 2 Price, 215. The opinion expressed by Lord Macclesfield, in *Hack v. Leonard*, and adopted by Lord Erskine, in *Sanders v. Pope*, 12 Ves. 294, that if the repairs were not done until the close of the term the landlord would have his premises in better order than if they had been done sooner, has been disapproved of by Lord Eldon in the strongest terms. "The Court," said his Lordship, "is surely not authorized so to deal with contracts. . . . It is taking a prodigious liberty with a contract by which the tenant has undertaken forthwith to repair, and to keep the premises in repair constantly, in order that the landlord may, during the whole currency of the term, have the property, if returned upon his hands, in exactly the state he intended. If this doctrine can be maintained in general cases, what is to be said of the case where, the Court administering this species of equity, the tenant has become bankrupt before the end of the term, the assignees refuse to take to the lease, and the premises are thrown back to the lessor in a state of utter non-repair? Would that be anything like an execution of the contract?" *Hill v. Barclay*, 18 Ves. 62.

With regard to a covenant to lay out a specific sum within a given time, in an early case relief was refused on breach of the covenant (*Barker v. Holden*, 1 Vern. 316; *S. C.*, 1 Eq. Ca. Ab. 28, pl. 5); but in *Sanders v. Pope*, 12 Ves. 282, Lord Erskine, distinguishing between a general covenant to repair, and a covenant to lay out a specific sum within a given time, granted the relief, as he considered that complete compensation might be made. In *Hill v. Barclay*, 16 Ves. 402, 403; 18 Ves. 56, Lord Eldon, although he did not expressly overrule *Sanders v. Pope*, for he distinguished it from that case upon grounds since held immaterial, refused relief. However, in a case in the Exchequer (*Bracebridge v. Buckley*, 2 Price, *200), which must be considered as [*1104] distinctly overruling *Sanders v. Pope*, it was held, after an elaborate consideration of the authorities, by Richards, B., Graham, B., and Thompson, C. B., dissentiente Wood, B., that a lessee, who, in breach of a covenant, had omitted to lay out a specific sum of money in a given time, was not entitled to relief in equity. "There is, certainly," said Richards, B., "no direct authority against the case of *Sanders v. Pope*, but both the present Chancellor (Lord Eldon) and the Master of the Rolls (Sir W. Grant) have intimated, by dicta, that they think otherwise; and I think the case of *Hack v. Leonard* does not sustain Lord

Erskine's decision. I am of opinion, therefore, that the lessor, in this case, is entitled to repossess his estate, by consequence of the non-performance of the covenant.

"But the bill suggests that the lessee will expend as much money as will put the premises in as good repair as if the money had been laid out according to the contract. In that case, it must be referred to the Master, to say what money would be required; and the sum directed by him to be laid out, though sufficient at that time, might, by a change of circumstances, become insufficient when the repairs are in progress.

"This bill was filed in 1809; now, if the lessee had died insolvent in the meantime, and pending the suit, what compensation could have been made to the lessor? In covenants to insure, the Court will not relieve, as has been decided; and what distinction is there in such cases and the present? If the lessee had died, and repairs had become necessary again, must an action of ejectment, and another bill in equity, be again resorted to? But, above all, how can the thing sought be done? The lessor cannot enter to superintend the repairs; and must the Master be directed to do so? If this had not been a long term, it might by this time have been exhausted. The Chancellor has said, the Court will not superintend repairs. The Master cannot: it is impossible. Lord Thurlow thought a building could not be erected under the superintendence of the Court: *Lucas v. Comerford* (3 Bro. C. C. 166; 1 Ves. jun. 235). Lord Hardwicke thought a building might (*City of London v. Nash*, 3 Atk. 512): but both thought that repairs could not be carried on under the direction of the Court. The Court, therefore, cannot give a compensation, because they have no means of ascertaining precisely what the compensation should be, or the mode of making it when ascertained. If affidavits were adduced, they could not enable the Court to arrive at any conclusion. . . . Lord Erskine's decision did not give satisfaction in Westminster Hall."

*Lord Eldon, indeed, distinguished *Hill v. Barclay* from *Sanders v. Pope*, on the ground that, in the latter case, there had [*1105] been no demand, or notice, given to repair; but it was held, in *Bracebridge v. Buckley*, that in the absence of any stipulation in the lease rendering a demand or notice necessary, it is immaterial; for, as observed by Thompson, C. B., "If a man covenant to do an act within a certain time, no demand is necessary; and a neglect of performance is tantamount to a refusal in law:" 2 Price, 213. In *Hill v. Barclay*, as observed by Graham, B., and Thompson, C. B., the landlord was partly obliged to give notice by the terms of the covenant, which, in that respect, was particularly worded: 2 Price, 228-230.

It has not been decided whether, under a general covenant to repair, notice from the landlord to repair is necessary: it is, however, presumed, that, as it is not necessary on a covenant to insure (*Rolfe v. Harris*, 2 Price, 206-209; *Green v. Bridges*, 4 Sim. 96), it is immaterial. See

Hill v. Barclay, 18 Ves. 62; *Job v. Banister*, 2 K. & J. 374; 3 Jur. N. S. 93; 26 L. J. (Ch.) 125.

As to the burthen of proof in an ejectment for forfeiture by a breach of covenant, see *Toleman v. Portbury*, 5 L. R. Q. B. 288.

Nor will Courts relieve against a breach of a covenant to erect houses within a specified period: *Croft v. Goldsmid*, 24 Beav. 312.

If, however, by unavoidable accident, by fraud, by surprise, or ignorance not willful, parties may have been prevented from executing a covenant literally, a Court of equity will interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, will give relief (per Lord Alvanley, M. R., in *Eaton v. Lyon*, 3 Ves. 693); because, although at law a covenant must be strictly and literally performed, in equity it will suffice if it be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit. And see *Hill v. Barclay*, 18 Ves. 62, where Lord Eldon expressly guards his observations, which are strongly against relief being granted in ordinary cases, from being taken to apply to cases of accident and surprise; the effect of the weather, for instance, in that case, or permissive want of repair, the landlord standing by and looking on. See *Hannam v. South London Waterworks Company*, 2 Mer. 61; *Bamford v. Creasy*, 3 Giff. 675; *Meek v. Carter*, 6 W. R. (V. C. S.) 852; *Burke v. Prior*, 15 Ir. Ch. Rep. 106.

And even at law, long acquiescence in a breach of covenant, as, for instance, not to apply a house to purposes of trade, will raise a presumption of a license so to use it that the lessor cannot insist *upon his [*1106] right to a forfeiture: *Gibson v. Doag*, 6 W. R. Ex. 107.

Upon this principle, the decision in *Wing v. Harvey*, 5 De G. Mac. & G. 265, proceeds. There a life policy was subject to a condition, making it void if the assured went beyond the limits of Europe without license. An assignee of a policy, on paying the premium to a local agent of the Assurance Society, at the place where the assurance had been effected, informed him that the insured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums till the assured died. It was held, by the Lords Justices, that the society was precluded from insisting on the forfeiture. See also *Duke of Beaufort v. Neeld*, 12 C. & F. 248.

But although relief may be obtained in equity against a forfeiture where a person incurring it has been misled by the person legally entitled to insist upon it, a subsequent distinct forfeiture, where no such excuse can be alleged, may be taken advantage of, as the Court will have no ground for its interference. Thus, although relief may be had in equity against a forfeiture of a lease during a period when the landlord dealt with the tenant so as to lead him to suppose the forfeiture would not be insisted on, if a subsequent forfeiture is incurred after such dealings have ceased, the

prior transaction will raise no equity for relief: *Flattery v. Anderdon*, 12 Ir. Eq. Rep. 218.

In the case of a lunatic's estate, relief will be given to a tenant who has incurred a forfeiture, if it were beneficial to the lunatic not to insist upon it. Thus, in *Ex parte Vaughan*, T. & R. 434, the tenant of a lunatic's estate upon petition was relieved against the ejectment brought by the committee, founded on a forfeiture, by breach of covenant to repair. *Pitt v. Reynolds* was cited against the petition. But Lord Eldon said, that there were forfeitures arising from breaches of covenant against which Courts of equity could not relieve, but which a judicious landlord would not take advantage of. The case which had been cited would not apply if the question was, whether there were a case in which the landlord, acting for himself, would not have taken advantage of the forfeiture; and that care must be taken not to get rid of a good tenant by being too strict.

It is clear that a Court of equity could not until recently grant any relief against proceedings at law, where a tenant had committed a breach of covenant by omitting to insure, even if he had made considerable expenditure in improvements; and the omission to insure was considered stronger against the tenant than the omission to repair, because, in the latter case, the landlord might, by exercising due vigilance, see to the observance *of the covenant; but in the former, where the lessee had undertaken to keep insured, the landlord must rely upon [*1107] him for the fulfillment of his obligation: see *Reynolds v. Pitt*, 19 Ves. 134; *Bracebridge v. Buckley*, 2 Price, 218; *White v. Warner*, 2 Mer. 459; *Green v. Bridges*, 4 Sim. 96; *Gregory v. Wilson*, 9 Hare, 683.

A covenant, however, by the lessee to insure the demised premises in the names of himself and the lessor, although not literally performed by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, that he could not recover for a breach of the covenant; the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, he is at liberty to dispense with it: *Havens v. Middleton*, 10 Hare, 641.

The legislature has lately conferred upon the Courts of equity power to relieve against forfeiture for non-insurance in certain cases. See the Act to further amend the law of property and to relieve trustees (22 & 23 Vict. c. 35), whereby it is enacted that "a Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit" (sect. 4): see *Page v. Bennett*, 2 Giff. 117.

The Court, where relief shall be granted, is to direct a record of such relief having been granted to be made by indorsement on the lease or otherwise (sect. 5), but is to have no power under the Act to relieve the same person more than once in respect of the same covenant or condition; nor where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favor of the person seeking the relief (sect. 6).

The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant (sect. 7).

[*1108] *Where, on the *bond fide* purchase after the passing of the Act of a leasehold interest under a lease containing a covenant on the part of a lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase: but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant (sect. 8).

The preceding provisions are applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons (sect. 9).

The Court has jurisdiction to relieve against a breach of a covenant to insure, committed after the date of the Act (22 & 23 Vict. c. 35) arising on a lease dated before the passing of the Act: *Page v. Bennett*, 2 Giff. 117.

Similar jurisdiction has been conferred upon the Courts of Common Law by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which enacts that in case of any ejectment for a forfeiture for breach of covenant or condition to insure against loss or damage by fire, the Court or judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeals as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of 22 & 23 Vict. c. 35, and upon such terms as

would be imposed in such Court (sect. 2), and where such relief shall be granted, the Court or a judge thereof shall direct a minute thereof to be made by indorsement on the lease or otherwise (sect. 3).

Equity will not relieve a lessee who, contrary to his covenant, does not cultivate land in a husbandlike manner (*Hills v. Rowland*, 4 De G. Mac. & G. 430), or who carries on a trade without a license (*Macher v. The Foundling Hospital*, 1 V. & B. 187); nor a lessee who assigns without license: "for he cannot," observed Lord Eldon, "show that, by the assignment, the lessor sustains no damage; that, on the contrary, he the lessee, is a beggar, who could not pay the rent, and the assignee *a [*1109] solvent tenant; that the lessor is therefore in a better condition, having two persons answerable to him instead of one tenant, under the circumstances I have mentioned. The answer is, that the Court cannot estimate the damage. The fact, as it is alleged, may be true at this moment; but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease: it is sufficient that the lessor insists upon his covenant, and no one has a right to put him in a different situation:" *Hill v. Barclay*, 18 Ves. 36; and see *Wafer v. Mocato*, 9 Mod. 112; *Wadman v. Calcraft*, 10 Ves. 67; *Lovat v. Lord Ranelagh*, 3 V. & B. 24; *Bracebridge v. Buckley*, 2 Price, 200, 221. Upon the same principle, in *Descarlett v. Dennett*, 9 Mod. 22, Sir Joseph Jekyll, M. R., refused to relieve a lessee, who, contrary to a particular covenant which he had entered into, not to suffer persons to make use of a way over part of the lands demised, had put up a gate at the entrance of the close, and permitted any person to pass over the way, requiring them to pay; "for the Chancery," said his Honor, "cannot relieve the non-performance of a covenant or condition, the prejudice in breach of which cannot be estimated by damages. This tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close. The case of an entry for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages. This has been a settled rule in equity;" and see *Bracebridge v. Buckley*, 2 Price, 221, where this case is approved of.

If there be breaches of several covenants in a lease, and there be any one of them with respect to which there exists no equitable ground for relief, although there may be as to all the others the most unquestionable right of relief in equity, the Court will not interfere to prevent the lessor from recovering in an action of ejectment founded on those breaches: *Nokes v. Gibbon*, 3 Drew. 693.

The right to insist upon a forfeiture may be waived at law (*Croft v. Lumley*, 5 Ell. & Bl. 648), as well as in equity (*Bridges v. Longman*, 24 Beav. 27), by the acceptance of rent after the forfeiture was incurred (*Price v. Worwood*, 4 H. & N. 516), even although the landlord when the rent was tendered took it not as rent but as compensation for use and

occupation subsequent to the forfeiture. See *Croft v. Lumley*, 5 Ell. & Bl. 648: there, after all the forfeitures had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the lessor. He refused to take it except on the terms that it should be [*1110] taken not as rent, but as compensation for *use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition; the lessor then took the money, declaring he would not take it as rent, or as waiving the forfeitures. It was held by the Court of Queen's Bench, that in legal effect money must be taken according to the intent of the party paying it—in this case as rent—and that the receipt of rent, as a matter of law, operated as a waiver of all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect; and, moreover, that the lessor must be taken to waive all forfeitures by that breach of which he had notice, although it was more extensive than he was aware of.

Where there is in a lease a general covenant to repair, and a covenant to repair within a certain period after notice, a notice to repair within a certain period may be a waiver of the forfeiture incurred by a breach of the general covenant to repair (*Doe d. Morecraft v. Meux*, 4 B. & C. 606); secus, when the notice is to repair forthwith (*Roe d. Goatly v. Paine*, 2 Camp. 520), or in accordance with the covenants of the lease: *Few v. Perkins*, 2 L. R. Ex. 92.

Where, in public undertakings, there is a stipulation that shareholders, on non-payment of calls, shall forfeit their shares, equity, upon grounds of public policy, and from the necessity of the punctuality in payment in such cases, will refuse to interfere, and grant relief upon forfeiture. Thus, in *Sparks v. The Company of the Proprietors of the Liverpool Waterworks*, 13 Ves. 428, Sir William Grant, M. R., refused to relieve against a forfeiture under a by-law of an incorporated company for waterworks, which provided, that the members receiving notice of default in paying a call should incur forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from town when the notice was sent, and other accidental circumstances. "This bill," said his Honor, "is founded in forfeiture, and upon the ground that the plaintiff did not consider himself as a partner, and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest [*1111] might be a compensation, *but in the majority of cases it is no compensation, from the uncertainty in which they may be left.

The effect is the same, whether money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can in equity enter into a discussion of the circumstances, each may bring his suit. They must remain a considerable time, to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted, there cannot be any certainty that every member who has made default may not file a bill. Can the Court impose a limitation of the period when bills may be filed? If the Court ever began to deal with these cases, the number must be infinite. This is the mode which a party has to withdraw from a losing concern. Why is not this equity open to contractors for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit? And if they could have relief, how could government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a bill. Accident here is only the want of precaution. The plaintiff did not inform himself of the orders and rules of the company. It was easy for the plaintiff to direct the secretary to send the notices as he pleased. The Court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself." His Honor afterward mentioned a late instance in Ireland, of a person who, after having paid some installments on a loan, neglected to make a further payment, and forfeited the installments he had paid. He petitioned Parliament for relief, but without success. With reference to this case, Mr. Eden, in his work on Injunctions, p. 22, note (b), observes, that there is a case in the Hargrave MSS. in which Lord Harcourt relieved a member of a benefit society against a forfeiture incurred by neglecting to pay the weekly installments; but that the reasoning of Sir W. Grant is so conclusive and satisfactory, that it is probable, if the question should ever be agitated again, that his decision would be adhered to. See *Prendergast v. Turton*, 1 Y. & C. C. C. 98, 110, 111, 112; *Naylor v. South Devon Railway Company*, 1 De G. & Sm. 32; *Sudlow v. The Dutch Rhenish Railway Company*, 21 Beav. 43.

The result of a forfeiture of shares may relieve the shareholder from being a contributory (*Woollaston's case*, 4 De G. & Jo. 437; *Marshall v. Glamorgan Iron Company*, 7 L. R. Eq. 129; *In re Cobre Copper Mine Company*, 9 L. R. Eq. 107), but not if the *shares were forfeited [*1112] by the directors ultra vires (*Spackman v. Evans*, 3 L. R. Ho. Lo. 171; and see *Lord Belhaven's case*, 3 De G. J. & S. 41; *Stanhope's case*, 1 L. R. Ch. App. 161; *Dixon's case*, 5 L. R. Ch. App. 79), or were fraudulently forfeited, not for the benefit of the company, but for the purpose of relieving the shareholder from liabilities: *Richmond's case* and *Painter's case*, 4 K. & J. 305.

As to the liability of past members of companies in respect of shares extinguished by forfeiture, see *In re The Blakeley Ordnance Company*,

Creyke's case, 5 L. R. Ch. App. 63; *Bridger's case* and *Neill's case*, 4 L. R. Ch. App. 266.

Where there is no clause in the deed of a Joint Stock Company conferring on the directors a general power to forfeit shares, they have no implied power to do so: *In re The National Patent Steam Fuel Company*, 7 W. R. (V. C. K.) 369.

The power of co-adventurers to forfeit the shares of one of their number for non-payment of calls, is not necessarily incident to a mining adventure conducted on the cost-book principle (*Clarke v. Harte*, 6 Ho. Lo. Ca. 633).

Where such power exists by agreement between the parties it is to be treated as strictissimi juris, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed (*Ib.*). And where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement) that his shares are liable to forfeiture, on non-payment of calls, will not affect his rights under the agreement: *Ib.*

The principle applicable to cases of contract between the parties is not applicable to the provisions of an Act of Parliament or conditions in law. For although, as we have seen, in cases of contract between parties, equity will often relieve against penalties and forfeitures, where compensation can be granted, relief against the provisions of a statute can never be given: *Keating v. Sparrow*, 1 Ball & B. 367, 373, 374.

It seems, that in the absence of any fraud or acquiescence on the part of the lord, the Court, as was decided in the principal case, cannot relieve, in the case of the forfeiture of customary estates and copyholds, by acts of the tenant, contrary to the contract imposed upon him by the law: *Hill v. Barclay*, 18 Ves. 64. See, however, and consider the cases cited in the principal case of *Peachy v. Duke of Somerset*, in which relief was granted.

But although a Court of equity will not give relief to a copyholder against a forfeiture properly incurred, [*1113] it has concurrent jurisdiction with Courts of law to relieve a copyholder against an illegal seizure of the property by the lord; *Andrews v. Hulse*, 4 K. & J. 392.

But the Court will not open an interlocutory application at the suit of copyhold tenants in a bill to establish certain customs disputed by the lord of the manor, restraining the lord from prosecuting his legal rights against one of such tenants in respect of an alleged forfeiture: *Lord Sefton v. Lord Salisbury*, 7 W. R. (V. C. W.) 272.

And it seems that even in the case of copyholds, where the forfeitures are intended for a different purpose, as for non-payment of rents or fines, which are only by way of security for the rent or fines, when these are paid afterward, with interest, the money itself being paid according to the

intent, save as to the circumstance of time, equity, acting according to its ordinary principles, would relieve against forfeiture: *ante*, *1099.

As, on the other hand, a Court of equity will give a person relief against a penalty, where it is only intended to secure the performance of the contract, so, on the other hand, it will not permit him to resist specific performance of the contract, by electing to pay the penalty. Where, however, the real intent of the contract is, that a person may, if he chooses, do certain acts, upon payment of an additional sum of money, in such case, as the agreement for payment of an additional sum is not intended to secure the performance of any other contract, but is a contract which the parties are at liberty to make, a Court of equity will neither relieve him from payment of the additional sum agreed upon, on doing such acts, although it may bear the appearance of a penalty, nor, on the other hand, will it compel him to abstain from them. The principle upon which the Court acts is sufficiently clear, though its application, which, in fact, depends upon the construction of the contract, is often attended with some difficulty. It is well explained by Lord St. Leonards in an important case. "The general rule of equity," he observes, "is, that, if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agrees to settle an estate, and execute his bond for 600*l.*, as a security for the performance of his contract, he will not be allowed to pay the forfeit for his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So, if a man covenant to abstain from doing a certain act, and agree, that, if he do it, he will pay a sum of money, it would seem that he will be *compelled to abstain from doing that act; and, just as in the con- [1114] verse case, he cannot elect to break his agreement by paying for his violation of the contract. . . . The question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking up the land is not inconsistent with the contract, which provides, that in case the act is done, the landlord is to receive an increased rent;" *French v. Macale*, 2 D. & War. 274.

That a person may compel another to perform an agreement, whether to do or refrain from doing a particular act, where, although there be a penalty annexed, it is only intended to secure its performance: see *Howard v. Hopkyns*, 2 Atk. 371; *Chilliner v. Chilliner*, 2 Ves. 528; *City of London v. Pugh*, 4 Bro. P. C. 395, Toml. edit.; *Hardy v. Martin*, 1 Cox,

26; *Roper v. Bartholomew*, 12 Price, 796; *Logan v. Wienholt*, 1 C. & F. 611; *French v. Macale*, 2 D. & War. 269; *Carden v. Butler*, 1 Hayes & J. 112; *Bray v. Fogarty*, 4 I. R. Eq. 544; or he may, if he elects to do so, proceed at law for damages; he can obtain relief in either, but not in both of the Courts. See *Fox v. Scard*, 33 Beav. 327. There a surgeon at Weymouth, upon taking an assistant, required him to give his bond in a penalty not to practice there. Afterward he discharged the assistant, who thereupon commenced practice at Weymouth. The surgeon then filed a bill to restrain him, to which the defendant demurred. In support of the demurrer it was argued, that it was a case for an action at law on the bond and not a suit in equity, and that the parties had by their contract agreed that the remedy upon the breach of the bond should be by pecuniary damages only. Sir John Romilly, M. R., overruled the demurrer. "I cannot," said his Honor, "accede to the defendant's view of this case, for I take the principle to be this:—Where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right both at law and equity, and can obtain relief in either, but not in both Courts. If he proceeds at law on the bond and recovers damages, and afterward comes into equity and states that fact in his bill, a demurrer will lie, because he has chosen the jurisdiction and the *remedy he will have. Accordingly, the practice has been [*1115] to adopt the rule very strictly in equity. It sometimes happens that the legal right is in doubt, and, in such cases, the Court had formerly to direct an action to try the right. This is now prevented by Mr. Rolt's Act (25 & 26 Vict. c. 42), which compels the Court to determine the legal right. But the practice under the old system is a good illustration. When the Court gave liberty to the plaintiff to try his right in an action, if he succeeded and took only nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, 'you have already had your remedy at law.' But the plaintiff had a right to say, 'I will not have money or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond,' which, in this case, is in the nature of a covenant by the defendant that he will not practice at Weymouth. The bill contains a paragraph waiving the penalties of the bond, but, without that, if, after an injunction had been granted against the defendant, the plaintiff should bring an action for damages, the defendant might come here and have the injunction dissolved." See also *Clarkson v. Edge*, 33 Beav. 227; *Mercer v. Irving*, 1 Ell. Bl. & Ell. 563.

The right to insist upon a penalty may be waived. See *Thornhill v. Neats*, 8 C. B. (N. S.) 831.

As before observed, we must carefully distinguish between the cases where the penalty is merely for the purpose of securing the performance of the agreement, and those cases where a sum is agreed upon by the parties, to be paid as the price for doing or refraining from doing a certain

act. Thus, where, in leases, a person covenants not to do an act, as to plow pasture land, or to cease to reside on the premises, but if he does, to pay an additional rent, a Court of equity will look upon the additional rent not as a penalty, but as liquidated damages fixed upon by the parties, and will not give relief. *Rolfe v. Peterson*, 2 Bro. P. C. 436, Toml. edit., is the leading case on the subject. There the lessee covenanted not to plow up any of the ancient meadow or pasture ground; and if he did, to pay an additional rent of 5*l.* per acre. Lord Camden looked upon the additional rent as a penalty, and decreed that the tenant should be relieved, and directed an issue quantum damnificatus; but the House of Lords overruled the decree. Of this case it has been well remarked by Lord Rosslyn, in *Hardy v. Martin*, 1 Cox, 27, "that it was the demise of land to a lessee to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; *that is a different case from an agreement not to do a thing, with a [*1116] penalty for doing it." And see *Ponsonby v. Adams*, 2 Bro. P. C. 431, Toml. edit.

And upon the principle, that the real meaning in such a contract is, that a party may do a particular act upon payment of an additional sum, the Court of equity has properly refused to restrain, by injunction, the person from doing the act by which the additional sum becomes payable. Thus, in *Woodward v. Gyles*, 2 Vern. 119, the plaintiff let a farm to the defendant at an annual rent, and, part of it being pasture land, covenanted, among other things, not to break up or plow any part of it; and if he did plow any part of it, he would pay after the rate of 20*s.* an acre. But the Court held, that the parties had themselves set a price for plowing, and therefore would not grant any injunction, and declared that, if the defendant were plaintiff against paying the 20*s.* per acre for plowing, they would not relieve him. And see *Forbes v. Carney*, Wallis, Rep. by Lyne, 38; and *Jones v. Green*, 3 Y. & J. 298. See *Sainter v. Ferguson*, 1 Mac. & G. 286; 7 C. B. 716; *Cuss v. Thompson*, 5 W. R. 289; *Carnes v. Nesbitt*, 7 H. & N. 778.

And upon the principle that stipulated damages are not in the nature of a penalty, a person who by doing, or abstaining from doing an act, which under his contract subjected him to the payment of such damages, would not be able to protect himself against discovery. Thus, in *Jones v. Green*, 3 Y. & J. 289, by an indenture a farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments, in case the tenant should not crop, manure, and manage the farm in manner therein specified and covenanted: and also in case the tenant, in the last three years of the term, should sow more than 70 acres of clover in one year, the additional rent of 10*l.* an acre for every acre above seventy acres for the residue of the term. It was held, that the additional rents were in the nature of liquidated damages, and not of penalties; and therefore, on a bill filed by the landlord for a discovery of

breaches of the covenants, in aid of an action at law, a plea that the discovery might subject the tenant to penalties was overruled.

And the Court will not infer, from the fact of the additional sum reserved upon doing or not doing a particular thing being disproportioned to the damage which results therefrom, that it is in the nature of a penalty. See *Chilliner v. Chilliner*, 2 Ves. 528; *Roy v. Duke of Beaufort*, 2 Atk. 190; *Logan v. Wienholt*, 1 C. & F. 611; and see *French v. Macale*, 2 D. & War. 280, disapproving of *Burne v. Madden*, L. & G., t. Plunk. 493.

[*1117] And it seems that where there are *sums made payable in case certain acts are done, and the performance thereof is over and above that secured by bond with a penalty, this is a reason for holding the first sums to be liquidated damages: *Ranger v. Great Western Railway Company*, 5 Ho. Lo. 73; but see *Chilliner v. Chilliner*, 2 Ves. 528.

The Court may, however, relieve against the additional rent, if the landlord has acquiesced in the acts of the tenant; but it must be remembered that it will not in general interfere against the legal effect of a covenant: there must be fraud, such as acquiescing for a benefit to arise from taking advantage of the breach, or giving reason to suppose that there would not be any interference. See *Barret v. Blagrove*, 6 Ves. 104; *Williams v. Earl of Jersey*, Cr. & Ph. 91; *Dann v. Spurrier*, 7 Ves. 231; *Jackson v. Cator*, 5 Ves. 688; *Macher v. The Foundling Hospital*, 1 V. & B. 188; *Hume v. Kent*, 1 Ball & B. 188; *Gerrard v. O'Reilly*, 2 C. & L. 165; 3 D. & War. 414.

Upon this principle, partly, Lord Hardwicke appears to have decided in *Roy v. The Duke of Beaufort*, 2 Atk. 108.

Where, however, there is not only a stipulation that an increased rent is to be paid upon certain acts being done by the tenant, but also that his interest shall be forfeited, the sum so stipulated to be paid will be considered as a penalty and not liquidated damages: *French v. Macale*, 2 D. & War. 269.

The question whether a sum is considered to be in the nature of a "penalty" or as "liquidated damages" is sometimes difficult to determine, and depends upon the construction of the whole instrument taken together; thus, it has been laid down that the words "liquidated damages" or "penalty" are not conclusive as to the character of the sum stipulated to be paid, for if the whole agreement is such that the Court can see that the sum is a penal sum, it must be so treated. On the other hand, if it is not a penal sum, it would be incorrect to treat it as a penalty merely because it is so called in the agreement: *Betts v. Burch*, 4 H. & N. 511, per Bramwell, B.; and see *Galeworthy v. Strutt*, 1 Exch. 659; *Jones v. Green*, 3 G. & J. 298; *Cole v. Sims*, 5 De G. Mac. & G. 1; and see *Finch v. Earl of Salisbury*, Ca. t. Finch, 212; *Chilliner v. Chilliner*, 2 Ves. 528; *Bonsall v. Byrne*, 1 Ir. C. L. 573.

We have hitherto considered cases with regard to forfeiture, where a legal relation, as that of lessor and lessee, existing between the parties, the

remedy of the former to enforce the forfeiture is at law. Where, however, there is a mere contract for a lease, which can only be enforced in equity, how far will a Court of equity interfere on behalf *of the lessee where there have been acts on his part, which, if the lease had [*1118] been granted according to the contract, would amount to a forfeiture at law? It seems that where a lessee has done such acts, the Courts of equity, in the exercise of their discretion, will refuse specific performance of the contract upon a bill filed by the lessee, for it would be useless to require the execution of a lease when it might be immediately determined: *Gourlay v. The Duke of Somerset*, 1 V. & B. 68, 72; *Gregory v. Wilson*, 9 Hare, 683, 687; *Lewis v. Bond*, 18 Beav. 85; *Rankin v. Lay*, 2 De G. F. & Jo. 65.

A strong case, however, is necessary to be made on the part of the defendant, for the Court, in refusing specific performance, prevents the question of forfeiture from being tried at law; and, therefore, before it refuses its interference, it ought to be well satisfied that there has been a forfeiture on which an ejectment could be maintained: per Sir George Turner, V. C., 9 Hare, 691; and see *Rogers v. Tudor*, 6 Jur. N. S. 692.

Where specific performance of an agreement for a lease is decreed, notwithstanding it is doubtful whether breaches of covenant have not taken place which would enable the lessor to re-enter, the Court will direct the lease to be dated at a period antecedent to the alleged breaches, and will require from the plaintiff an undertaking to admit in any action that the lease was executed on the day of its date: *Pain v. Coombs*, 1 De G. & J. 34; *S. C.*, 3 Sm. & Giff. 459; *Lillie v. Legh*, 3 De G. & J. 204; *Poynts v. Fortune*, 27 Beav. 393; *Rankin v. Lay*, 2 De G. F. & Jo. 65.

Where there is no clause of re-entry for breach of a covenant, as, for instance, a breach of a covenant to repair, the Court will not refuse specific performance of a covenant to renew a lease, merely because there is a breach of the covenant to repair, for the lessor may recover damages at law for the breach: *Hare v. Burges*, 5 W. R. 585.

Specific performance will be decreed of a contract to sell the fee where it is independent of a contract to grant a lease, a forfeiture of which has been incurred by the acts of the plaintiff, although the two contracts may be contained in the same instrument. Thus, in *Green v. Lou*, 22 Beav. 625, the defendant agreed to grant a lease of a plot of ground to the plaintiff upon his building a villa of a certain value thereon, which he was to keep insured in the joint names of himself and the defendant in a particular office. And it was also agreed, that if the plaintiff should not perform the agreement on his part, the agreement for a lease was to be void, and that the defendant might re-enter. The agreement contained a further *stipulation, according to which the plaintiff was to have the option of purchasing the fee within two years. The plaintiff [*1119] erected the villa, but insured in the wrong office, and in his own name only. It was held by Sir John Romilly, M. R., that the right to purchase

being independent of the right to a lease, the plaintiff was entitled to specific performance of the contract to sell to him the fee.

A Court of Equity regards a penalty or forfeiture as intended to secure the fulfillment of the contract, and not to enable one party to profit by the default of the other, or obtain a collateral advantage which was no part of the main design. Hence, when the breach admits of indemnity or compensation, such a tribunal may compel the injured party to accept a just equivalent, and preclude him from using the letter of the agreement as a means of recovering more; *The Pittsburg R. R. Co. v. The Mount Pleasant R. R. Co.*, 26 P. F. Smith, 481, 490; *Gould v. Bugbee*, 6 Gray, 371, 375; *Hagar v. Buck*, 44 Vermont, 285; see *Hackett v. Alcock*, 1 Call, 463; *Bowen v. Bowen*, 20 Conn. 127. It is on this ground that Chancery has, from an early period, relieved against the condition of a mortgage, and allowed the mortgagor to redeem on payment of the principal with interest as amends for the delay. Such also was the established rule in equity in the case of bonds; and it was adopted by the statute 8 and 9 William 3 c. 11, as that which should prevail when suit was brought on a bond at law.

The doctrine is now generally recognized by the courts of common law, which limit the recovery in actions *ex contractu* to damages, even when there is an express stipulation for a penalty, although

where an estate in land is forfeited by a breach of condition recourse must still be had to equity, or to a tribunal proceeding on equitable principles. See *Kemble v. Farren*, 6 Bing. 141; *Davies v. Penton*, 6 B. & C. 216; *Horner v. Flintoff*, 9 M. & W. 678; *Taylor v. Sandford*, 7 Wheaton, 13; *Spencer v. Tilden*, 5 Cowen, 144; *Perkins v. Lyman*, 11 Mass. 76; *Merrill v. Merrill*, 15 Id. 488.

It is well settled, in accordance with these principles, that a forfeiture incurred by the non-performance of a pecuniary obligation may be set aside on the payment of the debt, interest and costs; *Skinner v. Dayton*, 2 Johnson, Ch. 535; 17 Johnson, 339; *Hart v. Homiler*, 8 Harris, 248; *Walling v. Aiken*, 3 McMullin, Eq. 1; *Webster v. Skipwith*, 4 Cushman, 341; *Moore v. Platte*, 8 Missouri, 467; *Bright v. Rowland*, 3 Howard, (Miss.) 398; *Baird v. Tolliver*, 6 Humphreys, 186; *Giles v. Austin*, 38 N. Y. Sup. Ct. 215; *Carpenter v. Westcott*, 4 Rhode Island, 225. Hence, a tenant may come into a court of equity for relief against a condition that the lease shall be void if the rent be not paid at the day; and in some of the States redress may be had in such cases at law. See *Atkins v. Chilson*, 11 Metcalf, 112; *Sanborn v. Woodman*, 5 Cushing, 360; *Stone v. Ellis*, 9 Id. 55; 1 Smith's Leading Cases, 107, 7 Am. ed. These de-

cisions proceed upon the somewhat arbitrary assumption that interest is an equivalent for a default in the payment of money, which, as Lord Eldon intimated, is not always in accordance with the truth; *ante*, 2023; *Reynolds v. Pitt*, 19 Vesey, 140; *Sparks v. The Liverpool Waterworks*, 13 Id. 428; see *Henry v. Tupper*, 3 Williams, 330; but the rule taken generally is well founded, and necessary to protect the debtor from oppression. It is, in fact, a mere extension of the principle which lies at the foundation of the statutes against usury, and if these are now questioned as contrary to the doctrines of political economy, no one has yet contended that a creditor should be allowed to stipulate that a conveyance by way of pledge or mortgage shall become absolute if the debt be not punctually paid. See *Orr v. Churchill*, 1 H. Bl. 232; *Walker v. Wheeler*, 2 Conn. 299; *Bowen v. Bowen*, 20 Id. 127; *Hughes v. Fisher*, Walker, 516; *Deforest v. Bates*, 1 Edwards, Ch. 394; *Hoag v. McGinnis*, 22 Wend. 163, 166.

In *Steele v. Branch*, 40 California, 3, a condition in a contract for the sale of land, that if the vendee did not pay off a mortgage on the premises when it matured, the contract should be void and the land revert to the vendor, was held to be within this principle, and relief was consequently afforded against a forfeiture resulting from a failure to comply with the condition at the time prescribed.

In *Brockway v. Clark*, 6 Ohio, 45, the complainant gave a note for \$130 in consideration of the receipt

of \$100, and conditioned to be void on the payment of \$110 at any time before it matured, and it was held that, although the statutes against usury had been repealed, the larger sum was a penalty, and the smaller all that the creditor was entitled to receive.

A chancellor will not intervene on behalf of one who has been grossly negligent, nor where the breach is willful and persistent; see *Horsburg v. Baker*, 1 Peters, 236; *Clarke v. Drake*, 3 Chandler, 223; *Hancock v. Carlton*, 6 Gray, 39. In *Hancock v. Carlton*, land was conveyed "subject" to certain mortgages, which were to be assumed and paid by the grantee, and "on condition that the grantor should be indemnified and saved harmless." A bill having been filed by the grantee for relief from a forfeiture incurred by a breach of this condition, the defendant pleaded that he had been compelled by due process of law to discharge the mortgages after notice to the complainant that such payment was required, and a refusal on his part to pay the amount, and it was held to be good defence to the bill, although it appeared that the complainant had acted under a mistaken view of the law.

Where the condition, as in the case of a mortgage, is intended to secure the payment of a debt, relief will be given as of right, but a stipulation that if a contract be not punctually fulfilled it shall be void, and the parties stand as they did in the first instance, can hardly be regarded as a forfeiture. Under these circumstances, time is of the essence

of the agreement, and a chancellor will not aid one who is willfully or persistently in default. A lease conditioned to be void if the rent is suffered to be in arrear, seems to be within the reason of this distinction, and it has been repeatedly applied to contracts for the sale of land; *ante*, notes to *Seton v. Slade*. The rule is the same where the time at which payment is to be made, or an act done, is fixed by statute; see *Smith v. Mariner*, 5 Wisconsin, 551.

In *Gregg v. Landis* the contract provided that if the vendee did not (1) plant shade trees in front of the property before the 1st of May, 1865, (2) erect a house thereon for the purpose of occupation within one year, and (3) bring at least two and a half acres under cultivation in every year, the vendor should be entitled to "take back the land" on repaying the purchase money; and it was held that a forfeiture occurring by a breach of these stipulations would not be set aside by a court of equity; *Gregg v. Landis*, 4 C. E. Green, 850; 6 Id. 494, 514.

For like reasons, relief will not be given against a forfeiture of stock incurred by the failure of the complainant to comply with a call duly made under the provisions of the charter or deed of association; *ante*, 2036; *The Germantown Passenger R. Co.*, 10 P. F. Smith, 124; *Small v. The Herkimer Manufacturing Co.*, 2 Comstock, 335. In the case first cited, Sharswood, J., said that the doctrine had been settled on this basis ever since *Sparks v. The Liverpool Water-works*, 13 Vesey, 482, and that the reasoning of Sir Wil-

liam Grant in that case was unanswerable.

A court of equity may obviously intervene to set aside a forfeiture arising from a non-compliance with the letter of an agreement which has been substantially fulfilled; *Hagar v. Buck*, 44 Vermont, 285. In this case there were mutual covenants, on the part of the lessee to pay the rent and build, and on that of the lessor to convey on receiving \$500, with a condition in avoidance if the lessee did not comply with the agreement. The building was not erected within the time prescribed, the lessor entered, and the lessee then tendered the five hundred dollars and demanded a deed, which was refused on the ground that there had been a forfeiture from which equity would not relieve. The court held that the object of the condition was to secure the fulfillment of the contract. When the purchase money was tendered, it became immaterial whether the premises were or were not improved, and the lessor could not reasonably refuse to convey.

In *Faunce v. Burk*, 4 Harris, 469, a proviso that the decision of an engineer of a railway should be conclusive of all questions that might arise on a contract for the construction of the road, and that if the work was not done at the time, and in the way prescribed, the contractor should lose the right to proceed under the agreement, and forfeit twenty per cent. of what he had already earned, was held to be in the nature of liquidated damages and not a penalty from which equity could relieve. The same

point has been determined in other instances; *Phelan v. The Albany R. Co.*, 1 Lansing, 258.

Whatever may be thought on these points, it is clear that where the condition is precedent, and no right will arise under the contract until it is fulfilled, relief will not be given against a failure to perform it at the appointed time. See notes to *Seton v. Slade*; *Barrett v. The Passumpsic Turnpike Co.*, 15 Vermont, 757; *The City Bank v. Smith*, 3 Gill & Johnson, 265; *Wilkes v. Smith*, 2 Edwards, Ch. 226; *Robinson v. Cropsey*, *Id.* 138. Accordingly, where the provisions of the scheme or prospectus of a lottery were that no holder of a ticket should be entitled to a prize unless he presented his claim within a year, the court held that there could be no forfeiture where no right had accrued, and that relief would not be given against a failure to come forward at the time prescribed; *The City Bank v. Smith*. So, where it is agreed that the vendor and the purchaser shall each pay half of the incumbrances resting on the land, with a proviso that if the vendor fails to pay his proportion he shall have no right to call on the purchaser, the condition will be obligatory and a compliance with it a prerequisite to judgment. See *Flagg v. Munger*, 5 Selden, 483, 500.

It is equally well settled, that when a forfeiture is incurred by the non-performance of an act *in pais*, and the damages cannot be ascertained by computation, or without the aid of a jury, relief will not be given unless the parties can be restored to their original position.

See *Dunkler v. Adams*, 20 Vermont, 415; *Skinner v. Dayton*, 2 Johnson, Ch. 431; *White v. Skinner*, 17 Johnson, 35; *The Ottawa Plank Road v. Murray*, 15 Illinois, 336; *Clarke v. Drake*, 3 Chandler, 253. Hence a court of equity will not aid a tenant who fells timber, or who assigns without the permission in writing which the provisions of the lease require; *Baxter v. Lansing*, 7 Paige 350; *Green v. Bridges*, Sumner, 96; *Wilson v. Wilson*, 14 C. B. 616; *Gregg v. Landis*, 6 C. E. Green, 494, 511; *Gregory v. Wilson*, 9 Hare, 683; and the same principle applies when the conditions of a policy of insurance are violated by the insured. But in *Gregg v. Landis*, the court held that a provision in a contract of sale, that the vendee should not assign, did not come within this principle.

In *Henry v. Tupper*, 3 Williams, 358, a grantee was relieved from a forfeiture incurred by the breach of a condition to provide the grantor with food and lodging. The court cited and relied on *Ackston v. Raymond*, 9 Vermont, 420, but the decision would seem to be at variance with *Dunkler v. Adams*, and with the principles by which a chancellor should be governed under such circumstances.

Relief may be afforded in equity against one who is endeavoring to enforce a forfeiture arising from a breach which he authorized or sanctioned, whether his acquiescence was manifested by acts or words, and even when it was simply permissive; *Helme v. The Philadelphia Ins. Co.*, 11 P. F. Smith, 107; *Lilley v. The Fifty Associates*, 101

Mass. 432; *Gregg v. Landis*, 4 C. E. Green, 356; 6 Id. 494, 507. In *Lilley v. The Fifty Associates*, land was demised for one thousand years, yielding and paying the yearly rent of ten tons of first quality Russia Old Sables iron to be delivered on the premises, with a condition of avoidance in the event of breach. It appeared in evidence that the lessor had, for more than twenty-one years, received \$212 annually in lieu of the iron, and it was held that, although this did not establish a commutation of the rent, it was still proof of an acquiescence which precluded him from enforcing the condition without such notice as would give the lessee a reasonable time to import the iron. A forfeiture arising from a failure to pay the premium of a policy of life insurance at the appointed time, was set aside on like grounds in *Helme v. The Ins. Co.*, and the principle has been applied in other instances; see 2 American Leading Cases, 911, 5 ed.

All the authorities concur that even when the case is such that a court of equity would not set aside the forfeiture, it will not intervene to enforce it, and will leave the parties to their legal rights and remedies. See *The Atlas Bank v. The Nahant Bank*, 3 Metcalf, 581; *The Michigan Bank v. Hammond*, 1 Douglas, 527; *Livingston v. Tompkins*, 4 Johnson, Ch. 415; *Baxter v. Lansing*, 7 Paige, 350, 353; *Smith v. Jewett*, 40 New Hampshire, 530; *Warner v. Bennett*, 31 Conn, 461; *Lawl v. Hyde*, 39 Wisconsin, 353; *Clarke v. Drake*, 3 Pinney (Wisconsin), 228; *Meigs' Appeal*, 12 P.

F. Smith, 28, 35; *The Ol Creek R. R. Co. v. The Atlantic R. R. Co.*, 7 Id. 65.

The reasons for this course of decision were assigned by Sharswood, J., in the case last cited: "A bill for the special enforcement of a contract is an appeal to the conscience of the chancellor. He exercises upon the question presented a sound discretion under all the circumstances of the case, for the most part untrammelled by rule or precedent. If the bargain is a hard or unconscionable one, if the terms are unequal, if the party calling for his aid is seeking an undue advantage, he declines to interfere. Therefore it is that, although a court of equity will not in general relieve against a forfeiture unless it be in the case of non-payment of rent where an exact and just compensation can be made by decreeing to the landlord the arrears of his rent with interest and costs, yet they never lend their assistance to the enforcement of one, but leave the party to his legal remedies. More especially is this the case where the contract has been substantially carried out, but its literal fulfillment has been prevented by uncontrollable circumstances. It is unnecessary to cite authorities in support of these positions. They underlie all the cases which abound upon the subject, and have been canonized in the standard elementary works; *Jeremy's Eq.* 425, 471; *Adams' Eq.* 77, note; 2 *Story's Eq.* § 742, 750, 1319, 1323. They commend themselves to every man's common sense of reason and justice, in view of the special objects which

courts of equity have been constituted to effectuate. * * * The prayer of the bill is that the court shall enforce what the parties themselves agreed to be and denominated a forfeiture; to deprive the defendants of the entire benefit of their contract and lease, and that on the ground that a partial failure of performance has occurred, not productive of serious loss to the plaintiffs, and for which in all probability it would be difficult to persuade any jury to give them more than nominal damages. The judge at Nisi Prius was clearly right in dismissing the bill with costs, and the decree is affirmed, at the costs of the appellants."

It has, nevertheless, been held that when there is a substantial breach of condition, which is not technically complete and cannot be taken advantage of at law, a chancellor may direct a specific performance, or that the grantee shall make compensation; *Livingston v. Stickles*, 8 Paige, 398; 7 Hill, 253. See *Carpenter v. Catlin*, 44 Barb. 75. Such a decree is the reverse of a forfeiture, and gives effect to the intention of the parties by enforcing the condition as a covenant; and it is equally well settled that when a condition is intended for the benefit of a third person and partakes of the nature of a trust, it may be upheld as such by a court of equity. See *Leach v. Leach*, 4 Indiana, 628; notes to *Dumpor's case*, 1 Smith's Leading Cases, 134, 7 Am. ed.

Compelling the fulfillment of a stipulation is, obviously, a very different thing from enforcing a forfeiture resulting from the breach.

A condition imposing a restraint on the use or occupation of land which is not contrary to public policy, and which is beneficial to the adjoining land of the grantor, may, therefore, be specifically enforced by a court of equity, not only between the original parties, but for or against those claiming under them by assignment; *Gibert v. Peteler*, 38 New York, 165; *Whitney v. The Union Railway Co.*, 11 Gray, 359; *Linzee v. Mixer*, 101 Mass. 512; *Dorr v. Harrahan*, Ib. 531; *Badger v. Boardman*, 16 Gray, 559. "If," said Bigelow, C. J., in the case last cited, "it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent discussion of *Whitney v. Union Railway*, 11 Gray, 359, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity."

Agreeably to some authorities, a stipulation in a bond or mortgage accelerating the maturity of the debt if default be made in the payment of interest, is in effect a penalty and may be set aside by a court of equity, although relief will not be afforded where a day is fixed for the payment of the principal, with a proviso that further time shall be given if the interest is paid punctually. See *Mayo v. Judah*,

5 Munford, 495; *Bonafons v. Rylat*, 3 Burrow, 1370. This distinction is overruled by more recent cases, which establish that, in whichever way such a provision may be worded, it is an exercise of the undoubted right of the parties to determine when and under what circumstances the debt shall be paid, and does not therefore afford a ground for the intervention of a chancellor; *Jones v. Thomas*, 5 B & Ad. 40; *Basse v. Galleger*, 7 Wisconsin, 442; *The Marine Bank v. The International Bank*, 9 Id. 57, 68; *Bemerkott v. Traphagen*, 39 Id. 219; *Thompson v. Hudson*, L. R. 4 H. L. 27; *Schooley v. Romain*, 31 Maryland, 574, 579; *Farris v. Farris*, 28 Barb. 29; *The People v. The Superior Court of New York*, 19 Wend. 104; *Noyes v. Clark*, 7 Paige, 179; *The Ottawa Plank Road Company v. Murray*, 15 Illinois, 337; *Robinson v. Loomis*, 1 P. F. Smith, 78; *Baldwin v. Van Vorst*, 2 Stockton, Ch. 577. In the case last cited the bond was conditioned for the payment of the principal sum ten years after date, with interest semi-annually, and it was at the same time provided that if the interest should be behindhand the principal should be payable forthwith; and the court held that the obligor was not entitled to be relieved from the consequences of a want of punctuality in the payment of the interest. In *Farris v. Farris*, the purchaser, who was a married woman, alleged the absence of her husband and her own ignorance, but the court was clearly of opinion that such a provision does not partake of the nature of a penalty or forfeiture, and is

not less binding in equity than at law.

In *Martin v. Melville*, 3 Stockton, Ch. 222, it was, notwithstanding, held that a chancellor may relieve against such a default where it is the result of accident or mistake, which is virtually denying the right to make time of the essence of a contract for the payment of money. A greater sum cannot be exacted as compensation for the retention of a less, but this is a very different thing from a stipulation that the period for the payment of a debt shall depend on the punctual fulfillment of the obligation.

It has also been determined that a covenant for the payment of money by installments, and that if they are not punctually paid the whole sum shall be due, is objectionable, as accelerating the liability for the principal without discounting the interest; *Tiernan v. Harriman*, 16 Illinois, 400. In this instance Skinner, J., said: "We regard the proviso in the mortgage, that the whole sum shall become due upon failure to pay any one of the installments on the day, as a provision *in terrorem* and in the nature of a penalty, against which equity will relieve upon adequate compensation. There is no difficulty in this compensation. It is the payment of the installments due, the interest accrued thereon, and the costs incurred in the proceeding to sell under the power. This has been done, and the mortgagee is thereby, in contemplation of equity, placed in the same condition he would have been had the installment been paid on the day it became due.

But the mortgagee seeks to collect the whole mortgage debt, by reason of the non-payment of a small portion thereof on the day. If he is allowed to do so, a considerable sum of money, in the way of interest, is forfeited by the mortgagor to him; for there is no substantial difference in the forfeiture of a sum of money in the shape of interest or a named sum as a penalty.

"The installments extend through a series of years up to 1859, and are without interest. The proviso, if operative, works a forfeiture of the use of the money for the period of credit provided for, which use, or credit, is of the substance and essence of the contract, has a legal value, and is capable of ascertainment by computation. To deprive the mortgagor, then, of this credit, without a rebate of interest, is to take from him without consideration so much money as the interest on the installments not due, for the periods they respectively run, amounts to.

"This can be nothing else than a penalty, which equity will always relieve against. Where, by the terms of a contract a greater sum of money is to be paid, upon default in the payment of a lesser sum at a given time, both courts of law and equity will hold the provisions for the payment of the greater sum to be a penalty. And even where the parties stipulate for the payment of a sum certain on default of performance of an agreement such a stipulation will be treated as a penalty, if the damages are not difficult of ascertainment. *Skinner v. Dayton*, 2 Johnson, Ch.

526; 7 Vesey, 273; 2 Vernon, 316; 6 Bingham, 141; *Lansing v. Capron*, 1 Johnson, 617; 18 Johnson, R. 219; 6 Munford's R. 71; 6 Iredell's R. 65; *Carpenter et al. v. Lockhart*, 1 Carter, Indiana, 435; 1 Denio, 464; 22 Wend. R. 163; 9 Paige, Ch. 101; *Broadwell v. Broadwell*, 1 Gilman, 600; *Low v. Notte*, decided at the present term. The case of *The Ottawa Plank Road Company v. Murray*, 15 Illinois, 337, is not in conflict with this opinion. In that case the mortgage and bond provided for payment of interest at ten per cent. per annum, payable semi-annually, and provided that if the interest should not be paid when due the principal should immediately come due. There no forfeiture, in contemplation of law, could arise. If the money was not paid, it drew interest; if paid, the interest stopped with the payment." The soundness of this conclusion is questionable unless the instrument would have been usurious if it had contained an absolute undertaking that the gross amount should be paid forthwith.

In general, one who agrees that if the interest be not paid punctually the period for the payment of the debt shall be advanced, must take notice when the time arrives, and cannot allege that he was not warned; but the case is materially changed when there is a covenant on the part of the obligee which, though not precedent, will excuse the retention of the interest if unfulfilled, and it may then be requisite to notify the obligor that the covenant has been performed, before

making a default in the payment of interest a ground for the recovery of the principal. See *Broderick v. Smith*, 26 Barb. 539.

Although a stipulation for a penalty is invalid, the damages may be liquidated by agreement at any amount which does not manifestly exceed the loss; *Lowe v. Peers*, 4 Burrows, 2225; *White v. Dingley*, 4 Id. 433; *Pierce v. Fuller*, 8 Mass. 223; *Bayley v. Peddie*, 16 New York, 469; *Mott v. Mott*, 11 Barb. 127; *Tingley v. Outter*, 7 Conn. 291; *Myers v. Hays*, 7 Missouri, 98; *Slosson v. Beadle*, 7 Johnson, 72; *Gammon v. Howe*, 14 Maine, 250; *Dakin v. Williams*, 17 Wend. 437; 22 Id. 201; *Knapp v. Matthy*, 13 Id. 587; *Durst v. Swift*, 11 Texas, 274; *Low v. Nolte*, 16 Illinois, 478; *Hampton v. Ourton*, 6 Blackford, 206; *Sheeper v. Williams*, 12 Wright, 459; *McWheeler v. Douglas*, 1 Caldwell, 591; *Brown v. Maulsly*, 17 Indiana, 10. Such provisions are not only tolerated but favored by the law, as tending to prevent litigation and afford a standard which the court can apply without summoning a jury. Whenever, therefore, the contract is for the performance of an act *in pais*, and there is no certain measure of the injury that will ensue if it be not fulfilled, the parties may fix the sum that shall be payable as a compensation for the breach. A covenant in a lease not to plow or break up meadow land is within this principle, and so is a promise of marriage; *Astley v. Weldon*, 2 Bos. & Pul. 346; *Lowe v. Peers*, 4 Burrows, 2225; or a promise to per-

form work or furnish materials within a certain time; *Fletcher v. Dyke*, 2 Term. 32; *Curtis v. Brewer*, 17 Pick. 513; *Faunce v. Burke*, 4 Harris, 469; or a covenant to improve land on which the covenantee has a mortgage or ground rent; *Pearson v. Williams*, 24 Wend. 246; 26 Id. 630; or that a patent is valid, and will answer the purpose for which it was obtained; *Brewster v. Edgerly*, 13 New Hampshire, 275; or that a vendor will execute a deed on or before a certain day; *Durst v. Swift*, 11 Texas, 274; *Chamberlain v. Bagley*, 11 New Hampshire, 234; or that a purchaser will accept a conveyance and pay the price; *Reilly v. Jones*, 1 Bing. 302; *Gammon v. Howe*, 14 Maine, 250; *Williams v. Green*, 14 Arkansas, 13; *Mundy v. Culver*, 18 Barb. 336; *Holmes v. Holmes*, 12 Id. 137; or for the exchange of one tract of land for another; *Gibb v. Linder*, 76 Illinois, 137; or that a trade or profession shall not be practiced within certain limits; *Green v. Price*, 13 M. & W.; *Atkins v. Kinnier*, 4 Exchequer, 776; *Streeter v. Rush*, 25 California, 37. In *Green v. Price*, one who had covenanted not to carry on the business of a hair-dresser and perfumer within sixty miles of London, and bound himself in the sum of five thousand pounds for the faithful observance of his covenant, was held to be liable in that amount, whether it did or did not exceed the actual injury. The judgment was affirmed by the exchequer chamber, and followed in *Rawlinson v. Clark*, 14 M. & W. 187, and *Galeworthy v. Strutt*, 1 Exchequer, 659, and is sustained

by the main current of decision in England and the United States; *Miller v. Elliot*, 1 Carter, 404.

In *Cushing v. Drew*, 107 Mass. 445, the plaintiff sold his business as an expressman, to the defendant, for the sum of \$600, and agreed not to do any express business in East Weymouth, or cause any to be done so long as the defendant resided there and was engaged in that occupation, and in the event of his not fulfilling this stipulation to pay the defendant \$900. The court held that the sum last named was liquidated damages, and might be set off as such by the defendant. Chapman, J., said: "The tendency and preference of the law is to regard a sum stated to be payable if a contract is not fulfilled as a penalty, and not as liquidated damages; *Shute v. Taylor*, 5 Met. 61; *Wallis v. Carpenter*, 13 Allen, 19. Yet courts endeavored to learn from the subject-matter of the contract the nature of the stipulations and the surrounding circumstances what was the real intent of the parties, and are governed by such intent; *Lynde v. Thompson*, 2 Allen, 456. In that case the damages were held to be liquidated in view of the fact that the contract was for doing a simple specific act, and that there was no adequate means furnished, by the contract or otherwise, for ascertaining the precise damage which might result from the breach of it.

"The same reasoning applies to this case. The stipulation is for a simple thing, namely, to abstain from interference with the business which the plaintiff had sold to the

defendant, and it is difficult to ascertain the damages that may result from the breach of such a contract. The language of the contract also imports a stipulated sum rather than a penalty, and this construction being confirmed by the nature of the stipulations, the courts adopt it."

In *Powell v. Burroughs*, 4 P. F. Smith, 329, 336, and *The Wolf's Creek Co. v. Schultz*, 21 Id. 180, the uncertainty as to the extent of the injury which may ensue was said to be the criterion by which to determine whether it is a case of liquidated damages or a penalty, and a covenant to mine 40,000 tons of coal in the plaintiff's colliery, and pay him for that quantity, "at the rate of twenty cents per ton, whether the same was actually mined or not," held to be obligatory within this principle, because the loss occasioned by the breach depended on circumstances that were peculiarly within the knowledge of the parties and could be better estimated by them than by a court or jury.

The reason of this course of decision is analogous to that which prevails in the case of valued policies of insurance, that where there is no fixed measure of damages, the parties may agree on any amount which does not manifestly transcend the loss. But the law will not suffer a power conferred for a useful end to be abused, and where it is apparent that the stipulation goes beyond any injury that can result from the breach, it will be invalid; *Watts v. Sheppard*, 2 Alabama, 245; *Hughes v. Wistar*, 1 Walker, 516; *Baugh v. Rowland*, 5 Howard,

(Miss.) 398. An undertaking to give a larger sum as compensation for the non-payment of a less is within this rule; see *Lampman v. Cochran*, 16 New York, 275; *Astley v. Weldon*, 2 Bos. & Pul. 346; *Clement v. Cash*, 21 Id. 253, 260; and it may be said, in general, that the courts will not sanction the recovery of any greater amount for the non-fulfillment of a pecuniary obligation than the principal sum with interest; *Orr v. Churchman*, 1 H. Bl. 227; *Dakin v. Williams*, 17 Wend. 447; 22 Id. 401; *Bayley v. Peddie*, 16 New York, 469, 471; *Tiernan v. Hamman*, 16 Illinois, 400; *Williams v. Green*, 16 Arkansas, 315, 319; *Haldeman v. Jeremys*, Ib. 329, 333. A pecuniary default may nevertheless entail consequences which cannot be compensated by replacing the amount with interest, and where such is the case, the damages may, as it seems, be regulated beforehand by the parties. See *Bayley v. Peddie*, 16 New York, 469, 475.

The rule applies wherever the contract is in effect for the payment of money, whatever may be its terms; *Kuhn v. Myers*, 37 Iowa, 351; and consequently it has been said to be a covenant to pay the plaintiff's debts, and save him harmless from any suit that may be brought therefor; *Morris v. McCoy*, 7 Nevada, 399. In *Spear v. Smith* 1 Denio, 465, a covenant to comply with the decision of the arbitrators to whom the case had been submitted, or pay \$100, was accordingly held invalid, because the award might be, as the event proved, for a sum of money, and the measure of the injury was

consequently the principal with lawful interest. The cases of *Gregg v. Crosby*, 18 Johnson, 219, 226, and *Hoag v. McGinnis*, 22 Wend. 163, are to a like effect. And the weight of authority seems to be that an agreement to liquidate the damages will fail, not only where it imposes an obligation for the payment of a greater sum as a compensation for a less, but where it might have led to such a result, because that which must necessarily have been construed as a penalty in one event, will be supposed to have been intended to operate as such in all. See *Curry v. Larer*, 7 Barr, 400; *Niver v. Rossman*, 18 Barb. 50. A contract which contains various stipulations, some for the payment of money, and others that the party will do or refrain, cannot therefore be made the subject of a stipulation for liquidated damages, unless it is so drawn as to be exclusively applicable to the breaches which admit of such a standard of compensation. See *Niver v. Rossman*; *Thoroughgood v. Walker*, 2 Jones, N. C. 15; *Whitfield v. Levy*, 6 Vroom, 149; *Shiell v. McNitt*, 9 Paige, 101, 106. For like reasons, where the damages on one side of the contract admit of being liquidated, and those on the other do not, a covenant to that effect, which applies to both, will be inoperative; *Haldeman v. Jennings*, 14 Arkansas, 320. Hence, where it was agreed that if the vendor or the purchaser failed to comply with the contract, a sum certain should be paid as a compensation for the delay, the court held that the stipulation was not binding on the vendor, because it could not have

been enforced against the purchaser, who would only have been answerable for the purchase money with interest; *Thoroughgood v. Walker*. In *Whitfield v. Levy*, 6 Vroom, 149, a contract by the purchaser of a grocery to pay \$1300, and by the vendor not to engage in the same business for the space of ten years, and in which the parties "bound themselves to each other, under the penalty and forfeiture of \$500, to be paid by him who should fail to carry out the agreement," was held to be within the principle.

In *Talcott v. Marston*, 3 Minnesota, 339, the defendant gave a promissory note, "with interest at the rate of six per cent. per annum from date until due, and five per cent. per month after due, until paid," and it was determined that the contract for interest ceased to be operative at the maturity of the note, and that whatever was recovered for the time during which payment had been withheld after breach must be recovered as damages, and not as interest. It followed that, although the Revised Statutes, C. 35, provided "that any rate of interest agreed upon by the parties, specified in writing, shall be legal and valid," the case fell within the rule that the parties could not liquidate the damages for the breach of a pecuniary obligation at any higher rate than the seven per cent. prescribed by law.

It would, nevertheless, appear that, aside from the statutes against usury, or where these do not prevail, a contract by a debtor to pay a larger sum as a compensation for a delay in the payment of a smaller,

will be valid unless the inadequacy is so gross as to give rise to a presumption of undue influence or fraud; see *Goldsworthy v. Strutt*, 1 Exchequer, 659, 665; *Lynde v. Thompson*, 2 Allen, 456, 459; *Davis v. Harding*, 1 Montana, 499; *Hardee v. Howard*, 33 Georgia, 533. "I take it," said Parke, Baron, in *Goldsworthy v. Strutt*, "that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of an agreement to pay a smaller sum; but they must do so in express terms, and if that be done I do not see how the courts can avoid giving effect to such a contract." This dictum was approved in *Lynde v. Thompson*; and the language held in *Brockway v. Clark*, 6 Ohio, 45, is to the same effect.

It is, no doubt, true, that when no rule or policy of the law forbids, the parties may agree that a larger sum shall be paid in consideration of forbearance to demand a smaller. Contracts for interest are based on this principle, but it is not easy to determine the limits within which it may be applied. In general, inadequacy does not vitiate, but this rule is inapplicable when the disproportion appears on computation and from the face of the agreement; *Sheppard v. Roades* 7 Rhode Island, 470; *Schnell v. Neel*, 17 Indiana, 29.

In *Hardee v. Howard*, the inducement to a contract, by which the plaintiff agreed to sell his plantation for \$13,000, was that he should have that sum in cash, in hand on the 1st of January next, and it was further provided that if the pur-

chaser made default, he should forfeit the further sum of \$2000 for the difference between cash and credit. The court held that the contract was not usurious, nor to pay a greater sum as compensation for a pecuniary default, but that the purchaser should pay \$13,000 if he paid cash and \$15,000 if he bought on credit. It was in effect a sale for \$15,000, to be discharged on the prompt payment of \$13,000.

The rule that a contract for the payment of money does not admit of a liquidation of the damages, meets with an exception in the case of a foreign bill of exchange, or where the amount is payable in foreign coin, and the parties may then determine the value of that which is in itself fluctuating and uncertain. See *The United States v. Gurney*, 4 Cranch, 333.

In *Berenkott v. Trepbogen*, 39 Wisconsin, 220, the court held that the gross value of an annuity is not measurable by an exact pecuniary standard, and that the parties might consequently agree that if the annual payments were not made punctually the grantor should be liable in an amount exceeding the worth of the annuity, as calculated by the tables which are commonly used for such purposes.

A proviso that if a debt be not paid when due, and the creditor proceeds to sue, he shall be entitled to recover five per cent. on the amount for counsel fees and expenses, is not in the nature of a penalty, and may be enforced at law or in a court of equity, although it exceeds the sum actually expended; *Robinson v. Loomis*, 1 P. F. Smith, 79.

It seems that relief may be given against a covenant which, though not dependent, was yet intended as the consideration or equivalent for an undertaking which has not been fulfilled. See *Skinner v. Dayton*, 2 Johnson, Ch. 526; 17 Johnson, 357. In this instance the agreement was, on the one side, to make the machinery for a factory, and, on the other hand, to pay for it by installments, two of which, amounting to \$1400, were to fall due before the day named for the delivery of the machinery. The party of the second part wrote to say that the machinery would not be required, and the party of the first part thereupon obtained a judgment for the two installments, which the party of the second part sought to enjoin, on the ground that the amount recovered was really a compensation for work which had not been and would not be performed, and, therefore, was in the nature of a penalty from which chancery should relieve. The respondent answered that although the machinery was not made or delivered, he had still lost time and money in preparations, for which the judgment was not more than an equivalent. This defence was sustained by the chancellor, but the decree was reversed by the Court of Errors, because the respondent might sue for the remaining installments, and the aid of a Court of Equity was requisite to bring the whole matter within the compass of one proceeding, and to limit the recovery to the actual loss.

It has been intimated in some instances that the damages for the

non-fulfillment of a contract of sale cannot well be liquidated by agreement, because the true measure is the difference between the market value and the price, and the law will not suffer the vendor to stipulate for more. See *Shreeve v. Brereton*, 1 P. F. Smith, 175, 186; *Jimison v. Gray*, 29 Iowa, 537; *Lee v. Overstreet*, 44 Georgia, 507; *Burr v. Todd*, 5 Wright, 206; but the better opinion seems to be that such a stipulation is *prima facie* valid, although it may be set aside by a court of equity when the compensation is so much in excess of the injury that it cannot be exacted without an undue advantage. See *Hise v. Foster*, 17 Iowa, 23; *Williams v. Green*, 13 Ark. 315, 327; *Knapp v. Malby*, 13 Wend. 587; *Chamberlain v. Begley*, 11 New Hamp. 234.

In *Lynde v. Thompson*, 2 Allen, 460, Bigelow, C. J., said: "If the contract had been to pay a certain sum of money, or to purchase certain specific articles of merchandise, the value of which as between vendor and vendee could have been ascertained without difficulty, the measure of damages arising from a breach would have been certain and readily fixed, and the intent of the parties to stipulate for a penalty only, would have been fairly inferable. But such is not the nature of the present contract. It is an agreement for the sale of an entire stock in trade, and all the tools used by the plaintiffs in carrying on the manufacturing business. A transaction of such a nature, involving the transfer and surrender of the business and good will connected

with the trade and manufacturing in which the plaintiffs had been engaged, differs essentially from an ordinary agreement for the sale of goods or the payment of money. It is impossible to estimate with accuracy, or to measure with any definite or precise rule, the extent of damage which either party might sustain by reason of the breach of the contract. The necessity of taking an account of stock, the consequent interruption of business, the preparation to relinquish an old occupation and to engage in a new one, and other similar elements, would necessarily enter into the contemplation of parties making an agreement like that which is the subject of the present action. But the impossibility of placing any estimate in money on the damage which might result from such causes is obvious, and leads to the reasonable inference that the parties intended to fix the amount of compensation in the event of a breach by inserting a sum to be taken as liquidated damages in the literal sense of that term."

In applying the principle, regard should be had to whether the contract is for the delivery of specific things, or of things of a certain kind. In the former case the damages cannot always be fully estimated by a jury, and may therefore be liquidated by agreement, especially if the contract be one that would be specifically enforced by a chancellor. In the latter case the purchaser can presumably buy elsewhere if the vendor makes default, and the measure of damages is consequently the difference between the market price

and that fixed by the contract. But this rule is not universal, and does not apply where goods are wanted for a particular purpose which will be frustrated by delay. Under these circumstances, time is of the essence of the contract, and the parties may agree on a sum which shall be payable if delivery is not made at the day.

There are, accordingly, numerous decisions that a contract of sale may afford room for a stipulation in liquidation of the damages, on the part either of the vendor or the purchaser; *ante*; *Morse v. Rathburn*, 42 Missouri, 594; *Clement v. Cash*, 21 New York, 253; *Williams v. Green*, 14 Arkansas, 313, 327, 1. C.; *Chamberlain v. Bagley*, 11 New Hamp. 234. Although the obligation of the purchaser is in one sense pecuniary, his refusal to fulfill the agreement leaves the property on the hands of the vendor, and may subject the latter to the consequences of a fall in value. See *Chamberlain v. Bagley*; *Mead v. Wheeler*, 13 New Hamp. 351; *Tingley v. Cutler*, 7 Conn. 291; *Gammon v. Howe*, 14 Maine, 250; *Streeper v. Williams*, 12 Wright, 450; *Reilly v. Jones*, 1 Bing. 302; *Williams v. Green*, 14 Arkansas, 329; *Sheill v. McNitt*, 9 Paige, 101, 103. The principle is the same where a purchaser covenants to build as a security for the price; *Pierson v. Williams*, 24 Wend. 447; 26 Id. 20. In *Pierson v. Williams*, the court gave judgment on a covenant to erect two houses on land which the covenantor had purchased from the covenantee, and refused to inquire whether the sum thus fixed was

more than an adequate compensation for the injury. And it is generally conceded that the parties may agree on the amount which shall be paid by the vendor in the event of his failing to convey the property to the purchaser. See *Mead v. Wheeler*, 13 New Hampshire, 351; *Slosson v. Beadle*, 7 Johnson, 72.

The weight of authority, nevertheless, is that the stipulated amount must not exceed the value of the land, and should be so much within it as to show the object is not to secure an undue advantage at the expense of the opposite party. See *Haldeman v. Jennings*, 14 Arkansas, 329; *Williams v. Green*, Ib. 315, 326; *Lampman v. Cochran*, 16 New York, 275; *Clement v. Cash*, 21 Id. 253, 260; *Barr v. Tod*, 5 Wright, 206; and in *Spencer v. Tilden*, 5 Cowen, 144, an agreement to deliver twelve cows, or pay nearly twice as much as they were worth, was held to be invalid on this ground. It should, however, be remembered that, while price is *prima facie* evidence of value, it is not conclusive, and in *Slosson v. Beadle*, 7 Johnson, 72, the court enforced a clause in which the damages for the breach of a covenant to convey were fixed at \$800, although the covenantee had only agreed to give \$600 for the land.

It is equally well settled that while the damages arising from a repudiation of the contract by the purchaser may be liquidated by agreement, a delay in the payment of the purchase money does not admit of such a stipulation, and will, on the contrary, as in the case of other pecuniary obligations, be com-

pensated by the payment of interest; *Lampman v. Cochran*, 16 New York, 275.

A failure on the part of a vendor to fulfill a covenant for the extinguishment of a mortgage or other incumbrance on the premises, comes under the same rule as being a default which money will make good; although the case is essentially different where he refuses or is unable to give a title; *Westerman v. Means*, 2 Jones (Pa.), 97.

It seems, for like reasons, that a party may agree beforehand on the amount for which he shall be liable in the event of his revoking the instrument by which a controversy is submitted to arbitration, but not for his refusal to comply with the decision when announced, unless the case is such that the award will be for the performance of an act which has no fixed or certain value. See *Hoar v. McGinnis*, 22 Wend. 163; *Lowe v. Nolle*, 16 Illinois, 475; *Spear v. Smith*, 1 Denio, 464.

The parties may obviously make time of the essence of a contract to build a house or vessel, furnish materials, or render a specific service, and provide that if it be not punctually fulfilled a fixed sum shall be paid as a compensation; *Young v. White*, 5 Watts, 460; *Chase v. Allen*, 13 Gray, 42; *O'Donnell v. Rosenberg*, 14 Abbott, N. S. 59; *Powell v. Burroughs*, 4 P. F. Smith, 329, 336; *Hall v. Crowley*, 5 Allen, 304. The case first cited was that of a contract to have "a canal boat built, ready for the spring trade on the 1st of March," and in the event of failure, "to pay \$10 damages for every day after that time;" and the

court held that the estimate thus made was conclusive and could not be opened or set aside by a jury.

The question is, nevertheless, one of construction, to be gathered from circumstances not less than from the language of the contract, and when the amount named manifestly exceeds any loss that did or could ensue, it may be regarded as a penalty. See *Cohwell v. Lawrence*, 38 Barb. 643; 38 New York, 71; *Greer v. Tweed*, 13 Abbott, N. S. 227. In *Cohwell v. Lawrence*, the agreement was to construct a steam engine and place it on board a boat owned by the plaintiff "on or before the 3d of October next, or forfeit \$100 for each and every day's delay;" and the stipulation was adjudged to be merely *in terrorem*, and not designed to liquidate the damages.

In determining such questions, the stipulation should be read in connection with the contract which it was intended to secure, and if it then appears that the compensation is grossly disproportionate, it will be invalid in the eyes of a court of equity, if not at law. See *Stearns v. Barrett*, 1 Pick. 443; *Moore v. Platte County*, 8 Missouri, 467; *Hamaker v. Schroers*, 49 Id. 406; *Shreve v. Brereton*, 1 P. F. Smith, 175; *Lampman v. Cochran*, 19 New York, 275. In *Stearns v. Barrett*, an agreement that the defendant should pay \$100 for each workshop which he might establish for the manufacture of machines under a patent that had been taken out by the plaintiff, with the privilege of selling the machines in Rhode Island and Massachusetts, but not be-

yond those limits, and that the plaintiff should be entitled to recover \$1000 if the contract were infringed, was held to impose a penalty, because the effect might otherwise be to render the defendant liable in a larger amount for the sale of a single machine, than he was to pay for the right to manufacture many.

It seems to have been thought, in some instances, that one who would enforce a covenant for the liquidation of damages must show that there were no sufficient data by which they could be estimated, and that if the parties had not fixed the standard, it must have been determined arbitrarily by a jury. The better opinion, nevertheless, seems to be that here, as in other instances, the burden of proof is on him who alleges that a contract which has been legally executed should not be enforced. If, as the authorities agree, the parties may say what the consideration shall be if the agreement is fulfilled, they should be equally free to determine what amends shall be made for the breach; *Williams v. Green*, 14 Arkansas, 315; *Brewster v. Edgerly*, 13 New Hampshire, 275; *Pearson v. Williams*, 24 Wend. 244; 26 Id. 630.

The weight of authority, notwithstanding, is in favor of the admission of extrinsic evidence that the stipulated amount is so excessive as to indicate that the intention was to inflict a penalty under the pretense of compensation; and if this is made to appear, relief may be given in equity, or on equitable principles; *Berry v. Wisdom*, 5 Ohio, N. S. 241;

Watts v. Sheppard, 2 Alabama, 425, 441; *Foley v. McKeegan*, 1 Clarke, Iowa, 1, 6; *Shute v. Hamilton*, 3 Daly, 462; *Spencer v. Tilden*, 5 Cowen, 144; *Perkins v. Lyman*, 11 Mass. 76. In the case last cited, the court said: "One point seems to be settled. The question whether a sum of money mentioned in an agreement shall be considered as a penalty, and as subject to the chancery powers of this court, or as damages liquidated by the parties, is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances, although their words are to be taken as proved by the writing exclusively."

In *Streep v. Williams*, 12 Wright, 450, the court held that, in determining whether the sum named in an agreement as that which is to be paid in the event of non-fulfillment is a penalty or liquidated damages, "it is necessary to look to the language of the contract, its subject-matter, the intention of the parties as gathered from all its provisions, the ease or difficulty of measuring the breach in damages, and the amount stipulated therefor, and from the whole to gather the view required by equity and good

conscience." The language of Chief Justice Bigelow, in *Lynde v. Thompson*, 2 Allen, 456, 459, is substantially the same.

The judgment in *Perkins v. Lyman* was approved in *Curry v. Larer*, 7 Barr, 410, and the disproportion between the injury occasioned by the default and the amount agreed on, said to indicate that the covenant was meant *in terrorem*, to induce the fulfillment of the contract, and not as a compensation for the breach. So in *Dennis v. Cummins*, 3 Johnson's Cases, 297, the defendant covenanted to pay \$2500 if he did not fulfill the agreement into which he had entered for the purchase of a farm, and it was held that, as the purchase money was only \$3500, the covenant manifestly exceeded the injury, and must be regarded as a penalty. The same rule has been applied in other instances: *Fitzpatrick v. Cottingham*, 14 Wisconsin, 219; *Cohell v. Lawrence*, 38 Barb. 643; 38 New York.

Whatever may be thought on these points, it is clear that evidence of the nature and value of the consideration is admissible for the purpose of aiding the interpretation of the contract, and showing whether it was intended as a penalty or in liquidation of the damages. See *Hodgson v. King*, 7 Metcalf, 583.

The first question in every such case is—What did the parties intend? which must be gathered from the instrument, with the aid of such light as can be derived from circumstances, and effect should be given to their purpose as thus ascertained unless it conflicts with some rule of law or equity, which cannot

be said merely because the sum on which they have agreed transcends that which would, in the opinion of a chancellor, have been an adequate compensation for the injury. See *Clement v. Cash*, 21 New York, 253, 259; *Lindsay v. Annesley*, 6 Iredell, 181; *Gower v. Saltmarsh*, 11 Missouri, 271; *Peirce v. Weber*, 47 Illinois, 41; *Gamble v. Linder*, 76 Id. 137; *Williams v. Green*, 14 Arkansas, 313; *Hodges v. King*, 7 Metcalf, 583; *Dennis v. Cummins*, 3 Johnson's Cases, 297; *Shiel v. McNitt*, 9 Paige, 101; *Foley v. McKilgore*, 1 Clarke, Iowa, 160.

Agreeably to the recent course of decision, where the intention to liquidate the damages is indisputable, it will not be disregarded because the liability imposed for the breach much exceeds the apparent injury, without such proof of fraud, undue influence, or mistake, as justifies the interposition of a chancellor; *Morse v. Rathburn*, 42 Missouri, 606; *Clement v. Cash*. "Where," said Wright, J., in the case last cited "the parties to a contract, in which the damages to be ascertained are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, and in language plainly expressive of such an agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court to say that they intended something else. When the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve, but a court of law has no right erroneously to construe the intention of the parties

when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves."

A like view was taken in *Dwinel v. Brown*, 54 Maine, 468. There the defendant agreed that, in the event of his failure to faithfully perform each and every condition and stipulation expressed in a certain license and contract for carrying on a lumbering operation upon the plaintiff's land, he would pay the plaintiff "the full and liquidated sum of \$1000 over and above the actual damages which the plaintiff might sustain by reason of such default;" and the sum thus named was held to be recoverable, notwithstanding the objection that, as it was to be "over and above" the loss actually sustained, it must be a penalty; the ground of the decision being that the intention of the parties was to liquidate such consequential damages as could not be considered by a court or jury, while leaving the others to be assessed in the ordinary course of law.

Dickerson, J., said: "It is competent for the parties, in making a contract, to leave the damages arising from a breach of its provisions to be determined in a court of law, or to specify the amount of such damages in the contract itself. If the contract is silent in respect to damages, the law will allow only the actual proximate damages. In order, however, to provide for consequential damages, or secure the profits which are expected to arise from business or contracts that depend upon the performance of the principal contract, or to save ex-

pense, or to render certain what would otherwise be difficult to ascertain, it is sometimes desirable that the contract should fix the amount of the damages. If, for instance, a party has a contract for building a ship at a large profit, conditioned upon his having her completed at a specified time, it would be competent for him, in contracting for the materials, to make the damages in case of breach sufficient to cover his prospective profits in building the ship. While, to persons unacquainted with the circumstances of the case, the damages stipulated in such a contract might seem greatly disproportionate to the loss sustained by a breach of it, they might, in fact, be insufficient to indemnify the party against the loss he might sustain in being prevented from completing the ship according to his contract. The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure; and when they have mutually agreed upon the amount of such damages, in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. As in construing the other parts of a contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. The inquiry is—What was the understanding of the parties? and when it is said, in judicial parlance, that certain language of the parties is held to mean liquidated damages, and certain other language a penalty,

this is affirmed of the intention of the parties, and not of the construction of the court in contradistinction from such intention. It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract, when their intention is clearly expressed and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law presides, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon between the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud or illegality."

In general, a covenant that a fixed sum shall be paid for the non-fulfillment of an agreement containing stipulations of various degrees of importance is a penalty, because it is not reasonable to suppose that the parties intended to apply the same measure of damages to injuries differing in nature and amount; *Davies v. Penton*, 6 B. &

C. 216; *Kemble v. Farren*, 6 Bingham, 141; *Horner v. Flintoff*, 9 M. & W. 678; *Owens v. Hodges*, 1 McMullen, 106; *Carpenter v. Lockhart*, 1 Carter, 432; *Cheddick v. Marsh*, 1 Zabriskie, 363; *Whitfield v. Levy*, 6 Vroom, 149; *Jackson v. Baker*, 2 Edwards, 471; *Niver v. Rossmann*, 18 Barb. 50; *Berry v. Wisdom*, 3 Ohio, N. S. 244; *Foley v. McKeegan*, 4 Clarke, Iowa, 1; *Bagley v. Peddie*, 5 Sandford, 192; *Shreve v. Brereton*, 1 P. F. Smith, 175.

On the other hand, where a particular covenant is singled out and an amount prescribed as that which will be due if it is not performed, the inference is strong, if not irresistible, that the contract should be taken literally and enforced as it is written; *Mott v. Mott*, 11 Barb. 134; *Watts v. Sheppard*, 2 Alabama, 425, 445; *Lange v. Week*, 2 Ohio, N. S. 519; *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 Id. 354; *Rawlinson v. Clarke*, 14 Id. 187; *Dakin v. Williams*, 17 Wend. 447; 22 Id. 201; *Pearson v. Williams*, 24 Id. 244; 26 Id. 630; *Hodges v. King*, 7 Metcalf, 583; *Mead v. Wheeler*, 13 New Hamp. 301; *Harbrough v. Tutem*, 15 Johnson, 200; *Graham v. Polk*, 1 Stewart, 135; *Shute v. Hamilton*, 3 Daly, 462.

The rule is, nevertheless, a mere guide to intention, and will not be followed where it would conflict with the meaning of the contract or the object for which it was framed; *Brewster v. Edgerly*, 13 New Hampshire, 275; *Knapp v. Maltby*, 13 Wend. 587; *Taylor v. Sandeford*, 7 Wheaton, 19; *Clement*

v. *Cash*, 21 New York, 253, 259; *Cotheal v. Talmadge*, 5 Selden, 55. In *Atkyns v. Kinnier*, 4 Exchequer, 776, the defendant, who had bound himself in the sum of £1000 as liquidated damages not to practice medicine or reside within certain limits, was held to be liable for that amount, notwithstanding the contention that one and the same sum could not have been fixed as the compensation for breaches which were materially different in kind.

The mere circumstance that the contract contains various stipulations will not however, justify the inference that a stipulation for the liquidation of damages does not mean what it says, and should be disregarded, as an empty threat; *Cotheal v. Talmadge*, 5 Selden, 551; *Bagley v. Peddie*, 16 New York, 469; *Dwinel v. Brown*, 54 Maine, 458; although it may be a ground for adopting such an interpretation when the meaning of the parties is not distinctly expressed; *Clement v. Cash*, 21 New York, 253. This is entirely consistent with the decisions which establish that when a covenant to pay a sum certain—if the covenantor does comply with the provisions of a contract into which he has entered—manifestly transcends the loss that will result from a violation of any one of them, it will be inoperative in equity as it regards all; *Heard v. Bowers*, 23 Pick. 455; *Fisk v. Gray*, 1 Allen, 133.

In *Basye v. Ambrose*, 28 Missouri, 39, it was said that "where the agreement secures the performance or omission of certain acts which are

not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely." The rule, as thus stated, seems to be in accordance with the main current of authority, and has been vindicated and applied in numerous instances; *Long v. Towl*, 42 Missouri, 548; *Shreve v. Brereton*, 1 P. F. Smith, 175, 180; *Cook v. Finch*, 19 Minnesota, 407.

In *Clement v. Cash*, 21 New York, 253, 259, the adjudications that "when the sum named as security for the performance of an agreement to do several acts will, if they are not performed, be in some instances too large, in others too small a compensation for the injury, the sum is to be considered as a penalty," were, nevertheless, declared to have "no foundation in principle or authority unless among the things agreed to be done is to pay a sum of money, and the agreement is to pay a larger sum in case of a failure to fulfill any one or more of the stipulations."

The damages may clearly be liquidated by agreement when the stipulation includes various particulars which, though differing in kind or importance, are in effect one, or together make up a whole: as when the consideration of a contract for the sale of land is in part pecuniary and in part other land; *Clement v. Cash*, 21 New York, 253; *Cotheal v. Talmadge*, 5 Selden, 551; *Bagley v. Peddie*, 16 Id. 470.

In the case first cited, Wright, J., said: "The contract in question, in legal effect, provided but for the performance of a single act on each side and at the same period of time, viz., the execution and delivery of a deed of the land by the defendant, and payment therefor by the plaintiff. That the defendant agreed to receive in payment for his deed, and the plaintiff to pay simultaneously with its delivery, the consideration in money and other property, cannot divest what was to be done of the character of a single transaction. If the defendant failed to convey, or the plaintiff to make payment in the way covenanted, there was a total non-performance. The consideration to be paid for the deed was over \$9000, \$4000 of which was to be in cash and over \$5000 in money securities, the cash and transfers of the securities to be passed over to the defendant on receipt of the deed. It is not at all like the case of *Lampman v. Cochran*, 16 New York, 275, where the contract provided, among other things, that one of the parties should give to the other on a specified day a promissory note for \$200, and on a subsequent day a bond and mortgage for \$2000, and the parties agreed therein to pay one to the other the sum of \$500 as liquidated damages, on failure to perform the contract. That case but reaffirmed the doctrine in *Astley v. Weldon*, that when a larger sum is stipulated as damages for the non-payment of the smaller one, the larger one will be held to be a penalty. In the present case the consideration agreed to

be paid on receiving a deed of the defendant's farm was over \$9000, while the sum agreed upon as damages to be paid by the party failing to perform the agreement was \$2000."

In *Cotheal v. Talmadge* the plaintiff agreed with a number of persons, of whom the defendant was one, in consideration of the sum of \$100, received from each, to furnish them with a cabin passage to California, with subsistence for a year, and with the articles and tools necessary for carrying on mining operations; and they, on their part severally covenanted that they would diligently devote themselves to obtaining gold and other precious metals, in the manner and under the regulations specified in the agreement; that a certain proportion of the earnings of each should be paid to the plaintiff, and that any of them who failed to keep his engagement should pay \$500 as liquidated damages. The complaint alleged that the defendant had violated the agreement by absenting himself from the mining district and refusing to devote himself diligently and exclusively to the search for gold while there, and claimed the stipulated amount as compensation.

Ruggles, J., said: "It is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of \$500 was made payable for the non-performance of any or either, it must be a penalty, and not liquidated damages. This doctrine, in the cases in which it is asserted, is traced to the cases of *Astley v.*

Weldon, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141, but I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is, that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations, agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty, and being a penalty in regard to one of the stipulations to be performed, is a penalty to all."

The court then went on to observe that the stipulations of a contract might be so unlike or various that the same sum could not be assessed as damages for all of them, without exposing the defendant to a liability that would be grossly disproportionate to the loss, but the case under consideration was not such a one. It was a case where unity, subordination and obedience were essential to success, and where a breach of discipline in any particular might frustrate the whole undertaking. The plaintiff was consequently entitled to recover the sum named in the agreement.

In *Leary v. Laflin*, 101 Mass. 334, the suit was on a bond "for the payment of \$1000 as liquidated damages," to the lessor of a stable and the good will of its business, "if the lessee should not keep the stable during the demised term in a manner as satisfactory to all reasonable parties as the lessor had previously done, and at the end of the term surrender said demised premises and good will in as good re-

pute and run of custom as now thereto pertain;" and the court held that "from the nature of the case, the actual damages resulting from a breach of this agreement were not capable of being ascertained by any satisfactory and known rule, and it was manifestly the intention, as it was clearly within the power of the parties, not to leave them to the uncertain estimate of a jury, but to fix them by express agreement."

It has also been held that the stipulation must be regarded as a penalty where it is so worded as to impose the same liability, whether the breach is entire or partial; *Shreve v. Brereton*, 1 P. F. Smith, 175; *Lampman v. Cochran*, 16 New York, 269, 277. In *Curry v. Larer*, 7 Barr, 470, an instrument by which a surety bound himself in the sum of \$240 for the delivery of two boat loads of coal by the principal, was held to sin against this rule, as assuming to make the obligor answerable for the whole sum unless the entire quantity of coal was delivered, and although the obligee might have received one boat load and the greater part of another; and in *Perkins v. Lyman*, 11 Mass. 76, the court took a similar view of a covenant fixing \$8000 as the measure of the damages for the violation of an agreement not to engage in a particular line of business during seven years, because the obligor would be equally liable under it whether the breach was for a month or for the whole period embraced by the contract.

In *Shreve v. Brereton*, 1 P. F. Smith, 175, the seller agreed to de-

liver 1000 barrels of petroleum during a year, in each and every month, at the price of six cents a gallon, and that if he did not comply with his agreement, the buyer should be at liberty to supply the deficiency by purchasing at the market price, and charge the seller with the difference; and the parties further bound themselves to each other in the sum of \$10,000, not as a penalty but as stipulated damages; and it was held that the parties could not have intended that the liability of the vendor should be the same whether the default consisted in the non-delivery of a single barrel or of the whole, and that the purchaser was consequently entitled to compensation for his actual loss, although exceeding the sum named in the agreement.

In *Hamaker v. Schroers*, 49 Missouri, 406, the defendant agreed with the plaintiff to deliver one hundred grain and seed drills of a particular pattern and within a specified time, for the sum of \$1600, and executed a bond in a like sum, conditioned that he would fully comply with the agreement, and the court held that the amount named in the bond should be viewed as a penalty and not as liquidated damages, because, on the opposite construction, if the defendant had made and delivered ninety drills, he would have been liable to pay the whole sum for the failure to manufacture the other ten. The same conclusion was reached in *Lee v. Overstreet*, 44 Georgia, 507, with reference to a contract to "deliver all the turpentine produced on the defendant's farm, at the price of \$5

per barrel, either party failing to perform his part to forfeit \$1000."

The objection has been obviated in other instances by treating the stipulated amount as that which would be due if the breach were entire, and giving the defendant credit at the same rate for what has been actually done or performed. See *Watts v. Sheppard*, 2 Alabama, 425, 447; *Williams v. Green*, 14 Arkansas, 312, 322; *Lampman v. Cochran*, 19 Barb. 388. In *Lightner v. Menzel*, 35 California, 452, A. let a slaughter house to B., and agreed to purchase meat of him at a stated price, either party to forfeit \$500 to the other as liquidated damages in the event of his failing to comply with the terms; and it was held that A. was liable for the meat which he had received under the contract, and also in the stipulated amount for refusing to accept the residue.

Agreeably to the view taken in some instances, a stipulation for the payment of a sum certain if the contract be not performed, should be regarded as a penalty, unless a different intention is apparent; see *Taylor v. Sandiford*, 7 Wheaton, 19; and it seems that the courts will incline to this interpretation as a means of limiting the recovery to the actual loss; *Baird v. Tolliver*, 6 Humphreys, 186; *Cheddick v. Marsh*, 1 Zabriskie, 463; *Shiel v. McNitt*, 9 Paige, 161; *Foley v. McKilgore*, 1 Clarke (Iowa), 1; *Wallis v. Carpenter*, 13 Allen, 19; *Cushing v. Drew*, 97 Mass. 445; *Whitfield v. Levy*, 6 Vroom, 149; *Shreve v. Brereton*, 1 P. F. Smith, 175, 185; *Curry v. Larer*, 7 Barr. 470.

An obligation for the payment of a gross amount conditioned to be void if the contract which it is intended to secure is fulfilled, will not readily be construed as a liquidation of the damages; see *Foley v. McKilgore*; *Taylor v. Sandiford*; *Smith v. Wainwright*, 24 Vermont, 99; and it has been held, on the other hand, that what appears in the condition of a bond or other instrument is *prima facie* to be literally performed; *Fletcher v. Dyke*, 2 Term, 32; *Williams v. Green*, 14 Arkansas, 313, 321; *Cotheal v. Tulmadge*, 5 Selden, 551, 558. The question is, nevertheless, one of intention, and the amount in which the obligor declares himself to be bound, will operate as the measure of the damages for the breach of the condition, when such is manifestly the design; *Hodges v. King*, 7 Metcalf, 583; *Bagley v. Peddie*, 16 New York, 469.

In like manner, a court will not readily interpret that as a liquidation of the damages which is designated in the agreement as a forfeiture or penalty. See *Whitfield v. Levy*, 6 Vroom, 149; *Cahill v. Lawrence*, 38 New York, 71; *Burr v. Todd*, 5 Wright, 206; *Dyer v. Dorsey*, 1 Gill & Johnson, 440; *Labenheimer v. Mann*, 19 Wisconsin, 519; although the meaning of the parties should still be deduced from the four corners of the instrument, and effect given to it when ascertained; *Streeper v. Williams*, 5 Wright, 250; *Lynde v. Thompson*, 2 Allen, 461. In this case, Bigelow, C. J., said: "Some reliance was placed in the argument on the fact that the word forfeit is used in the

contract in connection with the stipulation for the payment of damages, as indicating that it should be construed as a penalty. But the force and effect of this word, as pointing to a penalty, is entirely overcome by the explicit agreement that the entire sum should be paid in full, as well as by the other circumstances, which indicate the intent of the parties to agree on a fixed sum as the measure of damages." A like interpretation was put in *Curtis v. Brewer*, 17 Pick. 513, on an agreement to pay a penal sum in case of non-performance. So in *Smith v. Ferguson*, 7 C. B. 730, a covenant to pay a sum certain as a penalty for the violation of an agreement not to practice medicine in the same town as the covenantee, was enforced as a liquidation of the damages, because the object which the parties had in view required such an interpretation, and could not have been secured in any other way.

It was declared in like manner in *Yenner v. Hammond*, 36 Wisconsin, 277, that, "as the contract may show by its nature and import that the term 'liquidated damages' means penalty, so the force of the word 'penalty' may be overborne by the general purport of the contract. * * * * * Whatever words are used in a covenant providing a sum for damages upon breach, the mere words are not conclusive, and the court ought, in the language of Chief Justice Abbott, in *Davies v. Penton*, 6 B. & C. 216, 'to look into the whole agreement.'"

As a penalty is intended to secure the fulfillment of the contract, and not to take the place of that which

the defendant has covenanted to do or fulfill, the payment or tender of the amount will not be an answer to a suit for damages, or bill of specific performance. Hence a bond conditioned for the conveyance of land will confer an equitable right to the premises, which a chancellor may enforce. See *Papin v. Massey*, 27 Missouri, 445. The rule is the same at law, and the designation of a penalty will not preclude the recovery of a larger amount in covenant or assumption; *Foley v. McKeegan*, 4 Clarke, Iowa, 1.

Conversely, a covenant for the liquidation of the damages not merely imposes a liability for that amount on the defendant, but fixes a limit which the plaintiff cannot exceed; *Perkins v. Lyman*, 11 Mass. 76; *White v. Dingley*, 4 Id. 433; *Williams v. Green*, 14 Arkansas, 315, 322; *Main v. Ring*, 10 Barb. 59; *Pearson v. Williams*, 26 Wend. 630. For as such a stipulation is the value set by mutual agreement on the fulfillment of the contract, so it will be binding on both parties whenever it becomes requisite to assess the damages for the breach.

It has been held, on like grounds, that one who covenants to pay a fixed sum as liquidated damages has the option of complying with the contract or paying the amount named; *Lowe v. Beers*, 4 Barrow, 228; *White v. Dingley*, 4 Mass. 483; *Williams v. Green*, 14 Arkansas, 315, 322; and that the covenantee consequently cannot demand the stipulated compensation for anything short of an entire breach, and will lose the right to enforce the covenant by consenting that

the contract shall be partially fulfilled; *Williams v. Green*; *Shiell v. McNitt*, 1 Paige, 101, 106; *Shute v. Taylor*, 5 Metcalf, 61, 67. In *Shute v. Taylor*, the defendant "bound himself in the full and just sum of \$500 liquidated damages to convey three thousand feet of land, at the corner of Middle and Lawrence streets." A deed was executed in pursuance of the agreement, and was accepted by the plaintiff, but the land, when surveyed, fell short of the prescribed quantity by some five hundred feet. The plaintiff thereupon brought suit for the damages named in the agreement. Shaw, C. J., said: "One consideration is, we think, decisive, namely: that there has been a part performance, and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract, it was for an entire breach. Whether divisible in its nature or not, it was in fact divided by an offer and acceptance of part. It is like the case of an obligation to perform two or more independent acts with a provision for single liquidated damages for non-performance. If one is performed and not the other, it is not a case for the recovery of the liquidated damages. See *Chitty on Contracts*, 5 Am. ed.; *Hoag v. McGinnis*, 22 Wend. 163."

It has been held that the rule is the same in equity, and that when the parties have agreed on the compensation for the breach, a chancellor will not decree a specific performance. See *Shiel v. McNitt*, 9 Paige, 101; *St. Mary's Church v.*

Stockton, 4 Halsted, Ch. 520 ; *Bodine v. Glading*, 9 Harris, 50. In the case last cited, a stipulation that if the purchase money was not paid at the appointed time the land might be resold at the vendee's risk, was held to be a provision for the liquidation of the damages, which precluded the vendor from filing a bill to enforce the contract. Such a conclusion may be entirely just where the intention is not to provide for the fulfillment of the agreement, but that it may be disregarded on the payment of a certain sum, as when a tenant covenants not to break up pasture land, and that if he does, the rent shall be increased ; but an agreement as to the amount which shall be recoverable at law is not necessarily inconsistent with the right to come into equity for a decree of specific performance ; *Dike v. Greene*, 4 Rhode Island, 288, 295. *Prima facie*, such a stipulation is for the benefit of the covenantee, to give certainty to one remedy, and not to prevent the use of any other. See *Clark v. Jones*, 1 Denio, 516 ; *Mancius v. Sergeant*, 5 Cowen, 271, note ; *Dike v. Green*, Rhode Island, 285. If this be the signification of the contract, a chancellor will not deny the right of election which it accords.

In *Hall v. Sturdevant*, 46 Maine, 34, the court decreed the specific execution of a contract for the sale of land, although it contained a proviso that if either party made default, he should pay a "penal sum" as "liquidated damages." To justify the opposite inference, it should appear that the intention was to allow the covenantor to choose

between payment and performance ; *Fisher v. Barrett*, 4 Cushing, 381 ; *Plunkett v. The Methodist Episcopal Church*, 3 Id. 561 ; *Lowe v. Nulte*, 16 Illinois, 475 ; *Gray v. Crosby*, 18 Johnson, 219 ; *Dooley v. Watson*, 1 Gray, 414 ; *Dike v. Green*. So in *Ayres v. Pease*, 12 Wend. 393, the vendor was allowed to recover the whole amount of the purchase money, notwithstanding a stipulation that if the vendee failed to comply with the agreement or any part thereof, he should pay \$25 in liquidation of the damages and surrender the possession of the land.

In *Dooley v. Watson*, 1 Gray, 414, the court held that one who agrees to convey land on certain terms, and at the same time, by another written agreement, promises to forfeit a sum of money if he fails so to convey, may be compelled in equity to convey the land, on the performance of the terms of the agreement by the other party. Shaw, C. J., said : 'The promise of the defendant to pay the plaintiff one hundred dollars, if the defendant should fail to perform his agreement to convey the land, was merely a security for the performance of that agreement. Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere condition to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out. The agreement between the parties in this case is clearly no alternative

agreement. It was an absolute agreement to convey real estate, and may be treated in all respects as such, either in a court of law or equity, without regard to the note."

In *The Grand Tower Co. v. Phillips*, 23 Wallace, 478, A. agreed to deliver monthly to B., at a price named, a certain number of tons of coal, with a proviso "that if A. did not so deliver the coal he should pay to B. twenty-five cents for each ton not delivered," "or, instead thereof, B. may elect to receive all or any part of the coal so in default in the next succeeding month." Coal rose, suddenly, in value. A did not deliver any coal in the first month, and B. elected to take it in the next; but A. delivered none in either month. The court held that B. was entitled to the actual damages, and could not be made to take the twenty-five cents per ton. Bradley, J., said: "It is evident, from an inspection of the contract, that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month, was a substitute for the liquidated damages of twenty five cents per ton. With regard to that particular amount of coal, the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiff 'so elected, to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month

to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs, the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it, a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be furnished, at all events, and, if they elected to do this, it was the duty of the defendant to furnish it."

In *Clark v. Jones*, 1 Denio, 516, the plaintiff leased certain premises for a term of years, at a rent of \$3300 per annum, payable quarterly, the rent to be secured by the bond of the lessee with surety, in the sum of \$3300, and it was also provided that the lease should cease and determine if the rent should be in arrear for thirty days after any day of payment, and that upon such failure to pay rent the bond should be forfeited, and the amount of \$3300 should be paid and be considered liquidated damages for the non-performance. Rent being in arrear, the lessor brought suit on the bond and obtained judgment for the rent due, and subsequently issued a *scire facias* setting forth the facts and claiming the rent which had accrued since the institution of the former proceeding. It was contended for the defence that on the breach of the condition the lessor ceased to be entitled to the rent as such, and could only re-

cover damages as liquidated by the agreement. The court was of opinion that the true intent and meaning of the contract was to give the lessor his election to avoid the lease and claim the \$3300, or affirm it and enforce the payment of the rent, and that having chosen the latter alternative the obligation was a continuing one, and the *scire facias* might well be maintained. See 1 Smith's Leading Cases, 112, 7 ed.

It is clear, under the authorities

and on principle, that one who claims or accepts the benefit of a provision for the liquidation of the damages will lose the right to enforce the contract specifically. See *Haldeman v. Jennings*, 14 Arkansas, 329; *Shiel v. McNitt*, 9 Paige, 101; and in *Shiel v. McNitt*, the bill was dismissed on proof that the complainant had taken a bond from the defendant for an amount exceeding that which the latter was to pay if he did not comply with the terms of the agreement.

INDEX

TO THE NOTES, ENGLISH AND AMERICAN, CONTAINED

IN VOLUME II.

THE NUMBERS REFER TO THE PAGES OF THE AMERICAN EDITION.

ABATEMENT OF LEGACIES.

On a deficiency of assets for debts, general legacies applicable before specific legacies, 634.

But where pecuniary legacies are bequeathed with a demonstration of a particular fund or property as the means of payment, they will not be compelled to abate or contribute, until the fund or property on which they are so charged is exhausted, 337-339.

If general legacies more than sufficient abate among themselves, 634.

Legacy apparently residuary, may be specific when testator contemplates a certain overplus, *ib.*

And will abate only with specific legacies, *ib.*

Secus, when testator does not know or assume to know amount of fund, 635.

Semble, pecuniary legatees, on a devastavit, are not to share losses with residuary legatees, 636.

Unless they have waived priority by their dealings with the executor, *ib.*

When a residuary legatee or a next of kin can be called upon, by the others, to refund in consequence of a devastavit, *ib.*

Where a legacy charged on real estate in aid of the personal, is payable out of the real estate, if the personal estate is insufficient through a devastavit, 636, 637.

Abatement of legacies and annuities rateably, 637.

General legacy for valuable consideration, entitled to priority over merely voluntary legacies, *ib.*

So a legacy for the relinquishment of dower, *ib.*

Or of a debt actually due, *ib.*

Secus, where a legacy is given on condition of executing a release where no debt is due to the legatee, *ib.*

Annuity charged on personalty abates proportionably with legacies, *ib.*

Proportional abatement, how calculated, 638.

Annuities given as specific interests in real estate do not abate with legacies, *ib.*

Though charged on real estate, *ib.*

Annuities abate among themselves, *ib.*

Corpus of estate insufficient to pay arrear of annuities charged thereon, how divisible, *ib.*

Where all the annuitants are living at the period of division, *ib.*

Where all are dead, *ib.*

Where some are dead, *ib.*

Immaterial that annuity is reversionary and falls into possession after testator's death, *ib.*

ABATEMENT OF LEGACIES, continued.

Annuity to executor for his trouble, not entitled to priority, 639.

Testator may prefer one legatee to another, *ib.*

But his intention must be clear, *ib.*

Specific legacies not applicable to debts until general legacies exhausted, 639, 652.

And do not contribute to payment of debts until entire exhaustion of general personality and descended lands, and then entitled to contribution from lands devised, 326, 652.

Nor are demonstrative legacies, 639, 652.

Except they become general legacies by the failure of the fund, *ib.*

Legatee of a demonstrative or specific legacy can compel contribution from devisee of land not charged with debts, *ib.*

General residue applicable before specific legacy charged with debts and legacies, *ib.*

Order of application of property for payment of debts, 326, 376, 652.

See ADEMPTION—ANNUITIES—ASSETS—LEGACY—MARSHALLING—REPETITION OF LEGACIES—SATISFACTION.

ABSTRACT OF TITLE.

When time of delivery of essence of contract. *See SPECIFIC PERFORMANCE.*

ABUSE OF CONFIDENCE, 1233.

See UNDUE INFLUENCE.

ACCIDENT.

Not relieved against to prejudice of purchaser for value without notice, 24.

ACCOUNTS.

When right of equitable set off exists, 1338, 1347.

ACQUIESCENCE.

When operative as estoppel, 30.

Of ward, 1437.

See COMPROMISE—TRUSTEES AND EXECUTORS, LIABILITIES OF—UNDUE INFLUENCE—VOLUNTARY DONATION.

ACT OF PARLIAMENT.

See STATUTE.

ACTION.

When compromise of, sustained, 1723, 1724. *See SUI.*

ADEMPTION.

Distinction between satisfaction, ademption, and revocation, 782, 803.

General legacy, except in the case of a subsequent portion given to a child, not liable to ademption, 620.

Specific legacy adeemed, if not in existence at testator's decease, 620, 653, 663.

The animus adimendi not considered, 620, 668

And ademption may take place in opposition to intention, 668.

A contrary opinion held in some of the cases, ib.

Specific legacy not adeemed by change which leaves subject-matter substantially the same, 664, 667.

Statutes in New York and Kentucky, 668.

Specific legacy of goods at a particular place adeemed by removal by the testator, 621.

Or by an agent with his approbation, *ib.*

By loss of goods insured, during life of, or at the same time as the death of the testator.

Temporary or accidental removal may not amount to, 622.

Nor a fraudulent or tortious removal, *ib.*

Lord Hardwicke's distinction as to goods on board a ship, *ib.*

Removal does not effect where words of bequest have not necessarily a reference to a particular locality, *ib.*

A debt generally adeemed by receiving it, 623, 664, 671.

Although paid off compulsorily by debtor, 669.

And after insanity of testator, ib.

But not necessarily by taking new security, ib.

Or substituting third person for original debtor, 671.

Or changing form of debt in any manner if debt still continues, 669,

When legacy is of debt, and what may be received from such source, payment is not ademption, 651, 672.

ADEMPTION, continued.

Aliter when gift is of what may be collected after testator's death, 673.

Legacy of stock not delivered by dissolution of corporation, 669.

Investing it on another security, 624, 669.

Distinction between a voluntary and compulsory payment of debt of no weight, 624, 664.

Ademption may be partial or total, 800, 801.

Partial receipt of debt an ademption pro tanto, *ib.*

When receipt of money not an ademption of a debt, *ib.*

Bequest of debt may comprehend it in its altered state, 625, 651.

Of stock by transfer from name of trustee, when it takes place, 626.

When not, *ib.*

Specific legacy of stock adeemed by sale, not revived by repurchase, *ib.*

A mere nominal change may not amount to, 627, 669.

As if stock be converted by Parliament into a different species, 627.

Or by transfer from trustee to testator, *ib.*

Or by railway shares being converted into consolidated stock, *ib.*

Or by transfer by fraud, 627, 628.

Or without authority, 628.

Or if testator dies before authority to sell be carried into effect, *ib.*

Where things bequeathed are disposed of by others after the insanity of the testator, 628, 629.

When by order of Court of Chancery in lunacy, 629.

Specific bequest of share of profits of partnership, not adeemed by new articles of partnership, *ib.*

Bequest of leaseholds adeemed by taking a new lease, *ib.*

Semble, not where legal estate is in a trustee, *ib.*

Takes place where lease is after the will assigned upon other trusts, 630.

But not where intention appears to pass subsequently acquired interests in lease, *ib.*

Takes place by under-lessee taking assignment of the original lease.

Unless intention to pass existing interest appears by codicil, *ib.*

And see now 1 Vict. c. 26, s. 23, *ib.*

A general legacy made specific by a subsequent instrument, not set up by ademption of the specific legacy, *ib.*

Specific legacy not adeemed by being pawned or pledged, *ib.*

Legatee will be entitled to have it redeemed, *ib.*

Or to compensation out of the general assets, *ib.*

Specific legacy of lease, where rents applicable in reduction of debt, *ib.*

How far specific legatee of shares entitled to have calls paid out of testator's personal estate, 631.

Result of cases according to Sir J. Romilly, M. R., 631.

Whether specific legatee or residuary estate liable to calls on shares fully paid up and specifically bequeathed, *ib.*

To whom bonuses or shares specifically bequeathed belong, 632.

Dividends or profits of partnership, *ib.*

When parol evidence admissible to identify property bequeathed, 674-676.

Demonstrative legacy not adeemed by non-existence of the fund out of which it is primarily payable, 633, 655.

But testator may show his intention that legatee is only to be paid out of a particular fund, 633, 676.

Adeemed legacy not revived by codicil confirming a will, 633.

Legacy remains a charge on land though revoked by a general bequest to another, 634.

Ademption of legacy by a portion. *See SATISFACTION.*

Ademption between parent and child. *See SATISFACTION*, 1-4.

debtor and creditor. *See SATISFACTION*, 5, 6.

See ABATEMENT—LEGACY—REPETITION OF LEGACY.

ADMINISTRATOR. See EXECUTOR.

Compensation of. See TRUSTEE.

Liability of. See TRUSTEES AND EXECUTORS, LIABILITY OF.

ADVANCEMENT.

What constitutes, 818.

When ademption of legacy to child, 757-760, 765, 779, 781, 784, 789, 796. *See SATISFACTION*, 1, 5.

ALLOWANCE, continued.

When bequest is subsequent to advance legatee must elect, 766, 819.

Prior advancement not satisfaction of subsequent legacy unless so agreed by legatee, 814-816.

ADVOWSON.

Mortgagor entitled to nominate to, 1053.

AFTER ACQUIRED PROPERTY.

When assignable, 1609.

See **EQUITABLE ASSIGNMENT**, 1.

AGENT.

Not allowed to profit by agency, 519.

Authority of, to sign written instrument, need not be in writing, 1102.

When notice to, is notice to principal. See **NOTICE**, 5.

AGREEMENT. See CONTRACT.**ANNUITIES.**

Are generally legacies, 613.

Comprised within the word legacies, when, *ib.*

Whether they are perpetual, or for life only, 614, 615.

Whether a charge upon the corpus, or payable out of income, 615-617.

Effect of acquiescence, by annuitant, in not resorting to corpus, 617.

Corpus liable for arrears, when, *ib.*

Annuitant entitled to receive money requisite to purchase, when, 618

Though annuity be only for life, *ib.*

Or the representative of annuitant dying before purchase of, *ib.*

And though money is to arise from residuary estate, 619.

Or from the sale of land, *ib.*

And the annuitant dies during the life of person having a prior interest in the land, *ib.*

Secus, where there is only a covenant or direction to pay out of an estate, *ib.*

Abate ratably with legacies, 637.

See **ABATEMENT OF LEGACIES—LEGACY**.

APPOINTMENT.

When exercise of power of, renders appointed property assets for payment of appointor's debts, 378. See **ASSETS**.

APPORTIONMENT.

Between legatee for life and reversioner, 695, 696, 713-716, 721.

ARTICLES OF AGREEMENT. See EXECUTORY CONTRACT.**ASSETS.**

Distinction between legal and equitable, 358.

Equity follows the law in administration of legal assets, 381, 388.

Distributes equitable assets equally, *ib.*

But will give full effect to specific liens or pledges whether acquired by means of greater diligence or otherwise, 390.

1. Legal assets, what are, 359.

Are assets recoverable by executor *virtute officii*, *ib.*

Although they are recovered in equity, *ib.*

Personal estate, including leaseholds, legal assets, *ib.*

Equity of redemption of sum of money charged on land is legal assets, *ib.*

Reversionary annuity, *ib.*

Real estate, how far liable by common law to debts, 255, 323, 359.

By statute law, 360.

Equity of redemption of mortgage in fee made legal assets by Sir J. Romilly's Act, *ib.*

Real estate assets for payment of debts as against lord claiming by escheat, *ib.*

Creditors by specialty in which heirs are bound have priority over those where the heirs are not bound, 361.

Ordinary course of administration of legal assets, 361, 362.

Liability of executor or administrator for payment of inferior debts first, 362, 364.

May prefer any creditor of equal degree before others, 363.

ASSETS, *continued*.2. *Equitable assets*, what are.

Lands devised though to executors as trustees for payment of debts, equitable assets, 364, 383, 388.

Or when devised, or descended to the heir charged with debts, *ib*.

Not necessary that descent should be broken, *ib*.

Where executor has a naked power to sell, *ib*.

Distinction between an express devise, and a charge of lands, for payment of debts, *ib*.

As to the order in which they are applied in payment of debts, *ib*.

With regard to the operation of the Statute of Limitations, *ib*.

When bequest or devise for payment of debts, will prevent the bar of the statute, 3^d 3, 384.

A devise of part of estate for payment of debts, if it be sufficient, is within Statute of Fraudulent Devises, 365.

If insufficient, is fraudulent, *ib*.

Or if a devise be not for payment of *all* debts, *ib*.

But a direction to pay simple contract before specialty creditors is good, *ib*.

Remedies given to specialty creditors by 3 W. & M. c. 14, confined to sums certain due in testator's life, *ib*.

Remedy extended by 1 Will. 4, c. 47, *ib*.

Charge of debts in equity comprise damages for a breach of covenant after testator's death, *ib*.

A direction that produce of real estate shall form part of personalty will not convert it into legal assets, *ib*.

Secus, where the sale is by the direction of the Court, 366.

3 & 4 Will. 4, c. 104, not applicable to estates charged with or devised, subject to payment of debts, *ib*.

Remarks in former edition against the distinction between specialty and simple contract debts in the administration of assets, *ib*.

Distinction abolished by 32 & 33 Vict. c. 48, 367.

Real estates in the West Indies cannot be devised so as to make them equitable assets, *ib*.

Right of retainer by executor or administrator, 367-369. *See* RETAINER.

What amounts to a charge of debts, 369.

As a general rule a mere general direction by a testator that his debts shall be paid, is sufficient, *ib*.

Although there is no devise or mention of realty, 370.

First exception, where, after a general direction for the payment of debts, a particular fund is specified, *ib*.

But not where there is a subsequent charge on the residuary personal estate, *ib*.

An express charge not affected by the appropriation of particular lands for payment of debts, 371.

Nor by a qualified charge in the same will, *ib*.

Second exception, where debts are directed to be paid by executors, *ib*.

Unless they are devisees of the real estate, *ib*.

Secus, where one only of them is a devisee, *ib*.

Unless intention of testator otherwise appears that he intends to charge the land devised to one executor, *ib*.

Where a charge of debts is a mere form, land not rendered equitable assets, *ib*.

As to whether expressions which are sufficient to charge real estates with debts will charge legacies, *ib*.

A direction to raise money for payment of debt out of rents and profits a sufficient charge, *ib*.

A charge of debts contracted includes those due at the death, 372.

Lien on land not affected by charge, *ib*.

As a mortgage, *ib*.

Or judgment, *ib*.

Neither debts by specialty nor by simple contract a lien on lands in the hands of his debtor, his heir, or devisee, *ib*.

Even since 3 & 4 Will. 4, c. 184, *ib*.

Lands in the hands of the alienee, though with notice that debts were unpaid, not bound, *ib*.

Mere deposit of title deeds of land by heir or devisee not a sufficient alienation to defeat creditors, *ib*.

Nor a covenant to settle it, *ib*.

ASSETS, *continued*.

Nor a judgment entered up against the heir or devisee, *ib*.

Equity of redemption of an estate in fee formerly considered equitable assets, 373.

Except where a term was mortgaged and the reversion in fee was left in the mortgagor, *ib*.

• Equity of redemption of mortgage in fee now legal assets, *ib*.

Equity of redemption of a term of years held in some cases to be equitable assets, *ib*.

Doubt thrown on those cases by Mr. Cox, *ib*.

Trusts of a chattel held to be equitable assets, *ib*.

But not an equity of redemption of a sum of money charged on land, 374.

Or produce of equity of redemption of leaseholds for lives sold by Court, 375.

Judgment creditor is entitled to priority of payment out of equity of redemption over simple contract creditors, *ib*.

Separate property of married women equitable assets, *ib*.

Order in which equitable assets are administered, 376, 385

Specialty and simple contract debts paid, *pari passu*, *ib*.

Claim of incumbrant for dilapidations, *ib*.

Debt contracted by Englishmen abroad not payable in priority to other creditors, *ib*.

Notwithstanding *lex loci contractus*, *ib*.

Debts paid first where lands are charged with debts and legacies, *ib*.

Personally primary fund for payment of legacies as well as of debts, 257, 323.

Even when charged on the realty, 257, 330.

What will operate as a charge of legacies, 331, 348.

Intention to impose a charge must be clearly apparent, *ib*.

Intention may be deduced inferentially, *ib*.

When implied from blending real and personal property as residue, in one bequest, 348, 353.

Order in which assets, partly legal and partly equitable, are administered, 326, 376.

1. Personal estate not specifically bequeathed, *ib*.

Unless exempted, *ib*.

2. Real estate devised for payment of debts, *ib*.

3. Real estates descended, *ib*., 377.

4. Real estate devised charged with debts, *ib*.

5. General pecuniary legacies, *ib*.

6. Real estate devised not charged with debts including lands comprised in a residuary devise, and personal estate specifically bequeathed, 377, 652.

And they must contribute ratably, *ib*.

Unless one is made primarily liable, *ib*.

Whether specific or pecuniary legatees entitled to contribution from devisees for payment of debts due by simple contract, *see* MARSHALLING, 4.

7. Personal property appointed by person having a general power, and which forms part of his assets, *ib*.

But there must be an actual execution of the power, *ib*.

Since Lord Romilly's Act, freeholds appointed by persons having general power are assets, 378.

Even for payment of simple contract debts, *ib*.

But assets becoming such by appointment, only applicable after the assets really the property of the appointor, *ib*.

But a bona fide purchaser from appointee will be preferred to creditors, *ib*.

Reason given by Sir W. Grant, M. R., *ib*.

Feme covert exercising power does not make appointed property assets, 379.

Except in cases of fraud, *ib*.

Lapsed shares of real and personal estate, how applicable, *ib*.

Creditors having a preference on legal assets postponed until other creditors are put upon an equality out of equitable assets, *ib*. *See* MARSHALLING.

So trustee, whether creditor or not, retaining legal assets in payment of his debts, *ib*.

Specialty and simple contract creditors now payable *pari passu*, 380.

Legal rights of creditors not altered by mode of distribution, *ib*.

Creditor in default for not coming in under a decree, *ib*.

Assets of deceased partner equitable assets as between his executor and his creditors, 381, 384, 391-429.

Distribution of partnership assets. *See* PARTNERSHIP.

When marshaled. *See* MARSHALLING.

See TRUSTEES AND EXECUTORS, LIABILITIES OF.

ASSIGNEE.

Of equity, take subject to prior equities, 50, 63, 70, 71. See NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE.

Of bankrupt acting as solicitor to fiat, only entitled to costs out of pocket, 575.

Entitled to all securities available to assignor, 1667.

When necessary to sue in name of assignor, 1624.

In Pennsylvania, must prove consideration, 1674.

Protected against acts of assignor and debtor after notice of assignment, 1624, 1667.

Must be diligent in perfecting title, 1660.

May exercise equity of redemption, 2006.

Of equitable assignment, remedies of, 1667, 1671. See EQUITABLE ASSIGNMENT.

Of mortgage. See MORTGAGE.

ASSIGNMENT. See EQUITABLE ASSIGNMENT—MORTGAGE—PURCHASER BONA FIDE WITHOUT NOTICE.

Of one of several demands, secured by same mortgage, 2008, 2009.

Of partnership property to separate account. See PARTNERSHIP.

Of debt. See DEBT.

Of mortgage. See MORTGAGE.

ASSIGNOR.

Declaration of, after assignment, not admissible against assignee, 1668. See EQUITABLE ASSIGNMENT.

ATTORNEY.

When notice to, is notice to client, 134. See NOTICE, 5.

Costs of mortgagee acting as his own solicitor, 517.

Compensation of, when also trustee and acting professionally for his cestui que trust, 517, 523, 547, 567, 574, 581, 583, 589.

Fees of, allowed as a proper disbursement in the accounts of fiduciaries, when reasonable and apparently necessary. See TRUSTEE.

Cannot pendente lite purchase subject-matter of suit from his client, 1223.

When clerk of may receive gift from client, 1227.

Mistake or ignorance of, in legal proceedings, no ground for equitable interference, 1335.

Contract with, for contingent fee, 1638, 1641.

When gifts from client, set aside. See UNDUE INFLUENCE—VOLUNTARY DONATION.

AWARD.

When proceeding on, enjoined, 1388.

BAILMENT.

For use of third person, when amounting to equitable assignment, 1659.

BANKRUPTCY.

When creditor holding collateral is entitled to prove for whole debt, 257.

BEQUEST.

When residuary, 333. See MARSHALLING, 4.

For life, 686. See CONVERSION OF RESIDUE.

BILL OF EXCHANGE. See PROMISSORY NOTE.**BILL OF LADING.**

May be varied by parol, 947

BILL OF SALE.

When treated as mortgage, 2005.

BONA FIDE PURCHASER. See PURCHASER.**BOND.**

Reformation of, 960.

Becomes at law, absolute on delivery, notwithstanding declarations to contrary, 949

If executed by false representations not binding, 950-958.

BOOK ENTRIES.

Referred to in will, when competent evidence, 816, 818.

BOUNDARIES.

Jurisdiction of the Court to issue commission to ascertain, 853.

Origin of it, ib.

Mere confusion of boundaries not sufficient ground for commission, 854.

BOUNDARIES, continued.

- Refused in cases of parish and manors, 854, 855.
- Some equity must be superinduced, 854, 855, 861, 863.
- Not sufficient that complainant's title is equitable*, 863.
- Doctrine in Pennsylvania*, 861-863.
- Fraudulent encroachment of one of the parties, 856.
- Confusion caused by act or default of defendant*, 864.
- Tenant neglecting to preserve the boundaries between his own and his landlord's lands, *ib.*
- A tenant for life, *ib.*
- Semble, even in case of tenant or lessee of one manor being owner of another, *ib.*
- One individual holding lands belonging to several offices, 857.
- When confusion caused by devisor and trustees, *ib.*
- Relief granted against volunteers, *ib.*
- Or purchasers with notice, *ib.*
- Principle on which cases proceed, 857, 858.
- Plaintiff must show that some portion of the land is in possession of the defendant, 858.
- And plaintiff's title to some lands in possession of the defendant must be established, *ib.*
- Inquiry when directed, *ib.*
- Commission or issue when directed, 859.
- Necessity for assistance of Court must be shown, *ib.*
- Equity also interposes to prevent multiplicity of suits, *ib.*
- Review by Lord Cottenham of the doctrine laid down in the principal case, *ib.*
- Relief where charity lands cannot be ascertained, *ib.*
- Semble, Court has jurisdiction to issue commission to ascertain boundaries of lands in our colonies, 860.
- Relief when lands, out of which rents are payable, cannot be discovered, in what cases granted, *ib.*
- Court will not interfere in the case of heriots payable by custom out of chattels, when, *ib.* See CHARITY.

CANCELLATION.

Jurisdiction of equity to compel, 1353-1356.

CAPITAL.

Of infants' estate, when applied in maintenance. See INFANTS, 3.

CHAMPERTY.

Equity will not enforce agreements partaking of, 1601-1605, 1631.

What constitutes, 1601-1605, 1631-1648.

See EQUITABLE ASSIGNMENT.

CHARGE.

Payment of legacies charged on land. See MARSHALLING.

Of debts, what amounts to, 369. See ASSETS.

Of debts, does not affect lien previously acquired, 372.

Whether liability for payment of sum due after decease is included in charge of debts, 778.

CHARITY.

No marshalling of assets for, 248. See MARSHALLING.

Lands belonging to, commission to ascertain, lands of equal value to be substituted for when, *ib.*

CHATTELS.

Failure of consideration no defence to sale of, 1107.

When contract for sale of, assignable, 1610.

See EQUITABLE ASSIGNMENT—CONVERSION OF RESIDUE—NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE.

CHECK.

When equitable assignment of deposit, 1653.

CHILD.

Who appointed guardian of. See INFANTS.

Gift from or to parent. See UNDUE INFLUENCE—VOLUNTARY DONATION.

CHOSE IN ACTION.

When assignee entitled to protection as bona fide purchaser without notice, 50-61. See PURCHASER BONA FIDE WITHOUT NOTICE.

Not assignable at common law, 1623.

Doctrine in equity, ib.

Right of assignee now recognized as law, 1668.

When assignable, 1623, 1631.

Mere personal torts not assignable, 1625-1626.

Aliter of injuries to property, ib.

May be subject of gift, 1646.

Remedies of assignee of equitable assignment, 1667-1671.

Assignment of, is subject to all equities enforceable against assignor, 56, 1672.

Assignment of, cannot be set aside against bona fide purchaser from assignee, 43, 1673.

Of married woman, how reduced to possession, 1570-1573. See EQUITABLE ASSIGNMENT.

CLERGYMAN.

When gift from parishoner set aside, 1230. See UNDUE INFLUENCE—VOLUNTARY DONATION.

CLIENT.

When gift to attorney set aside. See UNDUE INFLUENCE—VOLUNTARY DONATION.

COLLATERAL SECURITIES. *See CREDITOR—MARSHALLING—SUBROGATION—SURETY.*

COMMISSIONS.

When fiduciaries entitled to. See TRUSTEES.

COMPENSATION.

When specific performance decreed with. See SPECIFIC PERFORMANCE

Of Trustees, executors, etc. See TRUSTEES.

See PENALTIES AND FORFEITURES.

COMPROMISE.

WHEN SUSTAINED.

Of doubtful claims upheld, although claim relinquished was incapable of being enforced, 1684, 1703.

Civil law, 1684.

Law of Scotland, ib.

English law, ib.

Adequacy of consideration immaterial, 1685, 1723.

Unless grossly inadequate and coupled with other circumstances indicating undue influence, 1723.

Doubtful question of construction may be settled by, 1688.

Compromise by order of Court will not exclude a point of construction not under consideration, 1691.

Executory agreement of compromise may be specifically enforced, 1707.

Non-existence of risk compromised immaterial in equity, in absence of circumstances amounting to fraud, 1707-1723.

And same rule prevails at law, 1709-1716.

Purchase of doubtful right, or of invalid right treated as doubtful, binding, 1710.

Such claim may be good foundation for contract, 1711.

But parties must believe that doubt exists, 1712.

Though it is immaterial that demand was invalid, 1713, 1714.

Whether person is bound by a compromise which assumed something to be due not really due, 1690, 1691.

Compromise will be invalid if material fact assumed as certain did not exist, 1715-1718.

Part, seeking to enforce compromise must have had beneficial interest in property in dispute, 1719.

Whatever may be subject of wager may be matter of compromise, and contract will fail if the case be one where no doubt could exist, 1719-1723, 1737.

Compromise of pending suit valuable consideration though incapable of being prosecuted to judgment, 1723, 1724.

But good faith and existence of honest doubt are essential, 1724.

Payment of smaller sum in compromise of larger, valid defence at law and equity, if amount due admits of reasonable doubt, 1728-1731.

COMPROMISE, *continued*.

Creditor cannot avoid condition by declaring that sum is accepted on account, 1729.

Compromise after charge of fraud made by bill fails, not decreed, when, 1693.

Compromise made after a bill is filed, *ib*.

Steps to be taken when its validity is doubtful, *ib*.

Letters relating to, "without prejudice," not used as evidence, *ib*.

Or to take a claim out of the Statute of Limitations, *ib*.

But admissions of independent facts admissible, though contained in offer of compromise, *ib*.
Cannot be entered into by counsel or attorney against express authority of the client, *ib*.

Action for so doing lies against attorney, *ib*.

Not against counsel, *ib*.

Power of counsel or attorney in ordinary cases to effect, so as to bind the client, *ib*.

Unless the dissent of the client be known to the opposite party, *ib*.

Power of the Court to effect on behalf of infants, *ib*.

Of married woman in respect of her reversionary interest in a fund, *ib*.

Compromise in nature of family settlement generally enforced, 1683, 1684, 1725-1728.

Although contracting parties may be fiduciaries, married women, or infants, 1725.

But agreement must be complete, 1728.

May be implied, when, 1685.

Transaction between father and son on barring an estate tail, looked upon as a family arrangement, 1689.

Family arrangement not void under former usury laws where there was a provision for lender beyond legal interest, *ib*.

Family arrangement brought about by the fraud of a third party, if not unfair, not set aside, 1690, 1733.

Deed carrying out a family arrangement not binding if not executed by all parties, 1694.

Family arrangement between husband and wife, 1696. *See* SEPARATION.

In the case of compromises, especially in the nature of a family arrangement, ignorance of fact or law, common to all parties, immaterial, 1686, 1687.

Parol partition of land between members of the same family, 1725.

Agreement among members of family to share fortune of living ancestor, 1727.

Compromise of family dispute must be conducted with highest good faith and fullest communication of knowledge, 1691, 1692, 1727.

Especially if parties are not on equal terms, 1693.

WHEN SET ASIDE.

Not enforced when tainted with fraud, 1731.

Seemle, not carried into effect where parties do not understand their rights, or the nature of the transaction, especially if there exist circumstances from which fraud may be inferred, 1694.

Or if entered into under influence of threats, or duress, 1694, 1733.

Or under pressure of trustees in violation of their duty, *ib*.

Or if it is inconsistent with the rights of the parties, in a manner not contemplated by them, *ib*.

Not necessary that a party should distinctly understand his rights, if they were understood by his agent, *ib*.

Review of the authorities, by Lord Cottenham in *Stewart v. Stewart*.

When concealment of fact may amount to fraud, 1691, 1692, 1722, 1727, 1731, 1732.

Mere non-disclosure not sufficient to invalidate, compromise useless settlement, would not otherwise have been made, 1732.

Cannot be opened because unwisely or unfortunately executed, 1733.

Nor because unequal, 1704.

Nor to let in after-discovered evidence tending to show invalidity of claim compromised, 1704.

Mere mistake of law no defence to, 1734, 1737.

But misconception of elementary doctrines may afford ground for inferring undue influence. 1736.

Distinction between mistake of law and mistake of fact, 1685.

Lord King's decision in *Lansdowne v. Lansdowne*, that ignorance of the law was a sufficient reason for setting aside a compromise, disapproved of, 1688.

No relief granted against unless Court be satisfied that conduct of a party has been influenced by mistake, 1689.

Mistake of law or fact outside of risk may invalidate contract, 1690, 1691, 1715-1718.

Effect of acquiescence in, 1688.

CONCEALMENT.

Of fact, when compromise avoided by reason of, 1691, 1692, 1722, 1727, 1731, 1732.

CONDITIONS.

In restraint of marriage, 475. *See* MARRIAGE.

Annexed to gifts for the purpose of effecting separation of husband and wife, void, 499. *See* SEPARATION.

Deed upon, not generally considered as mortgage, 1997.

CONDITIONAL SALE. *See* MORTGAGE.**CONFLICT OF JURISDICTION,** 1396, 1398, 1402. *See* INJUNCTION.**CONFIRMATION.** *See* UNDUE INFLUENCE—VOLUNTARY DONATION.**CONFUSION OF BOUNDARIES.** *See* BOUNDARIES.**CONSIDERATION.**

What sufficient to avail vendee of defence of being bona fide purchaser without notice, 82–88.

When receipt in deed is evidence of payment of, 106–109, 133.

May be proved by parol, 946, 947, 964, 1031.

Sealed instrument not invalidated by false representation as to, 960.
doctrines in Pennsylvania and Massachusetts, 963.

Aliter of unsealed instrument, ib.

Adequacy of, when inquired into, 1031–1036.

When deed converted into mortgage, by proof of, 965.

Inadequacy of, when badge of fraud, 1237. *See* UNDUE INFLUENCE.
no defence to compromise. *See* COMPROMISE.

Failure of, when defence, 1344, 1363.

When pre-existing debt consideration for new promise, 1082, 1083, 1645, 1670.

In Pennsylvania, burden of proving rests on assignee, 1674.

For agreement to extend time of payment, 1911.

When deed considered mortgage by reason of. *See* MORTGAGE.

CONSTRUCTIVE NOTICE.

Of unrecorded deed or mortgage, 37–39. *See* NOTICE—PURCHASER BONA FIDE
WITHOUT NOTICE—REGISTRATION.

CONTINGENT BEQUEST.

When allowance for maintenance made from. *See* INFANTS, 3.

CONTINGENT INTERESTS.

When assignable, 1606. *See* EQUITABLE ASSIGNMENT, 1.

CONTRACT.

False representations invalidate, 950–958.

When parol testimony admissible to modify, 1020–1025.

Intoxication at time of execution, 1036, 1369.

By husband and wife, for sale of wife's land, not enforced, 1040.

When and against whom reformed, 989, 990. *See* REFORMATION.

Offer cannot be retracted after acceptance mailed in Post Office, 1080.

When time essence of, 1107. *See* SPECIFIC PERFORMANCE.

Proceedings on illegal contract enjoined, 1358, 1374.

By father to relinquish paternal rights, 1507, 1510.

Of parents, as to religion of child, 1458, 1459.

For sale of after-acquired property, 1610.

Executory contract, when assignable, 1628–1630. *See* EQUITABLE ASSIGNMENT, 1.

Waiver of sealed agreement by parol, 1914.

In nature of compromise, when enforced. *See* COMPROMISE.

Prohibiting marriage. *See* MARRIAGE.

When parol evidence admissible to explain. *See* PAROL EVIDENCE.

When specific performance of, decreed. *See* SPECIFIC PERFORMANCE.

See CHATTEL—EXECUTORY CONTRACT—STATUTE OF FRAUD—UNDUE INFLUENCE—VOLUNTARY DONATION.

CONVERSION.

Of partnership assets into separate property, when restrained, 397–399, 400, 402, 414, 415. *See* PARTNERSHIP.

CONVERSION OF RESIDUE.

- Of perishable property given to persons in succession, 686, 697, 701, 709.
Such as terms for years, or other interests, which will necessarily determine at a fixed period, 701, 702.
- Of reversionary property, 686, 702.
- What income tenant for life entitled to, 695, 696, 721.
- Income of estate, during interval preceding conversion, is capital*, 713-716.
- But first taker entitled to interest thereon*, ib.
- Apportionment between legatee for life and reversioner of profits of special partnership*, 716, 721.
- Legatee for life ordinarily entitled to accretions and accumulations*, 711.
- Comments of Lord Cottenham upon the rule in *Howe v. Earl of Dartmouth*, 686, 687.
- Result of rule laid down by Lord Eldon and Lord Cottenham, 687.
- Instances of the application of the rule, 688-690.
- Absence of direction to convert, 690.
- Question, to great extent, one of intention*, 705, 711, 712.
- Not necessary to convert when perishable or reversionary property is given specifically to persons in succession, 690.
- Nor where intention appears that it should be enjoyed in specie, 691, 698, 703, 706.
- As where gift is of things, quæ ipso consumuntur uso*, 702, 710.
- Or specific chattels are given specifically*, 702-707.
- Aliter where such chattels constitute part of residuary bequest*, 702.
- When legatee for life of personally must account for goods delivered to him*, 697.
- Legatee for life of chattels specifically bequeathed entitled to possession and not required to furnish security*, 706.
- Doctrine where bequest is of money or securities*, 707, 708.
- When security must be given by legatee having entire ownership, subject to be divested on happening of future event*, 708, 709.
- Leaning against conversion, 691.
- Effect of direction to sell at a particular time, ib.
- Not to convert during a certain term, ib.
- Or at the discretion of trustees, ib.
- Or to pay rents, issue, profits, and proceeds, where testator had leaseholds, 691, 692.
- Or rents, profits, and dividends, where there were long annuities, 692.
- Of a power of leasing, where there were leaseholds, ib.
- Such direction not sufficient to qualify express trust to convert, 693.
- Of power of attorney to receive dividends, where there were long annuities and bank stock, 693, 694.
- Of a direction to divide property after the death of tenant for life, 694.
- Exception of long annuities from express direction to convert, ib.
- When leaseholds taken by railway company, ib.
- What interest tenant for life takes in compensation money, 695.
- Tenant for life surviving duration of wasting property, absolutely entitled to produce, ib.
- Where tenant for life entitled to enjoy in specie investments remain, ib.
- But debts must be realized, ib.
- Effect of power to vary securities, ib.
- Personally bequeathed for life with remainder over must be invested and interest only paid to legatee for life*, 698.
- Doctrine in Maryland*, 700.
- Rule where property is not capable of immediate conversion without loss to the estate, 695.
- When trustee in accordance with a power to retain money on certain securities, 696.
- Where they do not convert securities they were not authorized to retain, ib.
- Trustees may recover from tenant for life amount overpaid to him, ib.
- What tenant for life will be entitled to receive in respect of reversion falling into possession which ought to have been sold, ib.
- Principle upon which the Court calculates what tenant for life is entitled to, ib.

CONVEYANCE. *See* DEED.

CORPORATION.

- When notice to directors is notice to*, 171-175. *See* NOTICE, 5.

COSTS.

Of mortgagee acting as his own solicitor, 517.

Allowed as proper credit in accounts of fiduciaries, when litigation has been conducted in good faith, for the apparent benefit of the estate. See TRUSTEE.

Rule, in Pennsylvania, as to costs in partition, 919.

COVENANTS.

When covenant to indemnify mortgagee renders covenantor responsible for debts, 344-346.

For title. *See* WARRANTY.

Performance of. *See* PERFORMANCE OF A COVENANT.

CREDITOR.

Is not purchaser for value, 89, 92.

And cannot impeach assignment, valid between parties, 90, 1661.

But is not affected by notice of equity attaching after judgment, 33, 95.

Nor are purchasers under judgment, 99.

When creditor holding collateral entitled to prove for whole debt, 257-259.

Liability of, receiving collateral security, 312-314, 1902-1904.

Whether bound to perfect lien of collateral security by registration, 309, 313.

When laches, in management of securities, discharges surety, 306, 312.

When subrogated to remedies of other creditors, 262.

Where creditor who has right of recourse against two funds waives his claim upon one, he will be postponed to all claims against the other of which he had notice at the time of the waiver, 305, 312.

The same rule applies, when the right of recourse against a subsequent purchaser is relinquished, to the injury of one of prior date, 291, 305.

But to produce this effect, the notice must be explicit, 297, 299, 302, 309.

When release of one of several parcels, subject to common encumbrance, releases all, 308-310.

Having set off, applicable to two demands, one of which has been assigned, cannot pay the other, without losing right of set off against former, 309.

When preferred creditor postponed, 379.

Deed may be reformed against, 989.

When gift, by debtor to, set aside, 1260.

Equity of redemption may be exercised by judgment, 2006.

Marshalling assets in favor of and against. See MARSHALLING, 1, 2, 4.

Of partnership. See PARTNERSHIP.

Satisfaction of debt, by legacy. See SATISFACTION, 5.

See SUBROGATION.

What acts of, discharge surety. See SURETY.

CUMULATIVE LEGACIES. *See* REPETITION OF LEGACIES—SATISFACTION.

CURRENCY.

Specific performance of contract made in depreciated, 1039.

DAMAGE. *See* REAL ESTATE.

DEBTOR. *See* CREDITOR—MARSHALLING—PAYMENT—SATISFACTION, 5.

DEBTS.

Personalty primarily liable for payment of, 323.

Assignment of debt, transfer securities for, 2008.

Rule does not apply to debt of third person charged on land, 341. See MARSHALLING, 4.

Order of application for payment of, 326, 376, 652. See ASSETS.

When capable of being set off in equity, 1338-1347.

When pre-existing debt good consideration for new promise, 1082, 1083, 1645, 1670.

Assignment of debt, transfers securities, 2008.

When deed in consideration of, is mortgage. See MORTGAGE.

When legacy a satisfaction of. See SATISFACTION, 5.

Right of retainer for payment of. See RETAINER.

Distinction between specialty and simple contract. See ASSETS.

See PENALTIES AND FORFEITURES.

DEBTOR.

When notification of equitable assignment necessary, 1665.

Equities of, on assignment of debt, 1671.

When surety of, discharged. See SURETY.

DECLARATION.

Of testator when admissible, 1283-1285.

In cases of redemption and satisfaction, 810-812. See SATISFACTION, 4.

Of no set off, effect of, 1673. See Volume I, 876-880.

DECREE.

When purchaser affected with notice of. *See* NOTICE, 6, 7.

DEED.

When inspection and delivery of, ordered, 8, 19, 20, 22, 31.

Fraudulent deed voidable, not void, 42.

When fraudulent alteration of, affects bona fide purchaser for value, 46.

No presumption of notice of defect in title arises from absence or presence of unlimited covenants, 73.

When receipt in, is evidence of payment of consideration, 106-109.

When absence of, affects purchaser with constructive notice of adverse title, 123, 124.

When contents of, notice to purchaser, 124. *See* NOTICE, 2.

Consideration of, may be shown by parol evidence, 946.

On delivery becomes absolute at law notwithstanding declarations to contrary, 949.

Parol evidence admissible to prove fraud or mistake inducing execution of, 950-954. See PAROL EVIDENCE.

When and against whom reformed, 958, 989. See REFORMATION.

Conveyance of land may transfer mortgage when intent apparent, 2008.

When converted into mortgage by parol, 965, 1016, 1986-1989, 2002, 2005. See MORTGAGE.

Effect of grant subject to prior executory contract to convey, 1151.

Conveyance pendente lite, 1155.

Obtained by duress, when set aside, 1245.

Conveyance by disseisor, or of land held adversely, when valid, 1631, 1632.

See NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE—REGISTRATION—UNDUE INFLUENCE—VOLUNTARY DONATION.

DEFALCATION.

What constitutes equitable, 1338, 1347. See SET OFF.

DELAY.

When bar to specific performance. *See* SPECIFIC PERFORMANCE.

DEMONSTRATIVE LEGACY. See LEGACY.**DEVEISE.**

Of mortgaged land, entitled to have mortgage discharged by executor, 340.

Marshalling between creditors, legatees, and devisees. See MARSHALLING, 4.

DILAPIDATION.

Claims of incumbent for, when paid in administration of assets, 362. *See* ASSETS.

DILIGENCE.

Must be used to obtain equitable relief, 1372, 1373.

DISCHARGE OF SURETY. See SURETY.**DISSOLUTION OF INJUNCTION, 1413-1416.****DONATIONS. See VOLUNTARY DONATIONS.****DOWER.**

Remedy of widow for, in equity, 893.

Now entitled to, out of equitable estates, *ib.*

Right to, may be defeated by husband, when, *ib.*

Not liable to mere debts of her husband, *ib.*

Dower act not applicable to freebench, *ib.*

Proceedings where right to, is disputed, 894.

On establishment of right, may be ascertained by reference.

Or by commission, *ib.*

As to costs on bill to assign, *ib.*

Sale to purchaser without notice of, 8, 11.

See PURCHASER BONA FIDE WITHOUT NOTICE.

DRAFT.

On particular fund when amounting to equitable assignment, 1642, 1646-1650. See PROMISSORY NOTE.

DURESS.

*When ground for setting aside gift, 1245.
compromise, 1733.*

EASEMENT.

When purchaser will have constructive notice of, from state of premises, 123, 131.

EDUCATION. *See* INFANTS, 1.

ELECTION.

When bequest is subsequent to advance, legatee must elect, 766, 819.

When legatee must elect between realizing debt due and legacy, 821.

See SATISFACTION.

EQUITABLE ASSETS. *See* ASSETS.

EQUITABLE ASSIGNMENT.

Of debt due as security, when postponed to transfer of legal title, 56. See PURCHASER BONA FIDE WITHOUT NOTICE.

1. WHAT MAY BE ASSIGNED.

Possibility, or chose in action, not assignable in law, 1559, 1623.

Except in the case of the King, 1559.

Annuity assignable, ib.

Grant can only pass what grantor owns, 1605.

Possibility and choses in action assignable in equity, ib.

Assignment operates by way of contract, 1560.

Expectancies assignable in equity, ib.

Legacy, or share of residue, ib.

Mere personal tort not assignable, 1624-1628.

Aliter of torts surviving to personal representatives, ib.

Non-existing property, as future freight or cargo, 1560, 1613.

When future or contingent interests assignable, 1606-1609.

Distinction between contingent right which must vest if event happens and mere anticipation, 1607.

Right of entry for condition broken not assignable before entry, 1609.

Aliter if in avoidance of estate for years, ib.

When after-acquired property subject of, 1609.

Effect of covenant of warranty on subsequent acquisition of title, 1610.

Contract for sale of chattels which vendor does not own may be foundation of action for damages, 1610.

But does transfer title to goods when acquired, ib.

Machinery to be added to or substituted for existing machinery, 1560.

Building materials to be brought upon premises, ib.

Directors cannot charge after-acquired, under a power to charge existing property, ib.

After-acquired lands assignable, 1561.

But they must be referred to, ib.

Or acquired, to perform covenant, ib.

When transfer before ownership invalid as against levy or sale after acquisition of title, 1610-1613.

Sale of future crops, 1613.

Railroad mortgage will cover rolling stock subsequently acquired, 1615, 1616.

Vendor may give license to seize chattels thereafter to be acquired, 1616, 1617.

Sale or mortgage of property not owned may be treated as contract to convey when title is acquired, 1616, 1619-1621.

But contract must be reasonable, 1621.

And not vague, 1622.

Assignment of rights under executory contract not invalid, 1628-1630.

But contract not yet made cannot be assigned, ib.

Assignment of wages to be earned, 1630.

Assignments contrary to public policy.

No effect given in equity to assignments contrary to public policy, 1599.

As of half or full pay of an officer in the army, ib.

Salary of counsel for the Treasury, ib.

Of a clerk of the peace, ib.

Secus, in the case of the salary of a retired military officer, ib.

Pension by late East India Company, ib.

Pension of officer in consideration of wounds, 1599, 1630.

Salary of a judge not assignable, 1599, 1600, 1630.

Secus, as to sum payable after the death of a judge 1600.

EQUITABLE ASSIGNMENT, continued.

Pension granted by Parliament to the Duke of Marlborough and his posterity, inalienable, *ib.*

Distinction laid down in principal case of *Row v. Dawson*, *ib.*

Interest or pension assignable where no particular services are to be rendered, *ib.*

Assignment of prize-money valid, *ib.*

Of pension for compensation for loss of a place in the customs, *ib.*

Of emoluments of a fellow of a college, *ib.*

Or of a canonry without duties, *ib.*

Portion of pay, half-pay, salary, or pension of bankrupt applicable for his creditors, 1601.

No effect given to assignments partaking of champerty or maintenance, 1601, 1631-1638.

As to what amounts to champerty or maintenance, 1601-1604.

Doctrine in the United States, 1631-1638.

Agreement contrary to stat. Hen. 8, against purchasing pretended titles, 1604, 1605.

Assignment by legatee too poor to sue for it, valid, 1605.

Contracts with attorneys for payment of contingent fee, 1638-1641.

Choses in action of married women, how far assignable.

Assignment of choses in action and reversionary personal property of the wife is subject to her right, by survivorship, 1573.

After the death of her husband, wife may adopt a settlement of her reversionary interest, *ib.*

Power of husband to reduce his wife's chose in action into possession will not render an assignment thereof binding on her surviving, 1574.

If he dies before it be actually reduced into possession, *ib.*

Release, by husband, of his wife's reversionary chose in action, inoperative to bind wife surviving, *ib.*

Reversion may be settled, under the Infants' Settlements Act, *ib.*

Assignment, by way of mortgage, of a reversionary interest of wife, created for that purpose, binds her, surviving, 1575.

Assignment, by husband and wife, of an annuity, or life interest of wife in a fund, passes only her interest during coverture, *ib.*

Wife cannot convert her reversionary interest into an interest in possession, by an assignment from all other persons having interest, *ib.*

Reversionary fund in Court, not paid to her or her husband, with consent of other parties interested, 1575, 1576.

Assignment of wife's reversionary chose in action, good against husband, surviving wife, 1577.

Subject to the wife's equity to a settlement, when it becomes an interest in possession, *ib.*

Wife absolutely entitled, upon judicial separation, *ib.*

And upon obtaining a divorce, *ib.*

Payment to the husband, or his assignees, defeats the wife's right by survivorship, *ib.*

And her equity to a settlement will be thereby defeated, *ib.*

As to form of stop order on the assignment of a wife's reversionary chose in action, *ib.*

Assignment of reversionary choses in action governed by law of the domicile of parties, when, *ib.*

Share of a married woman as joint tenant in a reversionary chose in action, survives to the other joint tenants, when, *ib.*

By Malin's Act, married women enabled to dispose of reversionary interests in personalty, when, 1578, 1579.

Result of the Act, its limited operation, 1579.

Husband may assign his wife's reversionary interest in leaseholds, *ib.*

Unless they cannot, by any possibility, vest in possession in the wife during coverture, *ib.*

Choses in action of married woman, how reduced to possession, 1570-1573. *See* HUSBAND AND WIFE.

2. WHAT OPERATES AS EQUITABLE ASSIGNMENT.

Criterion is intention to transfer, 1641, 1646.

Intention may be implied, 1642.

Sealed obligation may be assigned by parol, 1641.

Symbolical delivery may suffice, 1642.

EQUITABLE ASSIGNMENT, continued.

Effect of partial assignment of demand, 1642-1644.

A present right must be conferred on assignee, 1644, 1645.

An assignment ineffectual to transfer legal title, and not intended as gift, not enforced in absence of consideration, 1645.

Pre-existing debt good consideration for act on part of debtor, operating as payment or security, 1645, 1646.

Letter of attorney, 1653-1660.

Power to sell and apply proceeds to use of donee, 1654.

Power coupled with interest, 1656-1660.

Delivery of assets, or bailment, for use of third person, 1659.

Conveyances for benefit of creditors, ib.

Draft on particular fund, 1646-1650.

Bill of exchange, 1650-1653.

Check, 1653.

License to seize not an assignment of chattels, 1561, 1616, 1617.

If given to secure a debt, will go on release of the debt, ib.

Life policy, what considered a legal assignment of, on suicide of the assured, ib.

Possibilities in hereditaments, coupled with an interest, now by statute assignable at law, ib.

Ordinary form for the transfer of a chose in action, 1565.

No particular form necessary, ib.

Agreement between a debtor and creditor, that the creditor shall be paid out of fund coming to the debtor, amounts to, ib.

And order given by a debtor to his creditor upon a third person, for payment out of funds in his hands, 1562, 1563.

Not necessary in equity that the third person shall contract to pay the creditor, ib.

Assignments may be made verbally, 1564.

A mere mandate to an agent, not communicated to a third party, does not amount to, 1565.

May be revoked before execution, how, ib.

Effect of agent communicating mandate to the third person, ib.

Or a mere power of attorney to a person to receive money and pay it to a creditor, does not amount to, ib.

Order by debtor to pay checks "to his account with the bank" not an equitable assignment to the bank, 1566.

Secus, if the checks were directed to be passed to the bank, ib.

Promise by debtor to pay money when he receives debt due from a third person, does not amount to, 1567.

A mere order to pay money out of a particular fund must be stamped as such, ib.

But if it operate as an equitable assignment, it will be received by the Court stamped as an assignment, ib.

Policies of life assurance made by statute assignable at law, 1568, 1569.

Goods or freight comprised in policies of marine assurance, ib.

Choses in action of bankrupts, ib.

3. NOTICE OF ASSIGNMENT.

Not necessary as between assignor and assignee, 1564, 1579.

Or parties standing in the same position as assignor, 1579.

As a creditor on judgment at common law, ib

Or under a garnishee order, ib.

Death of the assignor before notice immaterial, 1564.

And his bankruptcy, ib.

Or his arrest by the assignee for the debt, ib.

Notice of assignment usual, ib.

Notice necessary to prevent payment of debt by the debtor to the assignor, ib.

Notice necessary in order to prevent subsequent incumbrancer from gaining priority by giving notice to trustees or debtor, 1564, 1580-1583.

In some States failure to notify debtor will invalidate assignment as against subsequent bona fide purchaser from assignor, 54, 56, 1665.

Aliter as against creditors or volunteers, 1667.

Notice need not be formal or express, 1666.

In other States notice to debtor is immaterial, 1666, 1672.

Notice to the office must be given of the assignment of policy of assurance, 1583.

Notice necessary to prevent application of the reputed ownership clause upon the bankruptcy of the assignor, ib.

EQUITABLE ASSIGNMENT, *continued.*

- Omission to give notice may operate as evidence of intention, *ib.*
- Debtor, having had notice of an equitable assignment, is bound to pay the assignee, *ib.*
- Though the assignor has commenced an action against him, *ib.*
- And the assignee refuses to indemnify him upon payment, *ib.*
- Secus, when an equitable assignment relating to real property in a foreign country is invalid by the law of that country, *ib.*
- Notice before relation of trustee and *cestui que trust* created, immaterial, 1584.
- Notices given at different times treated as contemporaneous, when, *ib.*
- Assignees neglecting to give notice of bankruptcy or insolvency postponed to subsequent assignee for value giving notice, *ib.*
- Secus, where assignment of chose in action takes place before bankruptcy and notice thereof is given after, 1585.
- Assignee doing all in his power toward taking possession will not lose his priority, *ib.*
- Judgment creditor postponed to subsequent mortgagee of equitable interest in stock, when.
- Priority of volunteers not affected by notice being given of assignment to them, 1586.
- Assignee of debt not bound to give assignor notice of non-payment by debtor, *ib.*
- Is chargeable for willful default, *ib.*
- Mortgagee of ship taking possession, entitled to freight as against the mortgagor, *ib.*
- His assignees in bankruptcy, 1587.
- Or subsequent incumbrancer, though he has given notice thereof, *ib.*
- Or assignee of freight, *ib.*
- Notice of assignment of debts necessary to take them out of order and disposition of the assignor on bankruptcy, *ib.*
- Or of a policy of assurance, *ib.*
- Law, how far altered by the Bankruptcy Act, 1869, *ib.*
- Present practice under order and disposition clause, 1588.
- To whom notice should be given of an assignment.*
- Notice of assignment should be given to trustees or debtors in writing, 1588.
- Parol notice sufficient, 1588, 1666.
- Not mere casual conversation, *ib.*
- Notice to one of several trustees or co-debtors, how long sufficient, *ib.*
- Not sufficient if he be the assignor, *ib.*
- Unless he assigns to a co-trustee, 1589.
- Notice to solicitor of trustees, *ib.*
- Notice, to be effectual, should be given to a company or office, *ib.*
- Notice to a shareholder not constructive notice to the company, *ib.*
- May be given to the secretary, 1590.
- Semble, director and actuary, *ib.*
- Director and auditor, *ib.*
- Casual mention to a clerk not sufficient notice, *ib.*
- As to mode of given notice of the assignment of a policy of assurance under 30 & 31 Vict. c. 144, *ib.*
- Notice to master of assignment of cargo, *ib.*
- Priority gained by a *distringas*, where, 1591,
- By a stop order, *ib.*
- Although the first assignment be to a trustee, *ib.*
- Order must be left at Accountant-General's office, *ib.*
- Mere notice to Accountant-General is not sufficient, *ib.*
- After a stop order obtained on a fund afterward ordered to be distributed, no priority gained by a subsequent stop order, *ib.*
- After notice to trustees, priority not gained by stop order when money is paid into Court, 1591, 1592.
- Stop order on fund in Court to take it out of the order and disposition of the owner, *ib.*
- Notice to executor of fund sufficient, when, *ib.*
- Secus, if subsequent incumbrancer gets stop order before notice, 1593.
- Effect of stop order, *ib.*
- Notice formerly necessary to take reversionary interest in a fund out of the order and disposition of a bankrupt, *ib.*
- Not now necessary, *ib.*

EQUITABLE ASSIGNMENT, continued.

- Where there are successive trusts notice should be given to trustees having the funds, *ib.*
 Priority not gained by notice to trustees of stock specifically bequeathed before the assent of the executors to the legacy, 1594.
 Notice of one charge, not a chose in action, not notice of another in the same deed, *ib.*
 Doctrine not applicable to equitable interests in land, *ib.*
 Whether freehold or leasehold, *ib.*
 No priority gained by registering assignment of legacy charged on land, *ib.*
 Notice should be given of assignment of money to arise from sale of land, *ib.*
 Or of portions to be raised by trustees by sale, *ib.*
 By mortgage, *ib.*
 Or otherwise, *ib.*
Payment by debtor after notice invalid, 1668, 1671.
So, after notice, declarations of assignor inadmissible against assignee, 1668.
So, of a release to debtor, 1669.
- 4. EQUITIES AFFECTING ASSIGNMENT.**
Assignee, as a general rule, takes subject to all equities and defences valid between original parties, 56, 1594-1596, 1671-1674.
But debtor estopped by admission of existence of debt made previous to assignment, 1673, 1674.
 Rule must yield to a contrary intention, 1596, 1597.
 Person entitled to equities may release or lose his right to enforce them, by neglecting to give notice of them to assignee, 1597.
 Exception to rule in the case of negotiable instruments, *ib.*
 Not in the case of a bond, unless, on the face of it, it appears to be negotiable, *ib.*
 Though it was intended to be so, *ib.*
 Indorsee of overdue bills takes them subject to all equities, 1597, 1598.
 But the equities must be such as attach to the bills, 1598.
 Not claims arising from collateral matters, *ib.*
 As a statutory right of set off, *ib.*
 Assignment of bonds, without notice, that they were given for a gaming debt, valid, *ib.*
 Assignment for limited purposes, by consignee, does not wholly destroy consignor's right of stoppage in transitu, 1599.
 Lien of a solicitor for costs not affected by assignment, when, *ib.*
Assignee of debt, or the chose in action, only takes assignor's interest, 51, 61.
And is subject to prior assignment and equities of third persons, unless perfected by acquisition of legal title, 56-70.
As when assignment transfers, or is attended by transfer of mortgage, 56-60.
Or prior assignees have been negligent, 53-56.
Assignment of mortgage, in New York, transfers mere equity, subject to prior equities, 57.
- 5. RIGHTS AND REMEDIES OF ASSIGNEE.**
Must use diligence to perfect title, 1660-1665.
Doctrine only applies in favor of bona fide purchaser, 1673.
In Pennsylvania assignment of judgment must be noted on docket, 1660.
Whether transfer on books of corporation necessary to complete sale or transfer of stock, 1660-1661.
When delivery or manual possession necessary to sustain assignment, 1660, 1661.
Assignee entitled to all remedies and securities available to assignor, 1667.
Mortgage passes by assignment of bond though made by parol, 1667.
When assignee of part of debt entitled to preference over assignor, 1668.
Assignee not prejudiced by acts of assignor or debtor after notice of assignment, 1624, 1668, 1669, 1671.
Manner in which relief is administered, 1669.
 Doctrine of equity, as to the assignment of choses in action, to some extent acted upon at law, 1567, 1668.
 Courts of law allow assignee to sue in the name of the assignor, *ib.*
Assignee of chose in action cannot ordinarily proceed in equity, 1670, 1567, 1568.
 Unless demand assigned is equitable, *ib.*
 If debtor ratifies assignment by new promise, assignee may take proceedings against him at law, 1567.
 If he does not assent, the assignee must, at law, sue in the name of the assignor, *ib.*
Pre-existing debt not good consideration for new promise, 1670.

EQUITABLE ASSIGNMENT, continued.

Aliter for act operating as payment or security, 1645, 1646.

Obligation to account to assignee good consideration for promise, 1671.

In Pennsylvania, assignee must prove consideration, 1674.

In equity assignee may sue in his own name, 1567.

EQUITY OF REDEMPTION. See MORTGAGE.**ESTOPPEL.**

Concealment or denial of title by owner to injury of third person, 28-30, 60.

Doctrine of equitable, 969,

Debtor estopped by admission that debt is due, 1674.

See NO SET OFF.

EVIDENCE.

Improper rejection or admission of, by courts of law, no ground for equitable interference, 1333

After-discovered, not generally ground for equitable interference, 1380, 1386.

See PAROL EVIDENCE.

EXECUTION.

When levy of, enjoined, 1408.

When withdrawal of, by creditor, discharges surety, 1900-1902.

EXECUTOR.

Constructive notice in dealing with, 140.

When assets marshalled in favor of, 288. See MARSHALLING.

Liability of, for payment of inferior debts first, 362-364.

Annuity to, for his trouble, not entitled to priority, 639.

Duty of, to collect assets, 700.

Power extends to chattels specifically bequeathed, ib.

May bring trespass if legatee removes the property without consent, ib.

Duty of, in case of chattels specifically bequeathed for life, 706.

Liability of, retaining investment made by testator, 701, 702.

Right of retainer. See RETAINER.

When devise to, or power to sell, renders land equitable assets. See ASSETS.

Duty of, on bequest for life. See CONVERSION OF RESIDUE.

Compensation of. See TRUSTEE.

Liability of. See TRUSTEES AND EXECUTORS, LIABILITY OF.

EXECUTORY CONTRACT.

When time essence of, 1107.

Sale of land, by, 1084, 1108-1110, 1112, 1138-1143.

EXONERATION.

Of legatees at expense of devisees. See MARSHALLING, 4.

EXPECTANCIES.

When assignable, 1606. See EQUITABLE ASSIGNMENT, 1.

EXPENSES.

Necessary expenditures, including counsel fees, costs, salaries, etc., liberally allowed to fiduciaries when for apparent benefit of estate, but refused when either unnecessary or for benefit of fiduciary, 547, 551, 564, 567, 569, 570, 573, 578, 582, 588, 591, 593, 598. See TRUSTEE.

Incurred on behalf of legatee, when ademption of pecuniary legacy, 793-795, 800.

EXTRINSIC EVIDENCE. See PAROL EVIDENCE.**EXPENDITURES. See EXPENSES.****FALSE REPRESENTATIONS.**

Sealed instrument executed by reason of, not binding, 950-958, 1018.

Effect of, under Statute of Frauds, 974-978.

Of consideration of sealed instrument, 960-964.

When defence to bill for specific performance, 1017.

FAMILY ARRANGEMENT.

How far sustained. See COMPROMISE—MORTGAGE.

FATHER.

When entitled to custody of children. See INFANTS, 1.

When bound to maintain children. See INFANTS, 1, 3.

FEME COVERT. *See* HUSBAND AND WIFE.

FIDUCIARIES.

Compensation of. *See* TRUSTEE.

See TRUSTEES AND EXECUTORS, LIABILITIES OF.

FORBEARANCE.

When valuable consideration, 84-87.

FORECLOSURE. *See* MORTGAGE.

FOREIGN JUDGMENTS.

When enjoined, 1396, 1378, 1402.

FORFEITURE.

When equity will relieve against, 1133-1135.

Contract not construed so as to create, 1129.

When vendee entitled to forfeit, 1125, 1135.

See MARRIAGE—PENALTIES AND FORFEITURES.

FRAUD.

When relief afforded to purchaser misled by fraudulent misrepresentations of infants, 28.

Constructive notice, by reason of, 123. See NOTICE, 1.

Fraudulent deed voidable, not void, 42.

Effect of sealed instrument executed by reason of, 950-958, 960-978.

Effect of, upon contracts within Statute of Frauds, 975-978, 1012.

When contract reformed on ground of, 1001-1010. See REFORMATION.

When parol testimony admissible to prove. See PAROL EVIDENCE.

Vitiates all agreements, 1731.

In conduct of proceedings at law when ground for equitable interference, 1350, 1368, 1377, 1383. See INJUNCTION.

FRAUDULENT DEVICES, STATUTE OF.

Devisee, of part of estate, for payment of debts within, 365.

FREIGHT.

Assignment of future, 1613. See EQUITABLE ASSIGNMENT.

FUTURE INTERESTS.

When assignable, 1606. See EQUITABLE ASSIGNMENT.

GENERAL LEGACY. *See* LEGACY.

GIFT.

Of choses in action, 1646.

Upon condition of remaining unmarried when valid. See MARRIAGE.

See UNDUE INFLUENCE—VOLUNTARY DONATION.

GRANT.

Fraudulent, voidable not void, 42.

Effect of, obtained by false representations, 950-958. See DEED.

GUARDIAN.

When assets marshalled in favor of, 288.

Compensation of, in the different States. See TRUSTEE.

Jurisdiction of equity over, 1434. See INFANTS.

When gift from ward, set aside. See UNDUE INFLUENCE—VOLUNTARY DONATION.

HABEAS CORPUS. *See* INFANTS.

HUSBAND AND WIFE.

Choses in action of a married woman, how reduced into possession.

Husband becomes entitled to choses in action of wife, if he reduces them into possession, 1570.

How reduced into possession, ib.

By acts changing the property therein, ib.

Not by mere intention of an executor to pay the husband, ib.

Or by his appropriation of a particular sum for that purpose, ib.

Nor by the husband's receipt for interest, ib.

Nor by the handing of a promissory note to him, ib.

Receipt of part of fund a reduction into possession pro tanto, ib.

HUSBAND AND WIFE, continued.

- Transfer of stock into the name of a married woman will not amount to, *ib.*
 Nor into the names of the husband and wife, *ib.*
 A fortiori, where trustees retain funds in their own name, *ib.*
 Nor will an agreement to sell a fund, *ib.*
 Whether debt due from a husband to a testator can be set off against a legacy left to his wife, *ib.*
 Semble, it may subject to the wife's equity to a settlement.
 Proof of wife's debt in bankruptcy will not amount to, *ib.*
 If the husband die before the dividend, *ib.*
 Receipt by husband of wife's chose in action a reduction into possession, 1571.
 Unless he receive it as a trustee, *ib.*
 Transfer of stock to the name of the husband a reduction into possession, *ib.*
 Or to his credit in the matter of his lunacy, *ib.*
 Transfer by husband of his wife's stock to trustees upon trust, inconsistent with his wife's title, amounts to, *ib.*
 Secus, where the husband directs or consents to an investment of stock, not inconsistent therewith, *ib.*
 Choses in action, even though promissory notes and bills of exchange given to wife before marriage, may be reduced into possession.
 By husband suing out execution on judgment in action in the name of himself and his wife, *ib.*
 Secus, if he die after judgment, but before execution, *ib.*
 Title of the wife to choses in action given to her during marriage, defeat by her husband obtaining a judgment on an action in his own name, *ib.*
 Award of execution on a judgment obtained before marriage will give the property to the husband, 1572.
 Semble, an award to the husband of the personal chattels of the wife does not defeat her title by survivorship, *ib.*
 And where there is only a decree in a joint suit by the husband and wife, and she survives him, *ib.*
 And nothing has been done to change the property, *ib.*
 Secus, where the property has been changed, *ib.*
 As by approval of a settlement on the wife, *ib.*
 Or an order for payment to the husband, *ib.*
 Husband surviving his wife entitled to his choses in action on taking out administration, 1572, 1573.
Husband—how far liable for devastavit of his wife.
 Husband during coverture liable for devastavit of his wife, 1784.
 Law as laid down by Lord Redesdale in *Adair v. Shaw*, *ib.*
 Liability under 30 Car. 2, c. 7, on taking out letters of administration to his wife, *ib.*
 Liability for devastavit committed during coverture, both at law and in equity, 915.
 Though wife be living separate from her husband, *ib.*
 Assets admitted may be proved as a debt on husband's bankruptcy, *ib.*
 At law, the liability of husband for devastavit of wife ceases on her death, *ib.*
 Unless judgment has been obtained against him and his wife, *ib.*
 Or goods remain in his hands in specie, *ib.*
 In equity, husband liable for assets which came to his hands, *ib.*
 Estate of the husband discharged if his wife as executrix has assets more than sufficient to answer demands, 1785.
 Wife surviving her husband, liable for devastavit, *ib.*
 Though she was covert when administration was taken out, *ib.*
 Responsible at law only to creditors, *ib.*
 In equity, to legatees also, *ib.*
Distribution of proceeds of sale of land belonging to wife and mortgaged for debt of husband, 318.
 Appointment by married woman under power does not make appointed property assets, 379.
 When deed for separation of, valid, 499, 500. *See DOWER.*
 Contract by, for sale of wife's land, not enforced, 1040.
Where married woman refuses to comply with contract of her husband and herself for sale of her land, husband not compelled to convey his interest, 1149.
So, where land is husband's, and wife refuses to convey, specific performance with compensation not decreed, 1149–1151.
 Unless wife's refusal proceeds from collusion with husband, 1150.

HUSBAND AND WIFE, continued.

Or agreement is separately acknowledged, 1101.

Contract of husband for sale of wife's land, to which she is not party, not specifically enforced, 1101.

Effect of part performance by married woman, 1101.

When proceeding on judgment against wife enjoined, 1371.

Wife not ordinarily appointed sole guardian of children, 1446.

When married woman bound by compromise, 1695, 1696, 1725.

When transactions between, set aside. See UNDUE INFLUENCE—VOLUNTARY DONATION.

Wife mortgaging her estate for husband's benefit is a surety, 1939. See MORTGAGE OF WIFE'S INHERITANCE.

Agreement prohibiting marriage. See MARRIAGE.

Contract for separation of. See SEPARATION OF HUSBAND AND WIFE.

IGNORANCE.

When ground for equitable interference, 1245, 1370, 1375, 1384. See UNDUE INFLUENCE.

ILLEGALITY.

Of contract, when ground for equitable interference, 1358, 1374.

IMPLIED TRUST.**1. Raised by precatory and recommendatory words, when, 1834–1836, 1857–1859.**

In order to create a trust, words of recommendation must be imperative, 1836, 1860.

Context may show that legatee's discretion is not to be interfered with, ib.

Tendency of modern decisions, 1837.

Subject-matter of recommendation or wish must be certain, 1837, 1860.

Not raised where devisee has power to diminish property, 1838, 1839.

Unless the context shows that the whole of the testator's property was intended, 1840.

Objects of recommendation or wish must be certain, ib.

Whether the word "family" points to objects sufficiently certain, 1841.

"Heirs" of the testator's late father, 1842.

"Near relations," ib.

"Nearest family," ib.

Tendency of decisions against creating a trust, 1842–1845, 1859, 1860.

Gift to a class not implied when it takes place in default of appointment, 1845.

Clear words of gift not cut down by subsequent words of desire, ib.

Or words sounding like a power, with a gift over in default of its exercise, 1846.

Donee takes property subject to trust created by words of recommendation, ib.

No trust results for next of kin or heir, ib.

Where trust intended, though too vague to be executed, donee will not take beneficially, 1846–1848.

2. Power in the nature of a trust, with recommendatory words, exercised by Court, when, 1848, 1865, 1866.

Not when there is a mere power not executed, ib.

Secus, where a trust is created, ib.

Doctrine on powers in the nature of trusts laid down in *Brown v. Higgs*, 1848, 1849.

Approved of by Lord Cottenham, 1849, 1850.

Mode in which Court will execute trust on failure of trustee, 1851.

Where rule laid down for guidance of trustees, ib.

Where no rule, Court divides equally, ib.

Distinction between cases, 1852.

Where there is a gift to a class with a subsequent power of appointment among them, 1853.

Where there is no gift to the class except in or by means of the power, ib.

"Relations" construed, as next of kin, when power exercised by Court, ib.

"Relations or friends," "family," 1853, 1854.

Donee may appoint among more distant relations, 1854.

Unless he have a mere power of distribution, and not of selection, ib.

Or he is confined to a particular class, ib.

Court goes beyond next of kin in cases of charities in favor of "poor relations," ib.

Or where testator has furnished a test for discovering relations beyond next of kin, ib.

In whose favor Court will execute a power imperative as a trust, ib.

IMPLIED TRUST, continued.

- When donee has a life interest in the subject-matter, *ib.*
- Where he has not, *ib.*
- Where donee having a life interest dies in the testator's lifetime, *ib.*
- Parties in whose favor the Court interposes take *per capita*, and not *per stirpes*, *ib.*
- Court will exercise the power, though the subject be not capable of division, 1855.
- Or one object of a class is to be selected, *ib.*
- Devisee of property, with a trust to devise it to a class, may fell timber, 1855, 1856.
- Control of the Court over the exercise of powers, 1856, 1866.

IMPROVEMENTS.

- Right to compensation may arise from expending money on land in ignorance of defect of title*, 79.
- When compensation allowed for, in partition*, 882, 916-918.
- By mortgagee in possession*, 2010-2014.

INCOME.

- What income tenant or legatee for life entitled to, 695, 696, 713-716, 721. *See* CONVERSION OF RESIDUE.

INCUMBRANCE.

- When, after sale, existing incumbrance is to be borne by vendor or vendee*, 272, 291-305, 341-346. *See* MARSHALLING, 6.
- When release of one of several parcels of land subject to common incumbrance releases all*, 308-310.
- What discharged, by sale in partition*, 919.

INFANTS.

- Jurisdiction of chancery*, 1434, 1517-1521.
- Common law jurisdiction*, 1524-1529.
- Infant not removed from custody, which is neither illegal nor injurious*, 1527.
- Statutory provisions*, 1528, 1529.

1. GUARDIANS.

- Father guardian by nature*, 1435, 1487, 1490, 1492, 1506.
- Statutory provisions*, 1492-1494.
- But not entitled to possession of infant's property*, 1487, 1490.
- Father may take manual possession of child*, 1507.
- Father not entitled to child if injurious to the latter*, 1494, 1525.
- May be removed if unfit*, 1517-1521.
- Poverty of father*, 1516, 1521.
- What effect given to inclination of child*, 1510, 1511, 1512, 1525.
- Agreement by father to waive parental right*, 1435, 1508-1510.
- Entitled to service of children*, 1491.
- Right may be relinquished*, *ib.*
- Legal liability to provide for children*, 1491, 1492.
- Father can direct custody of, even when resident abroad*, 1435.
- Contract by, to give up custody and education of, to wife, void, and not enforced in equity, when*, 1435, 1508-1510.
- Deed not rendered void by such provisions*, 1436.
- Trustee appointed under*, *ib.*
- Legal covenant therein enforced*, *ib.*
- Mother, after death of father, guardian of*, 1436, 1488, 1490, 1511.
- Unless he appoints a testamentary guardian*, 1436.
- Illegitimate children*, 1488.
- Father may appoint a testamentary guardian by deed or will for his legitimate children*, 1436, 1498-1500.
- But not since Wills Act, by will, during his minority*, *ib.*
- Will only appointing guardian does not require probate*, *ib.*
- Testamentary guardian supersedes guardianship of mother*, 1437.
- She may be appointed testamentary guardian*, *ib.*
- Wishes as to guardian in her will attended to*, *ib.*
- Testamentary guardian not disabled by attesting deed appointing him*, *ib.*
- Entitled to a grant of administration for benefit of, when*, *ib.*
- Office survives*, *ib.*
- Does not determine on marriage of a male ward*, *ib.*
- Does on marriage of a female ward*, *ib.*

INFANTS, continued.

- Religious tenets of guardian no objection, ib.
- Nor of the person appointing a guardian, ib.
- Express words not necessary, ib.
- Testamentary guardian is a trustee, ib.
- Statute of Limitations inapplicable to accounts between him and his ward, ib.
- But the claim of the ward may be barred by acquiescence, ib.
- Consent of testamentary guardian of infant to a sale of his property, under Settled Estates Act, not sufficient, ib.
- Guardian must be appointed for that purpose, ib.
- Scotch testamentary tutors not testamentary guardians, 1433.
- Guardian appointed by a stranger in the life of the father, 1433-1442.
- Distinction between such appointment and contract to transfer parental duties to the mother, 1442.
- Court will not deprive father of custody of, upon the mere offer of another to maintain them, ib.
- Though offer were for the benefit of the children, ib.
- Guardian appointed by the Court, 1443.
- Jurisdiction of the Lord Chancellor to appoint guardians, 1443, 1517-1521.
- As representing King as *parens patriæ*, ib.
- Jurisdiction over children of English parents born and resident abroad, 1444.
- What constitutes an infant a ward of Court, ib.
- Whether necessary that infant should have property, ib.
- Not necessary, where guardian is appointed, to consent to a marriage, ib.
- Otherwise guardian not appointed where infant has no property, ib.
- Guardian appointed upon petition of infant without a bill, 1445.
- Or on petition of some one on behalf of his infant, ib.
- Where testamentary guardian declines to act, ib.
- Conflicting claims for guardianship settled upon petition, ib.
- Guardian for person and estate appointed where there is no suit, ib.
- For person only, where suit is pending, ib.
- Court will generally appoint person nominated by father, as guardian for natural children, ib.
- Mother allowed access, but not to remove them, ib.
- Formerly there was a reference to appoint guardian, ib.
- Unless infant's property was very small, ib.
- Where suit has been instituted, guardians are now appointed at Chambers, ib.
- Appointed in Chambers on summons without suit, 1446.
- Powers conferred on Court for the care and education of infants convicted of felony, ib.
- Receiver of rents, &c., of infant's property, formerly not appointed unless bill were filed, ib.
- Rule now relaxed, ib.
- Guardian appointed by the Court, although infant, entitled to real estate at the age of fourteen, has appointed one, ib.
- Guardian of infant of unsound mind, not found so by inquisition, how appointed, ib.
- Office of guardians appointed by Court does not survive on death of one them, ib.
- Survivors, appointed without reference, ib.
- Married woman not ordinarily appointed sole guardian, ib.
- Practice on marriage of female guardian, ib.
- On appointment of guardian interests of ward to be primarily consulted, 1494.
- Regard will also be paid to wishes of deceased parent, 1495.
- When guardian possessed of *ex-territorial* powers, 1496-1498.
- Jurisdiction of the Court over guardians.
- Exercised over a father, 1446-1448.
- Persons appointed to act as guardians during life of father, on account of his bad behavior, when, 1448.
- Allowance made to support parents when poor, though their conduct bad, ib.
- Children not taken away from father merely because he is poor or insolvent, 1449.
- Poverty of father, 1516, 1521.
- Even if his character be such as the Court would not appoint him a guardian, ib.
- Where children taken away from father on account of his immorality, 1448-1450.
- Where father guilty of an unnatural crime, 1450.
- Or living in a state of habitual drunkenness, ib.
- Or laboring under religious delusions, ib.

INFANTS, *continued*.

Or guilty of gross ill-treatment and cruelty toward children, 689.

Semble, not taken away where father living in adultery does not bring child in contact with the woman, *ib*.

Access allowed to parents, when, 1452.

Jurisdiction of Court increased by stat. 2 & 3 Vict. c. 54, enabling Court to give custody of children under a certain age to the mother, *ib*.

Object of the Act explained by Lord Cottenham, 1453.

Custody of a child delivered to a mother where she left her husband on account of ill-treatment, 1454.

Or has a good defence to a suit for restitution of conjugal rights, *ib*.

Not where she leaves him without sufficient cause, *ib*.

Or her past morals were bad, *ib*.

Order refused against testamentary guardian, when, *ib*.

Next friend, for a woman to petition under the Act, not necessary, *ib*.

Even where application is made in form a pauperis, *ib*.

Petition being entitled under the Act does not prevent Court exercising jurisdiction independently of it, *ib*.

Person appointed to act as guardian, if conduct of the testamentary guardian be improper, *ib*.

Though not so readily as in case of guardian appointed by Court, 1455.

Or on his bankruptcy or insolvency, *ib*.

Orders made regulating conduct of guardians, *ib*.

Testamentary guardian not superseded on account of interest in the death of the ward, *ib*.

As to marriage of a female testamentary guardian, *ib*.

Testamentary guardian, and not mother, entitled to custody of person of infant, 1455, 1498-1500.

Mother not deprived of children for purpose of delivering them to testamentary guardian, 1511, 1512.

Unless unfit for their charge, 1512-1514, 1522.

Right of mother paramount to father when more conducive to benefit of child, 1513, 1515, 1516.

New Jersey Statute, 1522.

Children of tender years generally assigned to mother, 1523, 1524.

Discretion of Court as to allowing the mother the custody, or access, 1456.

Even in the case of illegitimate children, *ib*.

Access allowed to friends of a deceased parent, *ib*.

Order as to custody of infant final, *ib*.

Subject to appeal, *ib*.

As to education and religion of infants.

Guardian allowed to regulate education of infant, *ib*.

Assisted by Court in compelling ward to go to a particular school or college, *ib*.

Where guardians differ as to mode of education the Court will decide, *ib*.

Weight given to the wish of deceased father in the appointment of guardian, *ib*.

Whether parol evidence of it received, *ib*.

Wishes as to custody of child attended to, *ib*.

Though testamentary guardian appointed, *ib*.

Deceased father's wishes as to the religion in which child is to be educated, attended to, 1457, 1495.

Presumption that father wishes his child to be brought up in his own religion, 1458.

Court not influenced by pecuniary considerations affecting the infant, *ib*.

Effect of father having during his life abdicated his right of controlling religious education of his children, *ib*.

Of child having been brought up after the father's death in a faith contrary to the express wish of the father, *ib*.

Semble, verbal contract before marriage as to religion of children not binding, 1459.

According to laws of Spain, bishops, monks, and religious persons cannot be guardians, *ib*.

Unless they are relations of the minor, *ib*.

Ward of Court, in general, not allowed to be taken out of the jurisdiction, *ib*.

Exceptions to the rule, 1459, 1460.

Security taken for return of ward, and, if its stay be of some duration, for its proper education, 1460.

INFANTS, *continued.*

And in the case of female wards, that they shall not marry without the leave of the Court, *ib.*

Removal of ward out of the jurisdiction never compelled, 1461.

Infants subjects of a foreign country may be removed, *ib.*

Discretion of foreign guardians not interfered with, though guardians appointed in England, *ib.*

Clandestine removal of ward out of jurisdiction a contempt of Court, *ib.*

Enlistment of ward, *ib.*

Duty of guardians to give information to the Court as to its wards, *ib.*

Of solicitor to give information as to the residence of a ward of the Court, *ib.*

2. MARRIAGE OF WARDS OF COURT.

Necessity to obtain leave of Court on, 1462.

Granted only if marriage is suitable and the settlement is proper, *ib.*

Court will prevent clandestine marriage, *ib.*

Hearsay evidence of weight in these cases, *ib.*

Guardian or father conniving at marriage of ward of Court, 1463.

Sanction of the Court given to the marriage of an infant ward, when, *ib.*

Can now make binding settlements, *ib.*

Person marrying or assisting at marriage of a ward of the Court, guilty of contempt, 1464.

Even when ignorant that the infant was a ward of Court, *ib.*

Though the father be living, *ib.*

Whether marriage be valid or invalid, *ib.*

After invalid marriage of female ward, valid marriage ordered, *ib.*

Not always in the case of a male ward, *ib.*

Punishment for contempt of Court, 1465.

Though fact of the marriage be not for some years communicated to the Court, *ib.*

Court will restrain proceedings against infant in the Ecclesiastical Court, by person in contempt, 1466.

Punishment for contempt used as the means of compelling husband to make a settlement, *ib.*

Or his father, if he were implicated, 1467.

Settlement on marriage of ward by leave of Court.

Provision for issue by second marriage, *ib.*

An ante-nuptial settlement on ward attaining twenty-one may be confirmed, *ib.*

Property of female ward under protection of Court, though she has attained twenty-one, 1468.

Where settlement on ward has been approved of by the Court, it cannot be defeated by delaying the marriage, *ib.*

Improper settlement on ward, when reformed, 1469.

Ward's equity to a settlement, *ib.*

Settlement, where marriage is a contempt of court, *ib.*

Settlement, how framed in such cases, *ib.*

Where there are alleviating circumstances, *ib.*

Court may decline to part with funds during joint lives of husband and wife, 1470.

Semble, it could not enforce a settlement contrary to the wishes of both, *ib.*

Marriage of ward when annulled by the legislature, *ib.*

Court cannot compel male ward on coming of age to exclude wife by settlement from all his property, *ib.*

Settlement by infant of property not rendered valid by sanction of the Court independent of 18 & 19 Vict. c. 43, *ib.*

Covenant by husband to settle woman's personal property binding, *ib.*

Settlements by infants, under 18 & 19 Vict. c. 43, 1471.

Court has no power to make order after marriage, *ib.*

As to confirmation by an infant ward of settlement after the death of her husband, *ib.*

3. MAINTENANCE.

Powers of maintenance and advancement usual in wills and settlements must be exercised bona fide by trustees, *ib.*

Similar powers conferred by statute 23 & 24 Vict. c. 145, *ib.*

How far trustee before the statute, without a power, might advance income of infant for maintenance, 1472.

Trustee should apply to the court, when, *ib.*

Father bound to maintain his children, *ib.*

INFANTS, *continued*.

If of ability, not allowed by the Court maintenance out of their property, 1472, 1500.

Aliter if father's means inadequate, 1500.

So also in the case of property derived from a stranger, 1473.

Secus, where he has contracted for maintenance in a marriage settlement, *ib*.

Unless there is a mere power, *ib*.

Or a discretionary trust under a voluntary post-nuptial settlement, *ib*.

Although there be a provision for maintenance, *ib*.

What constitutes ability of father to maintain his children, *ib*.

Reference to the ability of the father, when omitted, *ib*.

No reference where the property small, *ib*.

Or no allowance for maintenance is asked, *ib*.

Or where children are taken from their father on account of his ill-conduct, 1474.

Wife not bound to maintain her children out of her separate estate, *ib*.

Separate estate not taken into consideration in determining the ability of the father, *ib*.

Married woman, under 33 & 34 Vict. c. 14, liable to maintain her children, when, *ib*.
After death of husband maintenance allowed without reference to the widow's ability, *ib*.

In allowing maintenance to an infant, regard had to the state of his family, *ib*.

As, brothers and sisters unprovided for, *ib*.

Even in the case of illegitimate brother born of same parents, *ib*.

Father and mother being in distressed and indigent circumstances, 1475.

Allowance made for charity, *ib*.

Maintenance allowed notwithstanding direction to accumulate, when, *ib*.

Or a limited interest be given for maintenance, with a direction to accumulate the rest, *ib*.

Maintenance allowed on principle of compensation, where there is a gift to class, though directed to accumulate, 1478, 1501.

Direction to accumulate will not preclude allowance for, 1502, 1503.

Not where gift over to a stranger, *ib*.

Or gift over to issue of one of the class on his death, 1471, 1501.

Or where unborn children may form part of the class, *ib*.

Nor where the contingencies upon which the shares among children become vested, are unequal, 1478.

Or bequests are contingent, 1502.

Unless proceeding from one under parental obligation, *ib*.

Allowance for maintenance made out of contingent gift cannot be recovered at law, 1504.

Allowed where contingencies are equal, with consent of all persons interested, 1478.

Or even if there be a gift over, if it can be inferred that it was the testator's intention to give it, 1479.

Where there are two funds, maintenance allowed out of fund most beneficial to infant, *ib*.

When capital applied to. 1501, 1503, 1506.

Court will not sanction trustee, as a general rule, in breaking in upon infant's capital, 1479.

Sanctioned when court would have done the same, *ib*.

Costs of suit have priority over all allowance to trustees for maintenance, 1480.

Distinction between an application of an infant's capital for advancement and maintenance, *ib*.

Cannot be made if there be a gift over of the capital, *ib*.

No allowance for maintenance out of kindness and benevolence, *ib*.

Distinction between a stranger and a trustee advancing money for infant's necessities, *ib*.

Court will not, in general, break in upon capital of infant for maintenance and education, 1481.

Except where the interest is too small, *ib*.

Distinction between allowance for prospective and past maintenance, *ib*.

Undertaking to pay money on account of maintenance enforced, 1482.

Person entitled to income left to him for the purpose of maintaining children, *ib*.

Entitled to his own share only when he incapacitates himself from performing the trust, *ib*.

Gift of income to widow for support and maintenance of herself and children, how applicable, 1483.



INFANTS, continued.

- Whether applicable to children who are adults, or foris familiaris, *ib.*
- Discretion of widow, honestly exercised, not interfered with, *ib.*
- Assistance of Court given to, *ib.*
- How far the Court will sanction a transfer, with the consent of the widow, of part of the fund to a child, *ib.*
- Residue not wanted for maintenance and education belongs to the widow, *ib.*
- Or her assignees, *ib.*
- Reference, if necessary, to ascertain its amount, 1484.
- Where a fund given to a person for the maintenance of his children, how far he will be controlled with respect to it, *ib.*
- Distinction between a bequest of a father and a mother for maintenance of children, *ib.*
- Guardian appointed for infant out of jurisdiction, to whom money for infant's maintenance may be paid, 1485.
- Proceedings in Ireland adopted, same person appointed guardian, *ib.*
- Attorney appointed to receive maintenance, when father out of jurisdiction, *ib.*
- Court may refuse maintenance, in order to compel parent to bring infant within the jurisdiction, *ib.*
- Income of lunatic infant residing abroad, paid to parent, *ib.*
- Power of Court to grant leases of infant's estates, *ib.*
- As to appointment of guardian ad litem, *ib.*
- Provisions relating to infants in the Divorce and Matrimonial Causes Act, 1486, 1487.
- Sale of infant's real estate*, 1504.
- When relief afforded to purchaser misled by fraudulent representations of, 28.
- Bound by constructive notice of solicitor, when sale is made under decree, 134.
- Partition against. *See* PARTITION.

INJUNCTION.

- Against conversion of partnership property*, 403, 404. *See* PARTNERSHIP.
- To stay proceedings at law, 1298.
- Dispute between Lord Ellesmere and Lord Coke as to the jurisdiction, *ib.*
- Account of, by Hallam, *ib.*
- Introduction of equitable pleas does not render injunctions to stay proceedings at law unnecessary, 1299, 1358–1365.
- Equitable jurisdiction not displaced by Courts of common law recently assuming concurrent jurisdiction*, 1358–1365.
- Instances in which equity stays proceedings at law, 1299.
- Party not bound to bring the whole matter into equity, 1300.
- To stay proceedings against executor having accidentally lost assets, *ib.*
- Where instrument fraudulently obtained, 1301.
- Or does not correctly represent an agreement, *ib.*
- Where person having only a legal interest commences an action against equitable owner, *ib.*
- To protect the separate property of a married woman, 1302.
- To stay proceedings under Interpleader Act, when, *ib.*
- When owner stands by and suffers another to lay out money on his estate, *ib.*
- Where the owner is a corporation, *ib.*
- Especially if the owner stands in some fiduciary relation toward person making the expenditure, 1303.
- And even where owner is a feme covert, *ib.*
- Where person encourages a nuisance, *ib.*
- Or permits another to deal with property as if his own, 1301.
- Person making expenditure on another's property, with notice of title, has no equity, *ib.*
- Nor if owner was ignorant of, and did not encourage, expenditure, *ib.*
- But owner coming into equity must make compensation, *ib.*
- Lessee or tenant from year to year making expenditure, unless with reference to some agreement, has no equity, 1305.
- Landlord not allowed to profit by outlay of tenant from year to year, whom he had encouraged to expect a lease, *ib.*
- Save where the expenditure was made under a mistake, *ib.*
- Proceedings at law stayed, when discovery required from the plaintiff at law, 1306.
- Injunction not extended to stay trial, if pleadings show that the discovery will not assist the defendant at law, *ib.*

INJUNCTION, *continued.*

- But plaintiff must show that an action can be maintained, *ib.*
- No stay of proceedings in superior or foreign Courts, until discovery made, 1307.
- No relief in equity to plaintiff, where the grounds of his case are equally available at law, *ib.*
- Especially since the Common Law Procedure Act, *ib.*
- Nor against mistake in pleading, or conduct of cause at law, *ib.*
- Except, perhaps, on receipt for payment of money being found after judgment at law, *ib.*
- Jurisdiction, under Common Law Procedure Act, to compel discovery, 1308.
- To admit equitable defences and replications, *ib.*
- Does not take away equity jurisdiction, *ib.*
- Defendant at law having an equitable defence at law may apply for injunction in equity, when, *ib.*
- As may plaintiff at law, instead of pleading equitable replications, *ib.*
- When defendant at law, having put in an equitable plea, can apply for injunction in equity, 1308, 1309.
- Creditor restrained from proceeding against executor, after a decree in an administration suit, 1310.
- But not until decree, though a bill be filed, *ib.*
- Or unless decree give a present right to go in and prove debts, *ib.*
- Person who has obtained charging order before decree not restrained, if order made absolute before decree, *ib.*
- Judgment obtained before, but on same day as decree, has no priority, *ib.*
- After decree, executor cannot exercise any discretion, 1311.
- Must take objection to the Statute of Limitations, *ib.*
- Executor's right of retainer not barred, *ib.*
- Executor must state what the assets are, either in his answer or by affidavit, *ib.*
- As to costs of action, when proceedings at law are restrained, *ib.*
- Or proceedings in County Courts to recover a legacy, *ib.*
- Costs of proceedings after notice of decree for administration, *ib.*
- Executor protected when estate has been administered by the Court, 1312.
- Executor after decree makes payments to creditors at his own risk, *ib.*
- Letting judgment go by default, *ib.*
- Suffering proceedings at law to continue, *ib.*
- Executor not permitted, without leave, to proceed against party to suit, after administration of the estate by the Court, *ib.*
- Creditor, after a bankruptcy in this country, not restrained from proceeding in foreign courts against the bankrupt, *ib.*
- Indian creditor not restrained from obtaining payment out of English assets, 1313.
- Priority of Irish judgment creditor over English simple contract creditors against property remitted from Ireland, *ib.*
- Lord Chancellor cannot stay execution of judgment annulling letters patent, *ib.*
- Jurisdiction may be exercised to prevent multiplicity of suits or circuitry of action, 1337.
- Existence of an equitable defence which is inadmissible at law is sufficient, 1328.
- Judgment not enjoined on legal grounds which were or might have been considered in the original form, 1330-1335, 1358.
- Unless prevented by fraud, accident, or mistake, from defending the action, 1365-1368.
- And valid defence must exist, 1369.
- When surprise will be ground for relief, 1368.
- But where defence is solely cognizable in equity, injunction will be granted, 1335.
- Legal proceedings may be enjoined to give effect to equitable set off and defalcation, 1338.
- What constitutes right of set off, 1339-1347.
- When injunction will be granted for matter within original co-ordinate jurisdiction of law and equity, 1348-1350, 1363-1365.
- Judgment not enjoined on grounds within jurisdiction of Court of law, 1358.
- As for fraud, unless legal remedy is inadequate, 1351-1353, 1354.
- Or illegality, 1356-1358.
- Injunction granted where constructive fraud or undue influence exists, 1353.
- When instrument directed to be surrendered and canceled, 1354.
- To restrain negotiation or transfer of negotiable securities, *ib.*
- Judgments rendered in absence of party complaining, when ground for relief, 1370-1372.
- Judgment will not be enjoined merely because defendant was not served with process unless good defence exists, 1370.

INJUNCTION, *continued.*

Injunction not granted after verdict in aid of a legal defence, unless complainant was prevented by fraud, accident, or mistake from presenting his defence or obtaining a new trial, and no negligence exists, 1372, 1374, 1377-1384.

Equity has jurisdiction of bill filed for injunction and new trial, 1377-1384.

But since new trials have been granted at law, relief seldom afforded in equity, ib.

New trial not generally awarded in equity on ground of after-discovered or cumulative evidence, 1380-1383, 1386-1388.

Ignorance no excuse if complainant could previously have obtained necessary information, 1375, 1384, 1386.

Injunction after judgment upon contract forbidden by statute or contrary to public policy, 1374.

Judgment irregularly entered not enjoined on that ground, 1374.

To restrain or vacate awards, 1388.

To restrain levy of execution, 1408-1412.

To restrain proceedings in Ecclesiastical Courts, 1313.

In the Admiralty Courts, 1314.

Under the statutory jurisdiction, conferred by the Merchant Shipping Act, 1854, 1315.

To restrain proceedings in the Lord Mayor's Court, 1316.

In Courts out of the jurisdiction, 1316-1319, 1396.

When judgments of Courts of other States enjoined, 1393-1401.

Courts of one State or country will not in general interfere by injunction with those of another State or country, 1398-1401.

Injunctions between Federal and State Courts, 1402-1406.

Party suing in equity and in another Court for the same thing, and same purpose, must elect in which he will proceed, 1319, 1320.

If he elects to proceed in equity, restrained from proceeding in the other Court, 1319.

What plea of proceedings in another Court must show, 1320.

Order to elect discharged, when, ib.

After decree, party restrained from proceeding for the same matter in another Court, ib.

If necessary to do so, leave of the Court must be obtained, ib.

Exception in the case of mortgagee, who may proceed on all his securities at once, ib.

Unless he has dealt with mortgaged property so as not to be able to restore it, ib.

Or when he has aliened it wholly, ib.

Or partially, ib.

Or cannot hand back the title deeds, ib.

Unless prevented by vis major, ib.

Semble, after foreclosure, mortgagee not precluded from suing on a bond or covenant, ib.

Secus, if mortgagee has sold the estate, ib.

And may prove in administration suit, ib.

But he must give up property, and not allowed costs of foreclosure, ib.

Parties restrained from proceeding against officers of the Court, when, ib.

Officers of the Court restrained from proceedings, when, 1321.

Criminal proceedings not restrained, ib.

Except when commenced by plaintiff in equity relative to the same matter, ib.

Semble, not in the case of defendant, 1322.

Formerly granted to restrain proceedings in bankruptcy, ib.

Party restrained from taking out a fiat in bankruptcy in fraud of an agreement, ib.

But equity would not interfere with distribution of the estate of a bankrupt, 1323.

Courts of bankruptcy can now restrain proceedings in other Courts, ib.

Practice of restraining proceedings in other Courts, ib.

Against proceedings in equity, 1324, 1389-1396.

How far parties will be restrained from applying for an act of Parliament, ib.

Not in general where a party merely seeks to supersede the rules of property, ib.

Whether arising from contract or otherwise, ib.

Not granted to restrain application to foreign legislature, when, 1325.

Parties restrained from applying funds of a company in an application to Parliament to extend its powers beyond the objects for which it was constituted, ib.

Or to vary the object contemplated by an Act of Parliament by which company was formed, 1326.

Funds appropriated by an Act of Parliament for certain purposes, cannot be applied for extension of those purposes, ib.

INJUNCTION, continued.

Without consent of the Court of Chancery, *ib.*

Such funds may be employed in defence of existing rights, *ib.*

As opposing a bill in Parliament, 1327.

Or funds of corporation may be applied in opposition to informations impeaching the title of the corporation, *ib.*

Equitable pleas, how far admissible, *ib.*

Equitable defence not allowed at law when defendant has filed a bill in Chancery, raising the same question, 1328.

Injunction will be dissolved on coming in of answer which denies all the equity of the bill, 1413.

But not where the denial in the answer is evasive, nor unless it is fair and full in all material particulars, 1415.

Nor when new matter is set up in confession and avoidance of the plaintiff's equity, 1415.

Nor when the answer is founded on hearsay, and not on the defendant's own knowledge, *ib.*

Injunction against several not dissolved, till all have answered, 1415.

Against conversion of partnership property, 403, 404. *See* PARTNERSHIP.

INSOLVENCY.

Distribution of partnership property in cases of, 407, 416-429. *See* PARTNERSHIP.

When creditor holding collaterals entitled to dividend or whole amount of debt, 257.

Of complainant, when bar to specific performance, 1040.

Effect of, on right of equitable set off, 1346.

INSURANCE.

Effect of policy erroneously drawn, 956.

Reformation of policy of, 958, 959.

When parol evidence admissible to contradict policy, 973.

Deed apparently divesting insurable interest, may be shown to be mortgage, 1005.

INTEREST.

When payable on legacies, 639-646. *See* LEGACY.

When allowed as compensation for delay in suit for specific performance, 1057, 1112.

See SPECIFIC PERFORMANCE.

INTOXICATION.

At time of executing contract, 1036, 1369.

INVESTMENTS. See TRUSTEES AND EXECUTORS, LIABILITIES OF, 3.**JOINT PURCHASERS.**

When agreement that one shall assume whole debt converts other into surety, 282.

JOINT TENANTS.

Notice to one not notice to all, 169.

Partition between. See PARTITION.

JUDGMENT.

When assignee of, postponed to subsequent assignee, 54.

When notice, 140. *See* NOTICE, 7.

Not affected by charge of debts, 372.

Marshalling against, 270-272. *See* MARSHALLING, 1.

When proceedings before and after, enjoined, 1330, 1365. *See* INJUNCTION.

In Courts of other States, 1396, 1398, 1402.

When equities of surety altered after, 1914.

JUDGMENT CREDITOR. See CREDITOR.**JURISDICTION, IN PERSONAM.**

Of equity, where person is within jurisdiction, to make a decree concerning property out of the jurisdiction, 1817-1819, 1823-1830.

Relief not refused solely because property is without jurisdiction if full relief can be administered by personal decree, 1823.

Cases of specific performance, 1823, 1824.

other cases, 1825-1830.

Pennsylvania Statute, 1825.

But relief refused where dependent upon construction of disputed title to lands in other States, 1830-1832.

Not confined to lands within the colonies or empire, 1819.

Lands out of the jurisdiction cannot be affected directly, ib.

JURISDICTION IN PERSONAM, continued.

- Possession of lands out of jurisdiction not decreed, *ib.*
- Nor a partition of, 1820.
- Nor an issue directed to try the validity of will of, *ib.*
- Nor, in the absence of contract, will boundaries of, be settled by the Court, *ib.*
- Nor abatement of nuisance upon, ordered, 1832.*
- Charity out of the jurisdiction, not administered by the Court, *ib.*
- Petition of right, with reference to lands in the colonies, 1821.
- Cases in which a sequestration of estates in Ireland was ordered, disapproved of, *ib.*
- Principles on which cases proceed, *ib.*
- As to restraining persons from proceeding in courts out of the jurisdiction, 1821, 1832.
- As to the effect of the 7th rule of the 10th Consolidated Orders, embodying the 33d Order of May, 1845, 1822.
- Of the Court of Chancery for the county palatine of Lancaster, where the subject of suit is out of the jurisdiction, 1823.

LACHES.

- When bar to specific performance. See SPECIFIC PERFORMANCE.*
- When bar to equitable relief, 1372, 1373.*

LAND. See REAL ESTATE.**LEASE.**

- When notice to purchaser, 125, 131. *See NOTICE, 2, 4.*
- Of infant's real estate, 1485.*
- When assignee allowed to prove that assignment was a mortgage, 2005.*

LEGACY.

- When general, 605, 646.
 - specific, 606, 646, 656.
 - demonstrative, 337, 606, 608, 654.
- Importance of distinguishing them, 606.
- Legacy not specific, unless clearly intended so to be, 607, 655.
- Instances of different kinds of legacies, 607, 647, 648, 665, 666.
- Bequests of money, 607, 647, 648, 649.
 - When specific, *ib.*
 - “ general.
 - Of debts, 607, 647.
 - When specific, 607, 608, 647, 648.
 - Of a part or residue of debt specific, 608, 611, 647, 648, 655.
 - Legacy out of debt, demonstrative, 608, 611, 648.
 - Proceeds of mortgage, 648.
 - Promissory notes, *ib.*
 - Carriages, furniture, &c., *ib.*
 - Of stock or Government securities, 608, 647.
 - Of “my stock” or “my shares” was, previous to Wills Act, specific, 608.
 - Since Wills Act intention to pass specific stock must appear more clearly, 608, 609.
- Bequest of share which I now possess, passes stock belonging to testator at the time of his death, 609.
- Thing will not pass as specific legacy, unless it belongs to testator at the time of his death, 610.
- Stock which testator has instructed broker to purchase will not pass, 610, 647.
- Though broker has given him credit in his books, *ib.*
- Secus, if broker has entered into a contract for the stock before the testator's death, *ib.*
- Or the broker, being the owner of the stock, has given the testator credit for the amount in his books, *ib.*
- Even before Wills Act mere possession of stock not sufficient to render bequest in general terms specific, 610, 647, 658.
- As of stock or annuities in particular funds, *ib.*
- Or of India bonds, *ib.*
- Or canal shares, *ib.*
- Unless there appears to be an intention to refer to particular stock, *ib.*
- Or if sale for benefit of legatee be directed, 611.

LEGACY, *continued*.

- Legacy of part of debt, or part of certain stock, is specific, 608, 611, 647, 655.
 Legacy of money out of debt, or out of stock, is demonstrative, 611, 648.
 So where a sum is given, and the fund for payment is only pointed out, 611.
 Unless intention appears to give specific legacy, *ib*.
Demonstrative legacy will not fail in consequence of failure or insufficiency of fund provided as means of payment, or if no such fund exist, 633, 655.
Bequest of whole or definite portion of personality is general, 654.
*And it is immaterial that testator enumerates items composing gift unless they constitute part of bequest, and general words are merely formal, *ib*.*
 After-acquired property may be given specifically, 611, 650.
Specific bequest may be made of that which testator does not possess but expects to acquire, 650.
So specific bequest may be made of debt, and also of what testator may receive from that source, and in such case legacy is not adeemed by payment, 651.
 Stock passes, though amount inaccurately described, 611, 612.
 If testator had no such stock, other stock might pass, 612.
 Things ordered by testator to be made, *ib*.
 When parol evidence admissible to determine the nature of a legacy, 612, 674-676.
Bequest not readily construed to be general when executor would be thereby compelled to sell and repurchase same property, 657.
General bequest not rendered specific by evidence that testator was possessed of goods corresponding in amount or value to those bequeathed, 658-661.
But general words may operate specifically when such intention appears in will, 661, 662.
 Bequest of lease, tithes or rent out of term, specific, 613.
 Where a gross sum is payable out of real estate, it is demonstrative, *ib*.
 And legacy is payable, though fund fails, *ib*.
 Secus, where gift is only in the direction to pay out of fund, *ib*.
 But money to arise from sale of property may be given specifically, *ib*.
 Annuities are legacies, 613. *See ANNUITIES.*
 Residuary bequest; whether specific or general, 619. *See CONVERSION OF RESIDUE.*
 Legatee has the right of selection, when, 619.
 Or to take legacy absolutely, if it cannot be applied to specified purpose, when, *ib*.
See ABATEMENT OF LEGACY—ADEMPTION—SATISFACTION.
 How far specific legatee of shares entitled to have calls paid out of the testator's personal estate, 631.
 Result of cases, according to Sir J. Romilly, M. R., *ib*.
 Whether specific legatee or residuary estate liable for calls on shares specifically bequeathed, *ib*.
 To whom bonuses on shares specifically bequeathed belong, 632.
 Dividends on shares, *ib*.
 Profits on share or partnership specifically bequeathed, *ib*.
 Parol evidence admissible to show what property answers to a specific bequest, 633.
 Not to show that other property was intended, if there be no property answering the description, *ib*.
 Interest is payable on legacies from the time they are due, 639.
 Specific legacies due at the death of testator, interest or emoluments from that time, belong to the legatee, *ib*.
 Immaterial that enjoyment has been postponed by the testator, *ib*.
 Demonstrative legacy does not carry interest from testator's death, 640.
 Legatee when entitled to interest on specific legacy, where it is reversionary, *ib*.
 If demonstrative legacy be reversionary, *ib*.
 Where no time fixed, general legacy payable a year after testator's death, and carries interest from that time, *ib*.
 And interest will be due, though the payment of the legacy be impracticable, *ib*.
 And whether the assets be productive or not, *ib*.
 General legatee of long annuities not entitled to dividends before a year has elapsed from testator's death, *ib*.
 Intention may be shown that interest is not to commence until after a year on a legacy, *ib*.
 But intention must be clear, *ib*.
 A mere reference to time when personal estate may be received, not sufficient, *ib*.
 Or a mere direction to invest legacies beyond the expiration of one year from the testator's death, 641.
 Interest will be given from the death, on legacy given in satisfaction of a debt.

LEGACY, continued.

- Or where real estate is charged with the debts of another, *ib.*
- Or where there is a direction to pay it previously, *ib.*
- Or on a legacy from a parent, or person in loco parentis, to a child, *ib.*
- But not to an adult, *ib.*
- Nor where parent has provided maintenance aliunde, *ib.*
- Nor to a natural child, or stranger, unless maintenance directed, *ib.*
- Nor to a wife, *ib.*
- Distinction between commencement of payment of an annuity and of interest on a legacy for life, 642.
- Person having a life interest in residue, entitled to income from testator's death, *ib.*
- But not to the income of that which is wanted for payment of debts, *ib.*
- No limitation over after a life interest, in things *quæ ipso usu consumuntur*, *ib.*
- Exception in case of stock in trade specifically bequeathed, as of a wine merchant, 643.
- Or farmer, *ib.*
- Man's wearing apparel bequeathed to a woman for life, *ib.*
- Consumable articles comprised in residuary bequest for life must be sold, 644.
- Interest from testator's death on legacy charged on land, *ib.*
- Where time fixed for payment of legacy, interest due from that time, *ib.*
- Except where a legacy is left by a parent, or person in loco parentis, to an infant, when it will be allowed from the death of testator, for maintenance, *ib.*
- Whether legacy be vested or contingent, *ib.*
- Though child be en ventre sa mère, *ib.*
- Or accumulation is directed, *ib.*
- Nor where sufficient sum is allowed for maintenance, *ib.*
- Even out of another fund, 645.
- Exception not extended to relatives other than legitimate children, *ib.*
- Unless the testator puts himself in loco parentis, *ib.*
- Or his intention appears in the will to allow maintenance, *ib.*
- Legacy to be paid at a future time, with interest, interest payable from the end of a year after testator's death, *ib.*
- Rate of interest on legacies, *ib.*
- When given free from legacy duty, 645, 646.
- Payment of legacy charged on land.* See MARSHALLING, 5.
- In what currency paid, *ib.*, 646.
- As to the exchange and expense of remittance of legacy in foreign coin, *ib.*
- If revoked or satisfied by settlement or advancement, is not revived by codicil confirming bequests in will*, 757, 813.
- Doctrine in North Carolina and New York*, 813, 814.
- From debtor to creditor, or vice versa, when satisfaction of debt.* See SATISFACTION, 5.
- Commissions of executor upon legacy*, 561, 586, 596.
- See ABATEMENT OF LEGACIES—ADEMPTION—ANNUITIES—CONVERSION OF RESIDUE—MARRIAGE—MARSHALLING—REPETITION OF LEGACIES—SATISFACTION.

LEGAL ASSETS. See ASSETS.**LEGATEE.**

- For life, ordinarily entitled to accretions and accumulations*, 711.
- In what manner entitled to enjoyment of bequest. See CONVERSION OF RESIDUE.
- Marshalling between devisees, creditors, and, see MARSHALLING, 4.

LESSEE.

- May exercise equity of redemption*, 2006.

LETTER OF ATTORNEY.

- When equitable assignment*, 1653, 1654.

LEVY OF EXECUTION.

- When withdrawal of, by creditor, discharges surety*, 1900–1902.

LICENSE.

- To seize after-acquired property*, 1616.
- Not assignable, when not in nature of property*, 1630. See EQUITABLE ASSIGNMENT.

LIEN.

- On land not affected by charge of debts, 372.
- Acquired by creditors of partnership when set aside. See PARTNERSHIP.
- What discharged by sale in partition*, 919.

LIMITATION.

When condition in restraint of marriage with limitation over is valid. *See* **MARRIAGE**.

LIMITATIONS, STATUTE OF.

See **STATUTE OF LIMITATIONS**.

LIQUIDATED DAMAGES. See PENALTIES AND LIQUIDATED DAMAGES.**LIS PENDENS.**

When operative as notice, 142, 192. *See* **NOTICE**, 6.

LOAN.

When valuable consideration for conveyance of land, 84.
Conveyance in consideration of, is mortgage, 1996.

MAINTENANCE.

Equity will not give effect to agreements partaking of nature of, 1601, 1631.
What constitutes, 1601-1608, 1631-1648.

MAINTENANCE OF INFANTS.

Doctrine as to, 1471. *See* **INFANTS**, 3.

MARRIAGE.

A valuable consideration to sustain agreement, 511.

Conditions in general restraint of, void both by Roman and our law, 475.

Or such as lead to probable prohibition of marriage, 475, 502.

Secus, if of a limited nature, 475.

As against marriage with particular person, *ib.*

Or a native of a particular country, *ib.*

Or a person belonging to a particular sect, *ib.*

Or which prescribe ceremonies of marriage, *ib.*

As of the Quakers, *ib.*

Or which prohibit marriage until a reasonable age, 475, 505.

But condition not to marry a man of a particular profession invalid, 476, 503.

Condition against a daughter taking the veil or attaching herself to a convent valid, 476.

Roman law as to conditions restraining widows from marrying, *ib.*

Gift, by our law, during widowhood valid, 476, 506.

Whether such condition valid when widow is without children, 507.

Whether such condition can be imposed on a man, 482, 507.

Conditions requiring consent to marriage void by the Roman law, 476.

Valid by the law of England, when, 476, 505.

Lord Roslyn's account of the adoption of the Roman law in equity, 477, 478.

Distinction between conditions precedent and conditions subsequent, 478.

Conditions precedent on devise of land, or charged to be raised out of land, on marrying with consent, valid, *ib.*

Aliter in regard to personalty, 505.

Though there be no limitation over, *ib.*

Distinction between condition and limitation, 507-511.

Legacy or annuity to daughter, provided she does not marry before a certain age. does not vest on marriage before that age, 479, 509.

Even with the consent of the testator, *ib.*

Whether condition precedent in case of a personal legacy requiring consent generally, be valid without a bequest over, 480, 509.

With a bequest over it clearly is, *ib.*

Or there is another provision on marriage without consent, *ib.*

Conditions subsequent, if general, in restraint of marriage, invalid, *ib.*

Whether in the case of a devise or a bequest, *ib.*

Even it be not general, it will not be valid, 481.

As where the condition is against marriage with a particular person, *ib.*

Or restraining a widow from marrying again, *ib.*

Secus, where there is a gift over, upon breach of condition, 481, 507.

Or gift to widow is made to cease on marriage, *ib.*

Doctrine in the United States, 509.

As to condition defeating a gift to a man on his second marriage, 482, 507.

Condition subsequent requiring consent to marriage in *terrorem* merely, if there be no bequest over, 482, 507, 508.

MARRIAGE, continued.

- Though there be a diminished gift to legatee on marriage without consent, ib.
 Or the power of diminishing the legacy be delegated to another, ib.
Secus, where there is a gift over of the legacy on marriage without consent, ib.
 Reasons assigned by the Judges for the operation of the gift over, ib.
 Gift of a residue not considered as a gift over, ib.
 Unless there be a direction that the legacy should sink into the residue, ib.
Limitations until marriage valid, 483-385.
sed quere, 505.
Distinction between condition and limitation, 507-811.
Consent to marriage, what amounts to, 486.
 Marriage in the life of a father, with his consent, equivalent to marriage with the consent of his trustee, ib.
 Or his subsequent approbation ib.
 Where no particular mode prescribed, when consent of trustees will be presumed, ib.
 Where consent is required to be in writing, 487.
 Favorable construction put upon expression of consent, ib.
 Trustee corruptly refusing consent, 488.
 Refusing to interfere by giving or refusing consent, ib.
 Consent cannot without cause be retracted, ib.
 Unless obtained by fraud or misrepresentation, ib.
 Whether the consent of all the trustees or executors be necessary, 489.
 Where person dies whose consent was necessary, ib.
 Or one of two whose consent was required, ib.
 Subsequent consent immaterial, ib.
 Marriage *without* the knowledge of trustees a breach of a condition not to marry *against* their consent, 490.
 Clause of forfeiture on marriage without consent, bequest vesting at particular age, how construed, ib.
 Relief from forfeiture occasioned by negligence of trustee, ib.
 Semble, testator's consent to marriage, where consent of others is not made requisite, dispenses with condition in respect to the time of marriage, ib.
 Or against marriage with a particular person, ib.
Secus, in the case of a condition precedent, 491, 492.
 Whether a legatee marrying without consent can take on second marriage with consent, 492.
 Effect of lapse of time against persons insisting on forfeiture, as to onus of proving that there was no consent, 493.
 Remarks on the Roman as contrasted with the English law, ib.
Contracts in restraint of marriage void, 494.
 So a contract to marry a particular person not similarly bound, ib.
 But not a contract by which persons are mutually bound to marry each other, ib.
 Unless it be a fraud upon parents, or persons in loco parentis, ib.
 Covenant to pay a woman a sum of money as long as she remains unmarried valid, 495.
 Marriage brokerage contracts void in equity, 495, 512.
 Otherwise in civil law, ib.
 Semble, vice of consideration may be pleaded at law, 496.
 Bond for assisting at an elopement void, ib.
 Equality of match will not render the bond valid, 497.
 Incapable of confirmation, ib.
 Money paid for it may be recovered in equity, ib.
 Contract by parent or guardian, for promoting or consenting to marriage void, ib.
 Contracts in fraud of party to the marriage or relatives void, ib.
 Security given by son, without privity of his parents, to return part of wife's portion, void, ib.
 Other cases of fraud, 498.
 Particeps criminis may obtain relief in equity, ib.
 Equity will not interfere to the injury of an innocent person, 499, 500. *See SEPARATION.*
When promise to make settlement on marriage specifically enforced, 1082.

MARRIAGE OF WARD OF COURT.

Jurisdiction of court of equity over, 1462. *See INFANTS*, 2.

MARRIED WOMAN. See HUSBAND AND WIFE.

MARSHALLING. *See* SUBROGATION.

Principle of doctrine, 238, 255, 263, 264.

Must be two funds in existence, 238.

And two creditors of the same person, 239.

And one of the creditors must have a claim upon two funds, 240.

Right enforced though not raised by pleadings, *ib.*

Not enforced to prejudice of a third party, 252, 270, 285.

Secus, in Ireland in case of first judgment mortgage creditor against a second, 252.

Not enforced against purchaser for value without notice, 270, 285.

Not refused because means circuitous, 257.

In general equity marshals assets by the process of subrogation, and not by that of exdation or restraint, 262, 318.

Marshalling securities, 250.

Doctrine of as laid down by Lord Hardwicke, *ib.*

Observed upon, *ib.*

Against company wound up under Companies Act of 1862, 242.

For paraphernalia, 248.

Not for charity, *ib.*

Charitable legacies fail so far as they are not payable out of pure personality, 249.

Mode of apportionment, *ib.*

Testator may direct charitable legacy to be paid out of pure personality, *ib.*

And legatees may stand in place of creditors exhausting it, *ib.*

But pure personality must contribute to debts and general and testamentary expenses, 250.

Not applicable to legacies given to charities in India, *ib.*

Between two estates comprised in one mortgage and one of estates comprised in a settlement, *ib.*

In bankruptcy, 253, 257, 258, 322.

Admiralty, 254.

Rule in Massachusetts and Iowa in administration of insolvent estates, 322.

And generally whenever, as between two parties liable for a debt, the liability of the one is relatively secondary and that of the other primary, 292. *See* SUBROGATION.

Principle not dependent on contract, *ib.*

Operates as between successive purchasers or encumbrancers of some estate, 272, 291-305, 341-346.

But will not be enforced to the injury of purchaser who has bought in good faith without notice, 280, 285, 286.

Between vendor and purchaser, 272, 283-285, 291-305, 341-346.

Doctrine of marshalling in Pennsylvania, 256, 258, 267-269, 314, 349.

1. BETWEEN CREDITORS.

a. *Of the same person.*

Between simple contract and specialty creditors, 240.

Voluntary specialty postponed to simple contract creditor, *ib.*

Between specialty creditor and mortgagee of copyholds, *ib.*

Simple contract creditors not entitled to larger fund than they had originally, 241.

As against real estate, where personal estate becomes insufficient in consequence of a devastavit, *ib.*

3 & 4 Will. 4, c. 104, and 32 & 33 Vict. c. 43, render marshalling between creditors unnecessary, 241, 255.

Assets marshalled when creditor, who has but one remedy, is in danger of being defeated by the action of another, who has two, 255, 259, 314.

And inter vivos as well as after death, *ib.*

Equity will not exclude a creditor who has two funds or remedies from either, nor compel him to surrender one as the price of access to the other, even in cases of insolvency, and for the purpose of producing equality among creditors, 259, 264-266, 322.

But equity will sometimes exclude a creditor who has two funds, from one, when the other is sufficient and immediately within his reach, and an opposite course would result in irreparable injury to others, 314, 316.

Creditor of mortgage, not allowed to arbitrarily disappoint other creditors, 260.

Burden of proving that remedy which is left open to senior creditor is as certain, prompt, and adequate as that which he relinquishes, is upon party seeking to confine creditor to particular remedy, 318-322.

Nature of relief granted, 262.

Nature of property constituting double fund is immaterial, *ib.*

MARSHALLING, continued.

- A lien creditor entitled to marshal assets against debtor is so entitled against subsequent creditors, 266.*
- In favor of mortgagee, 241, 267, 268.*
- mortgagor, 284.*
- Doctrine in Pennsylvania, 267-269.*
- As to judgments in different countries, 262, 270.*
- Not enforced against bona fide purchaser, 270, 285.*
- As against grant to volunteer with covenant of warranty, 271.*
- When incumbrance is to be borne by vendor or purchaser, 272, 341-346.*
- b. Of different persons.*
- Doctrine does not, in general, apply, 239, 273.*
- Unless on special grounds of equity, 272-277, 316.*
- 2. AGAINST CREDITORS IN DEFAULT.**
- Creditor knowingly impairing fund applicable to junior creditor is precluded from proceeding against doubly charged fund to extent of resulting injury, 306.*
- Doctrine applied in favor of surety, ib.*
- When creditor can release security, 308, 309.*
- When registration of subsequent conveyance amounts to notice to holder of prior incumbrance, 310, 312.*
- Liability of creditor receiving collateral security, 312-314. See SUBROGATION—SURETY.*
- 3. IN CASE OF SURETIES, 275, 277. See SUBROGATION.**
- When surety entitled to subrogation, 278-285, 317.*
- As against surety to whom security has been assigned, 251.*
- Creditor impairing security, 306.*
- When payment operates as purchase, 278, 287-291. See PAYMENT.*
- Remedies of surety, 317.*
- In suit against surety it is no defence that creditor has collateral security, 312, 316.*
- Surety may, before payment, file bill against principal to compel fulfillment of obligation on maturity, 278, 280, 283.*
- 4. BETWEEN LEGATEES AND DEVISEES.**
- Between creditors and legatees, 243.*
- Against lands descended, ib.*
- Not against lands devised, whether legacy be pecuniary or specific, ib.*
- And though, since 3 & 4 Will. 4, c. 106, the devisee be heir, ib.*
- Devisee and specific legatee contribute pro rata to pay debts, 244, 324, 324, 652.*
- When specific legatee entitled to exoneration at expense of devisee, 831.*
- Legatee, previous to 1 Vict. c. 26, would not be entitled to resort to, as against residuary devisee, 244.*
- Semble, not allowed since Act, ib.*
- But legatee may stand in the place of mortgagee of devised as well as descended estate, 244, 245.*
- Rule not to be extended, ib.*
- Observations of Sir James Wigram, V. C., in Johnson v. Child, 245, 246.*
- In favor of legatees or annuitants as against lands devised for, or subjected to, the payment of debts, 247.*
- Semble, between legatees and simple contract creditors, as against lands descended, since 3 & 4 Will. 4, c. 104, ib.*
- In favor of specific or pecuniary legatees, by throwing burden of debts on descended lands subject to lien or charge for their payment, by operation of law, or the will of the testator, 324.*
- But not against devisee, 324, 331.*
- Unless land devised is charged with debts by will, ib.*
- Or specifically pledged or mortgaged for their payment, by testator, 325.*
- When pecuniary legatee is entitled to benefit of doctrine, 327-330.*
- Pecuniary legacy payable out of specific legacy does not abate till latter is exhausted 337-339.*
- Pecuniary legacy following specific bequest of all testator's personality is payable out of latter, 352.*
- Nor in favor of a legatee of the whole or residue of the personality, 332-335.*
- Unless land made primarily applicable by will, ib.*
- Legatee of the whole or an aliquot part of personality entitled to have the assets marshalled in New York and South Carolina, 330.*
- In favor of devisee against heir, 339.*

MARSHALLING, continued.

Although land charged with debts, 352.

Residuary devisee entitled to contribution from land specifically devised, 339, 340.

Personally primarily applicable to payment of debts, 257, 323.

Even when they are charged upon the land by the testator, 257, 330.

Or the land has been specifically pledged or mortgaged for their payment, 323.

Rule does not apply to debts of third person, though charged on land, 341-346.

When the testator manifests an opposite intention by bequeathing the personality, and suffering the land to descend, 324, 330.

When it will be postponed to general or pecuniary bequests of the personality, 324.

Order of application of property for payment of debts, 326, 652. See ASSETS.

Doctrine in Massachusetts, 330.

Devisee or heir of land subject to mortgage for debt of testator, entitled to have personal estate applied in payment of debt, 340.

Unless land expressly devised for its payment, ib.

Aliter, where testator was not personally liable for the debt, 341-344.

Rule in Ohio and Pennsylvania, 326, 343.

But not the residuary legatee, 340.

5. LEGACIES CHARGED ON LAND.

Personalty primary fund, although at date of will testator had no personal property, 346.

But presumption may be rebutted, 347, 352.

When intention to charge realty may be inferred, 331, 348.

Rule when realty and personality are blended in a general or residuary bequest, 348-353.

Rule in New York and Connecticut, 349.

Pennsylvania and Massachusetts, ib.

New Jersey, 350.

When land is devised on condition that legacy be paid by devisee, legacy is primarily payable out of land devised, 351, 352.

6. INVERSE ORDER OF ALIENATION.

When land subject to encumbrance is sold in parcels, each will be liable in the inverse order of alienation, 291-293.

Reason of doctrine, 291, 294, 303.

Equity cannot be defeated by release or assignment from encumbrancer, 302.

Immaterial whether paramount encumbrance was created by vendor or results from act of prior owner, 295, 296.

In favor of successive mortgagees, 296.

Purchaser of part of tract subject to antecedent judgment may enjoin waste, ib.

Effect of covenant of warranty, 296, 303.

Absence of covenant against encumbrance or of warranty, 304, 308.

Rule not enforced in favor of purchaser, whose title does not appear of record, unless defect is supplied by notice, 297.

But notice is equivalent to registration, 37-40, 98, 149, 213, 299. See NOTICE—REGISTRATION.

Rule does not apply where vendor deducts amount of encumbrance from purchase money, 303.

MERGER.

Of equitable into legal title, 41, 42.

MINOR.

May be prohibited from marrying until of full age, or with consent, 505.

MISREADING.

Effect of, on sealed instrument executed by reason of, 950-958.

MISREPRESENTATION. See FALSE REPRESENTATION.**MISTAKE.**

Not rectified as against purchaser for value without notice, 24.

Parol evidence admissible to show that writing does not express intention of parties, 979-994, 1003-1009.

Of law, when relieved against, 985.

By court of common law, no ground for equitable interference, 1333.

Of law, no defence to compromise, 1688, 1734, 1737.

But misconception of elementary doctrines may afford ground for inferring undue influence, 1736.

MISTAKE, continued.

Distinction between mistakes of law and fact, 1685.

Of law or fact outside of risk compromised may invalidate contract, 1689-1691, 1715-1718.

See COMPROMISE — PAROL EVIDENCE—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.

MORTGAGE.

When cancellation and surrender of, decreed, 27.

Vendor's liability after sale for payment of mortgage existing at time of sale, 272, 341-346.

When release of one of several parcels of land covered by mortgage discharges its remaining parcels, 307-310.

Distribution of proceeds of sale of land belonging to husband and wife, and mortgaged for debt of husband, 318, 1938.

When devisee of mortgaged land entitled to have mortgage discharged by executor, 340, 341.

By whom mortgage should be paid after sale made subject thereto, 341-346.

Not affected by charge of debts, 372.

Of railroad includes rolling stock subsequently acquired, 1615.

Of property not owned, treated as covenant to convey upon acquisition of title, 1619.

Passes by assignment of bond, 1667, 2008.

Parol evidence to convert deed into, 965, 1016, 1986-1989, 2002, 2005.

Reformation on ground that debt exceeds sum named, 1002.

RIGHT OF REDEMPTION.

Forfeiture of mortgaged estate at law, on non-payment at the appointed time, 1952.

Right to redeem in equity, ib.

Right to redemption cannot be given up by contract at the time of the mortgage, 1953, 1984.

Or by subsequent agreement, 1984.

but release of equity, upon adequate consideration, sustained, 1985, 1986.

burden of proof is on mortgagee, 1984.

Or fettered by confining it to a particular time, or a particular class, 1953, 1986.

And these principles apply in every instance where a conveyance is made as a security, independently of the form in which it may appear on the face of the papers, 1983, 1991.

And to transfers of personalty as well as of land, 1990.

Immaterial that no written evidence of debt exists, 1991.

Mortgage may exist when there is no debt, 1991-1993, 1996.

Test is whether consideration is a loan, 1996.

Mortgagee cannot obtain a collateral advantage not strictly belonging to the contract, 1953.

As the conversion of interest into principal, ib.

An agreement to pay a commission to the mortgagee, 1954.

That he should be receiver with a commission, ib.

Or if an auctioneer, that he should receive a commission upon a sale, ib.

A cotemporaneous agreement to convey other property at a certain price, ib.

Making the mortgaged property unredeemable on non-payment at a certain day, on a further payment being made by the mortgagee, ib.

Agreement for a preference of pre-emption valid, ib.

But the terms must be strictly complied with, ib.

Where mortgagee agrees to receive less than sum due, it must be paid on the day agreed upon, ib.

Where mortgage is in the nature of a family arrangement, the time of redemption may be limited, 1956,

Mortgage may be given to secure a sum larger than that advanced, when, ib.

Whether absolute deed is mortgage depends on nature of consideration, 1986.

Parol evidence admissible to prove consideration, 1957, 1986-1988.

When consideration is antecedent debt which still subsists, deed is mortgage, 1989.

So where grantor agrees to repay consideration, ib.

Fraud or duress, ib.

Retention of possession by grantor, 1989, 1999.

Aliter when consideration is satisfaction of precedent debt, 1996.

Question one of fact, 1997.

Deed upon condition not generally mortgage, 1993.

Deed and cotemporaneous defeasance constitute mortgage, ib.

MORTGAGE, continued.

But they must be between same parties, ib.

If defeasance not recorded, conveyance treated as unrecorded mortgage, ib.

Redeem of mortgagor is in equity, 1991.

Nature of an equity of redemption, ib.

Is an estate in the land, ib.

May be devised and dealt with as the land, ib.

Husband may be tenant by the curtesy of it, ib.

Since dower Act, wife dowerable of it, ib.

Descends as lands, 1958.

Mortgagor of advowson entitled to present on a vacancy, ib.

Executor, and not heir, entitled to money due on a mortgage in fee, ib.

Who may redeem, 1967, 1968.

Every one having interest in, or lien upon, land may redeem, 2006.

Person entitled to redeem entitled to a conveyance and the title deeds, when, 1968.

Practice on redemption by a tenant for life, ib.

Mortgagee not bound to convey to person who has bought only a part of the mortgaged estate and has not accepted the title, ib.

Person entitled to redeem cannot before appointed time, 1969.

If he does not pay then, six months' notice of his intention to pay is necessary, ib.

Mortgagee, after proper notice, refusing tender of a sufficient sum must pay cost of suit for redemption, ib.

Bill of mortgagor for redemption, not paying at the appointed time, dismissed, ib.

Though tender made before notice to dismiss, ib.

Time within which redemption was allowed previous to 3 & 4 Will. 4, c. 27, ib.

What was considered a sufficient acknowledgment of mortgagor's title, ib.

Effect of lapse of time under 3 & 4 Will. 4, c. 27, s. 28, 1970, 1971.

Where lapse of time would preclude recovery in ejectment it will prevent redemption, 2006.

28th section of the Act is retrospective, 1971.

Time does not run whilst the possession of the mortgagee may be referred to another title, when, ib.

What is an acknowledgment of mortgagor's title, under 3 & 4 Will. 4, c. 27, s. 28, 1972, 1971.

Acknowledgment of mortgagee binds his lessee, 1972.

of tenant in tail those in remainder, ib.

of one of several mortgagees himself alone, ib.

Arrears of interest on mortgage debt, how far recoverable, 1973-1977.

As to a suit for the redemption of lands in Canada, 1977,

Right of redemption forfeited by concealment of former mortgage, when, ib.

Against whom absolute deed may be shown to be mortgage, 2005.

Reconveyance of mortgaged estate when directed under Common Law Procedure Act, ib.

FORECLOSURE OF MORTGAGE.

Mortgagee may pursue his remedies at law and in equity at the same time, 1961.

Where an equity of redemption may be foreclosed, ib.

He must offer to redeem prior encumbrances, 1902.

Sale when decreed previous to the Chancery Improvement Act, ib.

If mortgage be of a dry reversion, ib.

Or security where scanty, ib.

Or bill praying sale taken pro confesso, ib.

When mortgagor made executor, ib.

Or if heir and personal representative of mortgagor, being the same person, admit deficiency of personal estate, ib.

In case of infant heir or devisee of mortgagor, with the mortgagee's consent, which would be most beneficial, sale or foreclosure order, ib.

Right to redeem or foreclose whether co-relative, ib.

Practice when questions of priorities between co-defendants are raised in a foreclosure suit, 1963.

Jurisdiction to order sale instead of a foreclosure enlarged by Chancery Improvement Act, ib.

Principles on which the Court acts in directing a sale under the Act, 1964.

As to the right and remedies of a mortgagee of a share of a colliery co-partnership, ib.

In Ireland sale has always been ordered, ib.

Time for payment or redemption, where allowed, ib.

MORTGAGE, continued.

- Foreclosure when opened, and on what terms, 1964-1966.
- As to costs of disclaiming defendant in a foreclosure suit, 1966.
- Mortgage cannot be impeached, by defendant, for fraud in a foreclosure suit, ib.
- Only by a cross bill, ib.
- Railway debenture holders not entitled to decree for foreclosure sale, ib.
- Power of sale by contract, ib.
- By Act of Parliament, ib.
- Power of sale does not affect right to foreclosure, ib.
- After death of mortgagor, bill may be filed by mortgagee for administration, where, ib.
- Bill for foreclosure may be filed after decree in, 1967.
- Distinction between costs in different suits, ib.

CONDITIONAL SALE.

- What amounts to*, 1993.
- Distinction between a mortgage and an absolute sale, with proviso for repurchase, 1954.
- In the latter case the terms of the contract must be strictly complied with, 1954, 1995.
- So, where there is an absolute sale, with subsequent agreement for a repurchase, 1955, 1956, 1996.
- Distinction between a mortgage and an absolute conveyance, with collateral agreement for a repurchase, 1958.
- In the latter case, heir entitled to money on a repurchase, ib.
- Mortgage may be assigned by mortgagee alone, ib.
- When no prior indebtedness exists, intention of parties at time of conveyance governs*, 1999.
- Grantor remaining in possession*, 1989, 1999.
- In doubtful cases, conveyance generally construed mortgage*, 1995.
- Conveyance in satisfaction of pre-existing debt not a mortgage*, 1996, 1998.
- Aliter when debt subsists*, 1989, 1996.
- Question one of fact*, 1997.
- Conveyance with contemporaneous or subsequent agreement to reconvey not mortgage, unless consideration is loan*, 1998-2002.
- Parol evidence admissible to show true nature of transaction*, 2002.
- aliter in Pennsylvania, unless instruments bear different dates*, 2002-2005.

ESTATE OF MORTGAGEE.

- Legal title may be used in any way not inconsistent with equity of mortgagor*, 2006.
- Mortgagee may bring ejectment*, ib.
- recover rent*, ib.
- but, unless in possession, cannot maintain trespass*, 2007.
- Mortgagee can only use legal title as security*, ib.
- Outstanding legal estate no defence to ejectment or partition by mortgagor*, ib.
- Statutes reducing mortgagee's estate to mere lien*, ib.
- Estate ceases on satisfaction of debt*, ib.
- Mortgagee's estate sold under attachment*, 2008.
- Mortgagor's estate bound by lien of judgment*, ib.

ASSIGNMENT OF MORTGAGE.

- Without concurrence of mortgagee assignee takes, subject to equities and accounts between them, 2007, 2008.
- Effect of declaration of no set off*, 1873, 2009. *See* Volume I, 876-880.
- Payments by mortgagor to mortgagee without notice of a transfer valid, 1959.
- So, if action be brought in the name of the mortgagee, on a bond or covenant, the assignee can only recover what is due, ib.
- But mortgagor not allowed for payments to persons not authorized to receive them, ib.
- Assignee, without privity of the mortgagor, cannot turn interest due into principal, 1960.
- Secus, if the assignment is with the privity of the mortgagor, ib.
- Except as against subsequent encumbrancers, of whom there is notice, ib.
- Mortgagee in possession, assigning without the assent of the mortgagor, answerable for profits before and after assignment*, ib.
- Semble, not if mortgagor evades service of subpoena, to foreclose, ib.
- Mortgagor not chargeable with costs of transfer made without notice, interest having being duly paid, ib.

MORTGAGE, continued.

Stranger, to whom mortgage is assigned for less than is due, entitled as against mortgagor and his heirs to whole sum due, *ib.*

And ssemble, against subsequent encumbrancer or creditors, *ib.*

Prior encumbrancer purchasing puisne encumbrance without notice of one intervening, entitled to whole sum due, 1961.

Secus, if with notice, *ib.*

Person standing in a fiduciary relation to the mortgagor, entitled only to what he paid, *ib.*

So is the heir-at-law, as against a purchaser or creditors, *ib.*

But heir or trustee purchasing encumbrance to protect encumbrance, entitled to what is due on the security, *ib.*

Arrears of rent do not pass by an ordinary assignment of a mortgage, *ib.*

Assignment of debt transfers mortgage, 1667, 2008.

Aliter of assignment of estate, *ib.*

Unless contrary intent appears, *ib.*

Effect of transfer of one of several demands secured by same mortgage, 2008, 2009.

Mortgagor may redeem from mortgagee or assignee purchasing at sale under exercise of power, 1985.

Aliter when premises are sold to third person or assignee purchases at judicial sale, *ib.*

ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

Mortgagor in possession not bound to account for rents to mortgagee, 1977.

Nor his agent, *ib.*

Nor any person claiming under him as a volunteer, *ib.*

Mortgagee must account from the time he takes possession, *ib.*

When annual rests will be directed against mortgagee in possession, 1977, 1978.

Effect of tender by mortgagor, 1979.

Mortgagee holding over after payment will be charged with balance and interest, *ib.*

When with costs, *ib.*

Liable only for fair rents and profits, and willful default, when, *ib.*

Chargeable with rents actually or constructively received, 2010.

Or with occupying rent, *ib.*

Liable for damage done, as pulling down buildings improperly, 1079.

For destroying or losing the title deeds, *ib.*

For assigning estate to an insolvent person, *ib.*

Mortgagee in possession of part of estate not charged as having been in possession of the whole estate, *ib.*

Allowances made to mortgagee in possession, *ib.*

For necessary repairs, 1980, 2010.

For protecting the title of the mortgagor, 1980.

For money laid out in improvements, with the consent or acquiescence of the mortgagor, 1980, 2010.

Secus, if without his consent, *ib.*

But mortgagee allowed for value of permanent improvements when he is entitled to consider himself seized of absolute estate, 2011-2014.

Not allowed for speculations or adventures, as in opening mines or quarries, 1981.

Nor, if opened, for a large expenditure, *ib.*

No inquiry directed as to lasting improvements, in the absence of evidence, *ib.*

Mortgagee in possession may cut timber and open mines, when, *ib.*

Must not permit others, being the adjacent owners, to work mines under estate, *ib.*

Mortgagee of houses, when he may insure, 1982.

Employment of ship by mortgagee, *ib.*

Where lower rate of interest has been paid by mistake, mortgagee may claim the difference, *ib.* See MARSHALLING.

Agreement not acted upon for a long time, by a mortgagor, to release equity of redemption, does not disentitle him to surplus on sale of the mortgaged estate, 1982, 1983.

See PENALTIES AND FORFEITURES—PURCHASER BONA FIDE WITHOUT NOTICE.

MORTGAGE OF WIFE'S INHERITANCE.

For husband's benefit, her estate considered only as a surety, 1925, 1926.

Wife entitled to exoneration out of husband's estate, *ib.*

And will be discharged by any act of the creditor by which this right is impaired, or its exercise prevented, 1939.

Equity thus created, binding on subsequent purchasers with notice, *ib.*

MORTGAGE OF WIFE'S INHERITANCE, continued.

Not, as is laid down in *Tule v. Austin*, postponed to other creditors of her husband, 1926.

At all events where wife mortgages her separate estate, *ib.*

Is entitled, after payment, to prove as a creditor on his bankruptcy, *ib.*

And such creditors consequently cannot claim subrogation against her, 1938.

Wife entitled to be recompensed out of produce of estate of husband mortgaged with her own, 1939.

Distribution of proceeds of sale of mortgaged land, 318,

Whether her estate will be discharged by gift of time to husband, 1928. See **SURETY**.

Debt must be the husband's, 1929.

Presumption that money borrowed by the husband on the mortgage of his wife's estate, is for his benefit, *ib.*

Parol evidence admissible to rebut presumption, *ib.*

But not to prove transaction different from what it appears on the instrument, 1930.

Wife may waive her right to exoneration, when, 1930.

Will not do so by borrowing further sum, *ib.*

Estate considered to be wife's, when she has power, when, *ib.*

Secus, when mortgaged under joint power, *ib.*

Although equity of redemption is reserved to the husband and his heirs, trust results to wife, 1930-1932, 1940.

Unless intention of wife appears to alter limitation of equity of redemption, 1932-1938.

Wife's mortgage considered as voluntary conveyance, in regard to her husband, 1940, 1941.

Statutory provisions prohibiting such mortgage, 1941.

MORTGAGEE.

Nature of estate of, 2006.

When third, may gain priority over second, 10.

First, entitled to preference over second, though latter was without notice, 31.

When a purchaser for value, 32.

Rights of successive mortgagees to relief from payment of paramount encumbrance, 296. See **MARSHALLING**.

Registration of subsequent conveyance not notice to mortgagee, 310-312.

With power of sale, not allowed to profit by sale, 516, 1985.

Costs of, when acting as his own solicitor, 517.

Of undivided share, may file bill for foreclosure and partition, 881.

Liability of, in possession, 2010-2014.

Marshalling in favor of and against. See **MARSHALLING**.

See **MORTGAGE—NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE**.

MORTGAGOR.

When subrogated to mortgagee as mean of obtaining indemnity from purchaser, 284. See **SUBROGATION**.

Nature of estate of, 2007.

See **MORTGAGE**.

MOTHER.

When entitled to custody of children. See **INFANTS**.

When required to maintain child. See **INFANTS**, 3.

MULTIPLICITY OF SUITS.

Interposition of equity to prevent, 859.

MUTUALITY.

When necessary to obtain specific performance. See **SPECIFIC PERFORMANCE**.

NEAR RELATIONS.

Gifts between. See **UNDUE INFLUENCE—VOLUNTARY DONATION**.

NECESSARIES.

For Infants. See **INFANTS**, 3.

NEED.

When ground for setting aside gift, 1245.

NEGLIGENCE.

Injury to the debtor by the negligence of the creditor, with regard to the securities or remedies of the debtor, will discharge the debt to the extent of the injury, 305, 306, 312. See **SUBROGATION**.

NEGLIGENCE, *continued.*

When bar to equitable relief, 1372, 1373.

Constructive notice by reason of, 123. *See* NOTICE.

See PURCHASER BONA FIDE WITHOUT NOTICE.

NEGOTIABLE SECURITIES. *See* PROMISSORY NOTE.

NEW TRIAL.

Jurisdiction of equity to entertain bill for, 1377.

NO OFF SET.

Effect of declaration of, 1673. See Volume I, 876-880.

NOTE. *See* PROMISSORY NOTE.NOTICE. *See* PURCHASER BONA FIDE WITHOUT NOTICE—REGISTRATION.

Purchaser, with notice of equitable right, bound by it, 117.

So, of a purchase of chattels, 61-64, 195, 196.

Cannot defeat right, by acquiring legal estate, 117.

Doctrine rests on presumed fraud, *ib.*

Notice of a contract to sell or lease binding on subsequent purchaser, *ib.*

So, of defective or equitable mortgage, 118.

Or a lien for unpaid purchase money, *ib.*

Or, of a trust, *ib.*

Or, of unregistered conveyance, *ib.*

But notice of the unregistered conveyance must be clearly proven, *ib.*

Constructive notice sufficient, *ib.*

Purchaser without notice may, though he afterward acquires notice, gain priority by registration, 40, 119.

As may a subsequent encumbrancer, 119.

Purchaser, with notice from purchaser without notice, protected, 33, 34, 40, 95, 119, 225.

So is purchaser without notice from purchaser with notice, ib.

Even in the case of a charity, 119.

Trust attaches upon trustee selling and taking reconveyance from purchaser without notice, 120.

Purchaser with notice not bound by voluntary settlement, *ib.*

Assignee of equitable encumbrance takes subject to all equities affecting it, 120.

Assignee of equity takes subject to all prior equities, although without notice of their existence at the time of the assignment, 50-61, 70, 71.

Whether purchaser of equity will have such notice, 66-72.

Creditors not affected by notice of equities attaching after judgment, 33, 95-99.

When purchaser at sheriff's sale takes subject to prior equities, 33, 92, 94, 95.

Vendor not bound, by notice of mortgage by the purchaser, 120.

Nor of sub-sale by him, 121.

Notice before payment of purchase money, though it may be secured, and a conveyance executed, sufficient, 144.

Or before conveyance, though purchase money be paid, *ib.*

Or due acknowledgment of a deed by a married woman, *ib.*

Proof of notice, *ib.*

Actual notice, 121, 144.

question of fact, 144.

Mere vague reports will not amount to, 121.

Must proceed from some one interested in the property, 121, 146-149.

But knowledge or positive information derived from any source sufficient, 146-149.

Notice, whether actual or constructive, must be sufficiently certain to furnish definite information, or afford the means of obtaining it, 153, 154, 223.

How far necessary to notify debtor upon assignment of chose in action, 1579.

Of equitable assignment, 1665. See EQUITABLE ASSIGNMENT.

Constructive notice, 38-40, 121, 223.

question of law, 145.

not evidence of actual knowledge, 145, 155, 156, 157.

definition of, by Eyre, C. B., and Wigram, V. C., 121, 122.

doctrine not to be extended, 167.

Presumption of notice depends on facts and circumstances, 149-153.

May be rebutted by them, 157, 158.

Everything which amounts to actual knowledge, or which warrants the presumption that the purchaser either knew or remained willfully ignorant, operates as notice, 146-156.

NOTICE, *continued.*

Unless the communication was not one which should have put the purchaser upon inquiry, 161.

Or due diligence was used in inquiring, without discovering the truth, ib.

How far such inquiry must be prosecuted, 162-164.

Purchaser put on inquiry cannot rely on statement of vendor, 159-162.

In Pennsylvania, a purchaser who, when put on inquiry, fails to inquire of vendor, will be affected with notice of all he would have learned if latter had disclosed true state of case, 165.

but this is unsound, 165-168.

Public Act of Parliament notice, 140.

But not a private one, *ib.*

Even if made a public act, *ib.*

Nor an act or commission of bankruptcy, 140.

As to protection given by recent Acts to parties dealing with bankrupts, *ib.*

1. CONSTRUCTIVE NOTICE BY NEGLIGENCE OR FRAUD.

That which is sufficient to put a person upon inquiry, is notice, 123.

That legal estate is in another, *ib.*

Of easements, from state of premises.

That title deeds are in possession of another, when it affects purchaser with notice of a claim, *ib.*

When absence of title deeds will affect with, 123, 124.

2. CONSTRUCTIVE NOTICE BY RECITAL OR REFERENCE.

Notice in a deed leading to another fact, is notice of it, 124, 154, 189, 191.

Notice of a post-nuptial settlement, notice of articles previous to marriage, 125.

Concurrence in a deed of parties interested as devisees, notice of will, *ib.*

The fact of different lessors joining in a renewed lease, notice of their title, *ib.*

The fact of married woman being party to an under-lease, notice of her title, *ib.*

Purchaser, with notice of a deed, bound by its contents, *ib.*

Purchaser will have constructive notice of everything which appears on the face of the title papers, under which he claims, 145, 154, 189-192.

doctrine not applicable in contest between vendor and vendee, 146.

Or which is a necessary inference from the matters they contain, 189-192.

But such notice must be certain, or capable of being reduced to certainty, 192.

Notice of a lease imparts notice of its covenants, 125.

In cases of specific performance, notice of lease not notice of unusual covenants, 126.

It is a question of bona fides, *ib.*

Purchaser not bound to inquire after instrument which, by possibility, may affect subject of purchase, *ib.*

As after a deed, when he has only notice of a draft, *ib.*

Or after a settlement, which he is informed does not affect subject of purchase, 127, 128.

Purchaser bound with notice of contents of deed referred to in particulars of sale, 128.

Secus, where the vendor states the contents thereof to him, *ib.*

How far purchaser, from heir-at-law, bound by notice of the ancestor's will, *ib.*

Purchaser from assignees of insolvent debtor not affected by constructive notice of their negligence in sale, 129.

Assignee of charity lease takes with notice of facts showing its invalidity, *ib.*

Secus, where the facts depend on circumstances, dehors the deed, *ib.*

Purchaser with notice of articles of doubtful construction, *ib.*

General recital of mortgages is notice, *ib.*

Notice that a person had given a judgment or warrant of attorney, notice of mortgage, *ib.*

Notice of charge, though inaccurate, sufficient, *ib.*

In *Penny v. Watts*, notice of a devisee in consideration of a release of a legacy, notice of an agreement *fura conveyance* of the devised estate, *ib.*

Penny v. Watts disapproved of, 130.

Notice of an expired annuity, no notice of deed creating it, *ib.*

Purchaser of estate not affected with notice of facts which he might have found out if he had not been content with a short title to a portion of it, *ib.*

3. CONSTRUCTIVE NOTICE BY POSSESSION.

Possession constructive notice of title of party in possession, 180.

Whether notice is limited to title of occupant or extends to that of person under whom he holds, 187-189.

NOTICE, *continued.*

Possession must be sufficiently distinct and unequivocal to put purchasers on their guard.
180, 182.

And must exist at time of sale, 186, 187.

Presumption of notice from possession may be rebutted by proof of acts or omissions of party in possession, of a nature to mislead purchasers, 182, 183.

As where a grantor records a grant and remains in possession under an unrecorded agreement with the grantee, 184, 185.

Or by showing that the purchaser was unable to ascertain the truth by proper inquiry, 187.

Effect of possession as notice under the recording acts of this country, 187-185.

Where possessor has recorded one title, possession will not be notice of another which is unrecorded, 183.

Possession taken under one title, when notice of another acquired subsequently, 185, 186.

Possession of vendor not notice of lien for purchase money if receipt appears in the conveyance, 133.

Vendors having been long out of possession not notice, ib.

4. CONSTRUCTIVE NOTICE BY TENANCY.

Purchaser bound by equities of the occupiers of land, 130.

Doctrine in this country, 187-189.

As by a contract of a tenant for a lease, 130.

Or for purchase, 131.

Though it be posterior to the lease under which he held, ib.

*Doubted by the Vice Chancellor in *Penny v. Watts*, whether occupation be notice of an agreement not connected with it, ib.*

Concerning right to easement, ib.

Rights of burial, ib.

Purchaser not bound to inquire after title of last occupier, when the possession is vacant, 132.

Of receipt of rents, is notice of instrument under which they are paid, ib.

Possession of corporeal hereditament notice of title under which it is held, ib.

Not necessary that possession should be visible, ib.

Or actively asserted, ib.

Lessee entering without inquiries, affected by, ib.

And sub-lessee, ib.

And tenant from year to year, ib.

Summary of law, by Turner, L. J., 133.

Notice of tenancy not notice of lessor's title, ib.

Assignee of lease not bound to notice all the circumstances under which lessor derived his title, ib.

5. CONSTRUCTIVE NOTICE BETWEEN PRINCIPAL AND AGENT.

Notice to agent, attorney, counsel, director, or trustee, is notice to principal, 134, 145, 168, 172.

Whether agency is express or implied, 169.

When they are concerned for vendor and purchaser, 134.

Even although they be vendors, ib.

Or for mortgagor and mortgagee, ib.

Though solicitor affect to act as principal, ib.

Notice to solicitor in the country is notice to person acting in a cause by town agent, ib.

Is binding upon infants where sale is made under decree, ib.

Or conveyance is made to third person, ib.

Notice must be in same transaction, 134, 145, 155, 168, 170, 179.

Unless previously acquired knowledge is remembered and principal should have been informed, 175, 176.

But proof of this must be clear, 176, 177.

Or unless it be in a transaction closely connected with another, 135.

Principal not chargeable with notice of matters brought to knowledge of agent when latter is acting for himself or third person, 170, 175.

Principal affected with notice.

1. *When agent receives actual notice in same transaction,* 134, 145, 168, 179.

2. *When agent has constructive notice of matters principal would have learned if he had acted for himself,* 178, 179, 180.

3. *Where agent has knowledge which would render his conduct fraudulent if he bought for himself,* 172, 180.

NOTICE, *continued*.

- Sir J. Wigram's opinion in *Fuller v. Bennett*, 135-137.
 Knowledge must be material to transaction, *ib*.
 Sole solicitor does not necessarily act for both parties, so as to affect them with, 138.
 Nor solicitor or agent employed to do a mere ministerial act, 138, 177, 178.
 When fraud by solicitor affects his client with, 138, 177.
 Client or principal affected with notice of trust known to solicitor or agent, though latter may have committed fraud relative to the trust, 139, 177.
Aliter when agent is acting for both parties, 177.
When Corporations bound by knowledge of officers or directors, 140, 168, 171-175.
 Constructive notice in dealings with executors, administrators, and trustees, 140.
Notice to one joint tenant not notice to all, 169.
6. CONSTRUCTIVE NOTICE BY LIS PENDENS.
 Binding upon purchasers without notice, 142, 192-202.
 Principle on which doctrine is founded, 143, 192, 193.
 Interlocutory decree, 142.
 Decree to account, *ib*.
Operates as notice of all matters set forth with sufficient certainty to inform a purchaser, 192.
But not unless information thus communicated be certain, 197.
Nor unless suit be prosecuted with due diligence, 199.
Limited to subject-matter of bill, 197.
by jurisdiction of Court, 193.
And only extends to purchases made from the parties during continuance of the suit, 198.
Does not invalidate act done subsequently by virtue of antecedent right, 198.
Does not continue after judgment or decree, 201.
Effect of, when chattels are in question, 195, 196.
Negotiable instruments, 196.
 Some specific claim must be made in the suit to subject thereof to be affected by it, 143.
 But lis pendens will not affect purchasers without express notice, unless registered, *ib*.
 And will affect a person with notice of an equitable claim of one defendant against another, when, 143.
 Filing of special case taken as lis pendens, 144, 193.
 Registration of lis pendens may be vacated by the Court, *ib*.
 Liability of solicitor for not registering, *ib*.
7. CONSTRUCTIVE NOTICE BY JUDGMENT OR DECREE.
 A judgment is not notice, 140.
 Unless a search has been made, *ib*.
 Title depending on vendor not having notice of registered judgment not forced on purchaser, *ib*.
 Under old law, purchaser with notice bound by judgment, though not docketed, when, *ib*.
 Purchaser now not bound by a judgment, even with notice of it, unless registered, 141.
 Or of unregistered decree, *ib*.
 Re-registration of judgments, and decrees of judgments removed from inferior Courts, judgments in the counties palatine, *ib*.
 Writ of execution must now be registered and issued, to affect purchasers or mortgagees, *ib*.
 Though with notice, *ib*.
 Re-registration of crown debts, *ib*.
 Irish judgments, effect of, 142.
 Decree, after determination of suit, not notice, *ib*.
 Except to parties, *ib*.
8. CONSTRUCTIVE NOTICE BY REGISTRATION.
 Registration not of itself notice, 119, 144.
Aliter in the United States, 204.
 Distinction between English and Irish Registry Acts, 119.
 Doctrine of, has no application to British ships duly registered, *ib*.
 Presumption of notice on search of register may be rebutted by evidence showing the period searched, 144.
Registration is notice of all deeds and instruments which the law requires to be recorded, and which are duly recorded in compliance with the law, 204, 205, 206.

NOTICE, *continued.*

- But not otherwise, nor unless the property is sufficiently described in the deed, 205, 206.*
Nor unless the true nature of the grant or contract is apparent on the face of the record, ib.
Record of a deed, subject to an unrecorded defeasance, will not operate as notice, nor be valid against subsequent purchasers, 206, 207.
Registry is not notice to prior purchasers, nor of conveyances made by parties who have no title of record at the time of the registry, 210-212.
Registry only notice to those who claim through the grantor whose deed is recorded, 208, 209.
When registered deed is not notice to grantor it is not notice to those claiming under him, 40-42.
Notice of unregistered deed will supply want of registry, as against subsequent purchasers, 37-39, 98, 213, 299.
But when registry is necessary to validity against creditors, the want of registration cannot be supplied by notice, 218, 224-227.
And the same rule applies to unregistered mortgages, ib.
Except when the law is otherwise by statute, ib.
Whether such notice must be actual or may be merely constructive, 37-40, 98, 221-224.
Actual notice necessary in some of the States by statute, 215.
What notice necessary to render an unrecorded equity valid against a recorded conveyance of the legal title, 219, 220. See PURCHASER—REGISTRATION.
When of three successive purchasers the second has notice of the first, and the third of the second, but not of the first, the first will have priority over both the others to the extent of the right or interest of the second, 216.

OFF SET. *See* SET OFF.

ORDER AND DISPOSITION. *See* EQUITABLE ASSIGNMENT.

PARAPHERNALIA.

Marshalling assets to preserve, 248. *See* MARSHALLING.

PARENT AND CHILD. *See* INFANTS—UNDUE INFLUENCE—VOLUNTARY DONATION.

PAROL EVIDENCE.

- When admissible to determine nature of legacy, 612, 633, 674-676. See LEGACY.*
In cases of double legacy, 733-735. See REPETITION OF LEGACY.
Admissible to identify property bequeathed, 674.
Or when words in will are insensible, ib.
Specific legacy may be shown to be general, 675.
When testator's oral or written declarations admissible, 676, 810-812.
Equity arising on extrinsic evidence may be rebutted by like evidence, 676.
In cases of ademption and satisfaction, 758, 767-769, 781, 803-807, 809-812. See SATISFACTION, 4, 6.
Inadmissible, in absence of fraud or mistake, to alter written contract, 944, 971, 1011. doctrine in Pennsylvania, 966, 973.
Admissible to prove consideration, 946, 947, 964, 1031, 1986-1989.
Where contract rests partly in writing and partly in parol, 944, 946.
Inadmissible to incorporate antecedent oral stipulation into written agreement, 944, 963.
Principle applied to case of landlord and tenant, 945.
Bills of sale, 946.
Applicable to unsealed instruments, 945, 974.
Estoppel by reason of oral stipulation knowingly omitted, 946.
Where grant or promise of one party is in writing, while obligation of other remains in parol, 946, 947, 978.
Admissible to prove collateral or distinct contract, 947.
When memorandum may be explained by, 947, 948.
Tendency to restrict admission of, ib.
Declarations on delivery of deed or bond inadmissible at law to restrict operation of instrument, 949.
But fraud inducing execution may be shown by, 950-958, 978.
Admissible to establish resulting trust, 964.
When deed converted into mortgage by, 965, 1016, 1986-1989, 2002, 2005.
To show promise upon which a bequest was founded, 978.
Admissible to prove that writing is not drawn in accordance with intention of parties, 979-994.
In cases of mistake of law, 985.

PAROL EVIDENCE, continued.

Erroneous description of subject-matter, 988.

When parol evidence of mistake or fraud admissible to obtain, as well as resist, specific performance, 991-1010.

To reform mortgage when debt exceeds sum named, 1002.

To reform writing within statute of frauds, 1001-1010.

Inadmissible to prove promise to perform act not required by instrument, and failure to perform such act not of itself fraud, 1014-1016.

Subsequent parol modification of antecedent written contract, 1020-1025.

Writing altered by oral testimony becomes parol, 1028.

Admissible to show that wife's mortgage was for husband's benefit, 1929.

But not to contradict mortgage, 1930.

See SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.

PARTIAL ASSIGNMENT.

Effect of, 1642-1646. See EQUITABLE ASSIGNMENT.

PARTITION.

Jurisdiction in equity as to, 880, 894.

Extends to the partition of incorporeal hereditaments, 918.

Not to the determination of adverse or conflicting legal titles, 898, 900-903.

In such cases the bill may be retained until after the decision of the legal question at law, 901.

But defendant will not be allowed to oust jurisdiction by futile objections, 903.

When the title claimed by the plaintiff, or set up adversely by the defendant, is equitable or depends on equitable principles, equity may pronounce on the question of title, and then proceed to the partition, 903, 904.

The power of equity does not extend to sale, even where the property cannot be divided without injury, 915.

But has been enlarged in some of the States of the Union by statute, ib.

Writ of partition abolished, 880.

Partition of copyholds decreed under 4 & 5 Vict. c. 35, ib.

Not previously, unless by enforcing performance of contract, ib.

Or where there were freeholds and copyholds to be divided, ib.

Decree for, is matter of right, 881.

But right may be waived by agreement, 908-910.

Not necessary that all parties interested should be bound by it, 881.

Decree obtained by or against tenant for life, ib.

Tenant for life determinable on marriage, ib.

Or tenant for term, ib.

Remainderman not in esse bound by decree against tenant for life, ib.

Bill can only be filed by a person in possession, 881, 895.

When possession will be presumed, 895.

When tenant in common not in possession can maintain partition, 896-898.

Purchaser of undivided share at sheriff's sale may maintain partition before entering, 896.

Bill for foreclosure and partition may be filed by mortgagee of shares, 881.

Not incident to foreclosure or redemption suit, ib.

Plaintiff's bill dismissed, if no title be shown, ib.

Defendant cannot impeach common source of title, 899.

Defendant may show equitable right to complainant's share, 900.

Reference previous to commission, on small failure in proof of title, or if the interests of the parties are uncertain, 881.

Bill for, cannot be made the means of trying a disputed title, 882, 898, 902, 903.

Semble, disputed question may be tried by consent in suit for, 882.

When co-tenant may, in bill for, demand an account, 911.

Court may charge share with servitude or easement, 912.

Death, after decree, of person entitled to share, 882.

Inconvenience or difficulty of making partition no objection, 882, 907, 911.

Nor is diminution in value, 906.

Partition of a single house, 882.

Convenience of parties considered, 882, 907, 915.

Tenant in common entitled to his own share in severally irrespective of wishes of co-tenants, 905, 906.

Principle on which commissioners should proceed, 883.

Should only draw lots as to shares as a last resort, 884.

Should make separate return if they cannot agree, ib.

PARTITION, continued.

- Court cannot appoint person to draw lots, *ib.*
- Sum of money or rent awarded in equity for equality of, *ib.*
- Could not have been done under suit of partition, *ib.*
- Not awarded by commissioners unless directed by decree, *ib.*
- When compensation for improvements allowed*, 882, 916-918.
- If joint owner has received more than his share of rents, 885.
- Charged with occupation rent if he has been in possession, *ib.*
- Not entitled to allowance for repairs unless so charged, *ib.*
- Partition of mill, *ib.*
- adwoson, *ib.*
- In last three cases no commission necessary, *ib.*
- Sale of adwoson under Partition Act, 1868, *ib.*
- Of a man or, *ib.*
- Does not affect right of third parties, *ib.*
- As rights in common, *ib.*
- Estate of mortgagee, *ib.*
- May be confined to aliquot share of plaintiff where there are several defendants, 886.
- Perfecting by reciprocal conveyances, after allotment by commissioners, *ib.*
- When shares are minute, estate vested in trustee with directions to convey, *ib.*
- Day given to infants, *ib.*
- Except when legal estate is in trustees, *ib.*
- Or when infant is declared a trustee, or under the Trustee Act, 1850, *ib.*
- Conveyances were not necessary on partition at law, *ib.*
- Costs in cases of, 887.
- Of infants or lunatics may be raised out of shares, 888.
- Of purchaser made party by amendment, *ib.*
- Decree as to title deeds on, *ib.*
- As to proceedings under, *ib.*
- Exceptions to return of the commissioners, *ib.*
- Not set aside on light grounds, *ib.*
- As for mere inequality in value of allotments, *ib.*
- Set aside when different returns are made, *ib.*
- Where there is a gross error of judgment, *ib.*
- If made by commissioners upon an understanding with some of the parties, *ib.*
- Approved of by Court sometimes without commission, *ib.*
- Sale directed instead of, when, before Partition Act, 1868, 889.
- Partition Act, 1868, 889-891.
- Bill for sale under, must contain prayer for partition, 891.
- It may be added by amendment, *ib.*
- 4th section of Act is retrospective, *ib.*
- Onus of showing that sale ought not to be ordered thrown on parties opposing it, *ib.*
- Sale imperative when asked for by owners of a moiety or upward, when, *ib.*
- Whether immediate sale can be ordered when parties are out of the jurisdiction, *ib.*
- Practice in such cases, *ib.*
- Sale directed when infants are interested, 892.
- Whether it should take place in chambers or by auction, *ib.*
- Injunction after decree for, to restrain waste when granted, *ib.*
- Jurisdiction of the Inclosure Commissioners as to, *ib.* See **DOWER**.
- Under the Incumbered Estates Act, in Ireland, *ib.*
- By parol, cannot be questioned, when, *ib.*
- What liens discharged by sale in*, 919.
- Rule in Pennsylvania as to costs in*, *ib.*

PARTNERSHIP.

- Outgoing partners entitled, as against partners assuming partnership debt, to subrogation to securities of partnership creditors*, 277, 281.
- Partner mortgaging individual property for partnership debt is surety, as regards mortgaged premises*, 282.
- Upon death of one partner liabilities are cast on survivor*, 392.
- Assignment of partnership property, by surviving partner, for benefit of his separate creditors, invalid against execution issued on firm judgment*, *ib.*
- Separate creditors postponed to partnership creditors in distribution of partnership assets*, 392, 393.
- Paramount right of partnership creditors depends on equities of the partners*, 393, 396.

PARTNERSHIP, continued.

- Partners cannot appropriate joint assets to payment of private debts, 393, 394.
 Assignment, by insolvent firm, which puts separate creditors on level with partnership creditors, is invalid, 394.
 A levy for separate debt will yield to a subsequent levy for a debt due by the firm, 394, 395.
 Whether property be real or personal, 395.
 Nature of liability of partners to their creditors, 395, 396.
 Creditors cannot follow assets into hands of bona fide purchaser from partnership, 396.
 Unless they are thereby wrongfully hindered and delayed, ib.
 So where partner makes bona fide sale of his interest in firm to his co-partners, 397-399.
 Distinction between such sale and absolute assignment, 405.
 But interest of outgoing partner may be transferred in such manner as to create a trust, 399.
 Where co-partners have no lien on partnership effects for payment of partnership liabilities no preference can be claimed by creditors, 399.
 So in case of dormant partner, 400.
 When transfer by one partner, or conversion of firm property into separate property, is valid, 397-399, 400-402, 414, 415.
 Each member of firm has equitable lien on whole stock for payment of joint debts, 403.
 When injunction awarded and receiver appointed, 403, 404.
 Dissolution of firm, or death of member, does not extinguish equities of partners, 404.
 Effect of absolute assignment by retiring partner, 405.
 release, 406.
 insolvency of remaining partner, 407.
 Effect of levy and sale of partnership assets for separate debt, 408.
 Doctrine in Pennsylvania, 410-414.
 Order of distribution of joint and several assets, 416-429.
 In England, and most of the States of this country, the separate creditors have a prior right to the separate, and the joint creditors to the joint, assets in both bankruptcy and insolvency, 416-418.
 Aliter in others, 423-429.
 But where there is no joint estate, separate assets will be distributed equally, 418.
 When creditor holding joint and several security for debt of bankrupt firm, must elect against which estate he will proceed, 419.
 Distribution in administration of estate of deceased partner, ib.
 When lien acquired by joint creditor will be set aside in favor of separate creditor, 420, 421.
 Apportionment of profits of partnership between legatee for life and reversioner, 716, 721.
 Contracts for partnership not specifically enforced, 1103.
 When debts may be set off, 1341.

PART OWNER.

- Of ship, not entitled to commission as ship's husband, 519, 520.

PAYMENT.

- Will operate as purchase in equity, when made with the intention of purchasing, and by those entitled to buy, 286, 287.
 By one collaterally liable, operates as purchase, ib.
 Unless made and received as extinguishment, 286.
 By stranger, when purchase, 287-290.
 Stranger cannot purchase debt without creditor's consent, 289.
 Subrogation not enforced in favor of volunteer, 287.
 Will not operate as extinguishment, unless made on behalf of debtor, and authorized and ratified by him, 287-290. See PAYMENT, Vol. I—post SUBROGATION.
 Effect of payment by one under mistaken supposition that obligation on his part existed, 290, 291.
 Of smaller sum, in satisfaction of greater, when valid as compromise, 1729-1731.

PECUNIARY LEGACY.

- When assets marshalled in favor of. See MARSHALLING, 4.

PENALTIES AND FORFEITURES, RELIEF AGAINST.

- Ground of the jurisdiction for relief against, 2023, 2044.
 Origin of, ib.
 Doctrine at law, 2044.
 Relief in the case of the penalty upon a bond to secure payment of money, 2023.

PENALTIES AND FORFEITURES, RELIEF AGAINST, *continued.*

In the case of an estate forfeited by non-payment of mortgage money, 2024, 2044, 2045.

When penalty is to secure performance of some collateral act, issue quantum damnificatus directed, 2024.

Contract for the payment of a larger sum than was advanced, if not repaid at the time appointed, relieved against in equity, 2024, 2055, 2056.

Secus, where there is a contract to accept a less sum than is due if paid at a certain day, otherwise the whole amount due, 2025.

A stipulation for the acceleration of the payment of principal, on default in the payment of interest, is not viewed as a forfeiture, and is equally valid at law and in equity. 2049, 2050.

When obligor entitled to notice of arrival of time for payment, 2051.

When a stipulation for the payment of a sum certain in the event of a breach of contract or condition will be viewed as a penalty, or as liquidated damages, 2052-2056.

Covenant for payment of money by installments, 2050.

Contract for acceleration of payment not in the nature of penalty, *ib.*

Recovery of penalty at common law for breach of agreement, *ib.*

Actual damages only recoverable under 8 & 9 Will. 38 c., *ib.*

And relief given generally against a forfeiture or penalty incurred by the non-payment of a sum certain, on the payment of principal and interest, 2044.

Not in general for a forfeiture incurred by the non-performance of an act in pais, unless the injury inflicted by the breach is certain or susceptible of exact computation, 2047.

Relief granted in equity against forfeiture for non-payment of rent, under 15 & 16 Vict. c. 76, 2026, 2027.

Where party proceeds at law upon breach of other covenants as well as for non-payment of rent, what relief given in equity, 2027.

Relief given where lease is void on non-payment, as well as where re-entry is required, 2028, 2044.

New lease not now requisite on relief being given against forfeiture, *ib.*

Jurisdiction given to Courts of common law to relieve from forfeiture on non-payment of rent, *ib.*

Relief not given for breach of covenant to repair, 2029.

Effect of acquiescence, *ib.*

Relief not given against breach of covenant to lay out a specific sum in repairs, 2029-2031.

Notice from landlord unnecessary, 2031.

Breach of covenant to erect houses not relieved against, 2032.

As to burthen of proof in an ejectment for forfeiture for breach of covenant, *ib.*

Where literal performance of a covenant has been prevented by unavoidable accident, fraud, surprise, or ignorance, not willful, equity will relieve, *ib.*

Or where landlord stands by and looks on, *ib.*

Effect of acquiescence in breach of covenant at law, *ib.*

acquiescence, 2047.

negligence, 2045.

willful breach, *ib.*

Life insurance office not allowed to insist on a forfeiture after misrepresentation by agent causing it, 2032.

Subsequent distinct forfeitures not relieved against, *ib.*

Relief may be granted to a tenant of a lunatic's estate, when beneficial to the lunatic, 2033.

No relief until recently against breach of covenant to insure against damage by fire, *ib.*

Insurance in lessor's name only, not a breach of covenant to insure in the name of lessor and lessee, *ib.*

Relief now afforded in equity under 22 & 23 Vict. c. 35, 2033, 2034

At common law, under 23 & 24 Vict. c. 126, 2034.

No relief against breach of covenant to cultivate land in a husbandlike manner, *ib.*

Or not to carry on trade without license, *ib.*

Or not to assign without license, *ib.*

Or not to suffer persons to use a road over land, *ib.*

No relief granted in equity for some breaches where there are others on which relief cannot be granted, 2035.

Waiver by acceptance of rent, at law, *ib.*

In equity, *ib.*

PENALTIES AND FORFEITURES, RELIEF AGAINST, *continued*.

- Effect of notice to repair, after breach of covenant to repair, 2036.
- No relief against forfeiture on non-payment of calls to a company engaged in a public undertaking, 2036, 2046.
- Forfeiture may relieve shareholder from being a contributor, 2037.
- Unless shares forfeited *ultra vires*, *ib.*
- Or fraudulently, *ib.*
- Liability of past members of companies in respect of shares extinguished by forfeiture, when, 2038.
- No implied power in joint-stock company to forfeit shares, *ib.*
- Or in co-adventures in mining adventure on the cost-book principle, *ib.*
- Power by contract must be strictly followed, *ib.*
- No relief against an Act of Parliament, *ib.*
- Nor, in the absence of fraud or acquiescence, against forfeitures of customary estates or copyholds, *ib.*
- Copyholder in equity relieved against illegal seizure, *ib.*
- Against forfeiture to secure payment of rent, or fines, when, *ib.*
- Specific performance decreed where penalty is to secure performance of contract, 2038, 2039.
- Party cannot elect to pay penalty, 2039.
- Plaintiff cannot have specific performance and the penalty, *ib.*
- Must elect in which Court he will proceed, *ib.*
- Right to insist on penalty may be waived, 2040.
- No relief where contract is to pay an additional sum on doing a particular act, *ib.*
- Which he will not be restrained from doing, 2041.
- Nor can he protect himself from discovery, *ib.*
- Additional sum not to be considered as a penalty, because disproportioned to damages caused by doing a particular act, *ib.*
- Fraudulent acquiescence, by landlord, ground for relief, 2042.
- Question is one of construction whether sum is to be considered as a penalty or liquidated damages, *ib.*
- Specific performance of agreement to lease refused after acts of forfeiture, *ib.*
- But a strong case of forfeiture must be made out, 2043.
- Where forfeiture doubtful, specific performance decreed, *ib.*
- And plaintiff put upon terms in the proceedings at law, *ib.*
- Specific performance not refused on mere breach of covenant to repair, where there is no clause of re-entry, *ib.*
- Although acts of forfeiture committed with reference to a contract for a lease, contract to purchase the fee, if independent, enforced, *ib.*
- Forfeiture relieved on substantial compliance with contract*, 2046.
- Not relieved against condition precedent*, 2047.
- Nor unless parties can be restored to original position*, *ib.*
- Equity will not enforce forfeiture*, 2048.
- When specific performance enforced*, 2049.

PENALTIES—LIQUIDATED DAMAGES.

- Equity will not allow either party to a contract to stipulate for anything more than a compensation in case of breach*, 2052–2056.
- Rule the same at law as in equity*, *ib.*
- And when the injury inflicted is certain, or capable of being reduced to certainty by computation, a stipulation for anything more will be regarded as a penalty, against which relief will be afforded*, 2057–2060.
- When the injury is uncertain, the parties may fix the amount of compensation by agreement*, *ib.*
- Relief against covenant intended as equivalent for unfulfilled undertaking*, 2056, 2059.
- When time may be made essence of contract*, 2059.
- Stipulations for the payment of a sum certain generally valid as liquidated damages*, 2052–2056.
- Unless the amount thus fixed as compensation manifestly exceeds the amount of injury which will result from the breach*, *ib.*
- Whether the existence of such excess may be shown by extrinsic evidence or must appear by calculation*, 2060, 2061.
- Courts inclined to construe such stipulations as penalties and not as liquidated damages*, 2060, 2061, 2067–2069.
- But if intention was to liquidate damages, equity will not interfere, in absence of fraud, undue influence, or mistake, although amount is excessive*, 2061, 2062.

PENALTIES—LIQUIDATED DAMAGES, continued.

Effect of stipulation for the payment of one and the same sum for breaches varying in amount and nature, 2054, 2063, 2064.

Where same liability is imposed whether breach entire or partial, 2066.

Where particular covenant is singled out, 2063.

Where stipulation includes various particulars, forming a whole, 2064.

Application of these rules to contracts of sale, 2057, 2058, 2064, 2065.

To contracts against pursuing a trade or profession within certain limits, 2052, 2053.

Whether covenantor has option of complying with contract or of paying amount, 2069–2072.

Contract cannot be specifically enforced by party seeking to compel liquidation of damages, 2072.

PENDENTE LITE.

Effect of alienation upon right of specific performance. See SPECIFIC PERFORMANCE.

PERFORMANCE.

Of continuing contract, 1079–1082.

PERFORMANCE OF A COVENANT.

1. Purchase in fee of lands allowed to descend, performance of a covenant to purchase, settle, and, 835, 848.

Or of a covenant to convey and settle, where covenantor has no real estate, 836.

Whether express devise is performance, 848.

Lands purchased of less value, a performance pro tanto, 836.

Although heir be not the person interested in the performance of the covenant, lands bound in his hands, ib.

Immaterial whether lands be not purchased within time appointed, ib.

Or at different times, in small parcels, ib.

Or without the consent of the trustees, though required, ib.

Case of Lechmere v. Earl of Carlisle, 836–838.

Doctrine applicable, though covenant was to pay money to trustees to be laid out in land, 838.

But not by expenditure on lands vested in trustees, 839.

Doctrine applicable where the obligation to purchase arises under an Act of Parliament, ib.

Where estate covenanted to be settled has been exchanged, 480.

Or where it is optional to settle lands or rent charge, unless intention to settle a rent charge be shown, ib.

Assignment of a mortgage on an estate purchased, no objection, ib.

Lands descending, which covenantor had at the time of a covenant, pointing at a future purchase, not a performance of it, ib.

Nor if lands purchased are of a different nature or tenure from those covenanted to be purchased, ib.

Covenant to secure jointure out of after-acquired estates, applicable to estates then contracted for, ib.

Covenant to purchase land a mere specialty debt, 841.

Will not create a lien, as against a purchaser or mortgagee without notice, ib.

Equity of redemption of lands purchased in performance of covenant liable to it, ib.

Price paid for lands, in the absence of fraud, considered their value, ib.

Lands purchased by trustees, under an obligation to lay out money in lands, to be taken in fulfillment of, ib.

Trust funds, if improperly invested, will be followed, 842.

Purchase by husband, with consent of trustees, of property not authorized by the settlement, ib.

Further sum paid by husband for lands, purchased pursuant to trusts, considered as an advancement, ib.

2. Devolution, by intestacy of husband, of share of personality to his widow, equal to or greater than the sum which he covenanted to leave, or that his executor should pay her, a performance of the covenant, ib.

If share be less, a performance pro tanto, ib.

Immaterial whether wife takes out administration, ib.

Slight difference between leaving and paying, or the time of payment, in the covenant, not attended to, ib.

Doctrine applicable where covenant is to pay to trustees, ib.

PERFORMANCE OF A COVENANT, continued.

Covenant to pay or assign moiety of real and personal estate to wife, part performed by devolution of one-third of personalty on husband's intestacy, 843.

A gift by will not a performance of covenant to leave widow a certain sum, *ib.*

Unless, although there be a will, the personal property is divisible, according to the Statute of Distributions, *ib.*

Principle not applicable where the covenant is to pay interest of a sum of money for life, 844.

Or an annuity, 845.

Nor where husband covenants to pay a sum in his lifetime, 845, 846.

Entire covenant not divided by holding one part performed, when another part is not, 847.

Distinction between cases of satisfaction and performance, 847, 848.

To give a child an equal share with others, *ib.*

See SATISFACTION, 5.

PERISHABLE PROPERTY. See CONVERSION OF RESIDUE.**PERSONALTY.**

Primary fund for payment of debts and legacies, 257, 323.

But not for debts of third person, though charged on land, 341.

When bequest of, for payment of debts, bars Statute of Limitations, 383, 384.

Marshalling between legatees and devisees. See MARSHALLING, 4.

See REAL ESTATE.

PHYSICIAN.

When gift to, from patient, set aside, 1230. See UNDUE INFLUENCE—VOLUNTARY DONATION.

PORTION.

Satisfied by, or when satisfaction of, legacy. See SATISFACTION, 1, 2.

POSSESSION.

When operative as constructive notice. See NOTICE, 3.

POSSIBILITY.

Not assignable at law, 1559, 1623.

Except by king, 1559.

When assignable in equity, *ib.* See EQUITABLE ASSIGNMENT.

POST OFFICE. See CONTRACT.**POWER IN NATURE OF TRUST.**

Doctrine as to. See IMPLIED TRUST, 2.

POWER OF ATTORNEY. See LETTER OF ATTORNEY.**POWER OF REVOCATION.**

When voluntary deed reformed on ground of absence of, 1250-1266.

POWER OF SALE.

When an equitable assignment, 1654.

PRECATORY WORDS.

When trust implied from, 1834. See IMPLIED TRUST.

PRINCIPAL AND AGENT.

When principal affected by knowledge of agent, 134. See NOTICE—SURETY.

When gift to agent set aside, 1227. See UNDUE INFLUENCE—VOLUNTARY DONATION.

PROMISSORY NOTE.

When valuable consideration for purchase of land, 82-87. See PURCHASER BONA FIDE WITHOUT NOTICE.

When parol evidence admissible to explain, 974. See PAROL EVIDENCE.

Negotiation of, when restrained, 1354.

When amounting to equitable assignment of fund, 1650-1653.

Effect of alteration of, 1907, 1908.

Accepted in payment of debt due, implies agreement to wait until maturity of, 1915, 1916.

Acceptor or maker not entitled to equities of surety as against holder, 1917, 1918.

PUBLIC POLICY.

Assignment against, 1599, 1631-1648. See EQUITABLE ASSIGNMENT, 1—MARRIAGE.
VOL. II.—134

PURCHASE.

Of titles on speculation, when valid, 1631, 1632.

PURCHASER.

Rights and liabilities under executory contract for sale of real estate, 1089, 1108-1110, 1112, 1138-1143.

When entitled to specific performance. See SPECIFIC PERFORMANCE.

PURCHASER WITH NOTICE. *See NOTICE, 1—PURCHASER BONA FIDE WITHOUT NOTICE.*

Deed may be reformed against, 989.

PURCHASER BONA FIDE WITHOUT NOTICE. *See NOTICE—REGISTRATION.*

Who is, 32, 33, 50, 57-59.

Plea of, has no application between legal titles, or in courts of law, 45, 46.

Obtaining legal title at time of his purchase, protected against prior equitable right, 4.

May get in outstanding legal estate, 4, 37, 47, 60, 71.

Or an unsatisfied legal mortgage, even pendente lite, 5.

If done before decree to settle priorities, ib.

Even where equitable title depends on forged or revoked will, 5, 6.

*Principle departed from in *Carter v. Carter*, ib.*

*Comments on *Carter v. Carter*, by James, L. J., 7, 8.*

Purchase of pretended legal title will entitle purchaser to protection even where he acquires no actual title, 5, 6, 36.

Purchaser from agent of apparent owner not in possession, cannot plead that he is, when, 9.

Protected where he has the best legal right to call for legal estate, ib.

And whether the purchase be of realty or personalty, 9, 43.

Cestui que trust of trust fund, where a breach of trust has been made good by the application of another trust fund, considered as, ib.

Purchaser not protected where he obtains legal estate from trustee, with notice of trust, 9, 34, 49, 70.

Whether purchaser from cestui que trust is affected with notice, 69.

Trustee for successive encumbrancers cannot, by conveying legal title to one, give him priority, 10, 34.

Third mortgagee without notice may get legal estate from the first, though he has notice of the second mortgage, 10, 33, 37, 47, 70.

Reason of doctrine, 96.

Semble, not protected by conveyance of a dry trust estate, or of a satisfied term from a trustee with notice, 10, 43.

Or from a satisfied mortgagee with notice, ib.

Cannot avail himself of legal estate obtained by fraud and not conveyed to him, ib.

And no relief will be given as against such a purchaser, even to the holder of the true or actual legal title, 11-17, 31, 32, 45.

But this rule only applies to those buying in good faith, and under circumstances which justify the belief that they are acquiring the legal title, 34, 46.

No relief given to person having only equitable estate, 14-16.

Exception where legal mortgagee files a bill against subsequent mortgagee or purchaser, 16, 17, 45.

Or where encumbrancers having equal equities with a person not having the legal estate is prior to him in date, 17-19.

Deeds when ordered to be delivered up as against, when, 19.

When fund is in Court, ib.

When Court declares the right between adverse or innocent parties where the legal estate is outstanding, 20.

*Difficulty of reconciling *Williams v. Lambe* and *Collins v. Archer* with other cases, ib.*

Plea of, not allowed in former cases, as Court of equity had concurrent jurisdiction with Courts of law, ib.

*So explained by Lord Westbury, C., in *Phillips v. Phillips*, ib.*

Phillips v. Phillips disapproved by Lord St. Leonards, 22.

*Semble, doctrine of *Phillips v. Phillips* correct, ib.*

Defence that person is, not applicable to prevent him from production of deeds which he has set forth in his answer, ib.

Will not prevent Court protecting property pendente lite, 23.

Equity will not put a term out of the way of widow claiming dower against, ib.

PURCHASER BONA FIDE WITHOUT NOTICE, *continued.*

Commission of bankruptcy not superseded when there were purchases under it, 24.

Neither accident, mistake, nor ignorance of parties prejudicial to, *ib.*

When vendor, who has been induced to sell by fraud, can reclaim property from, 43, 53.

May defend himself by demurrer, 24.

plea, 24, 102.

answer, 25, 102.

When purchase pleaded as a bar to relief and discovery, must be averred to be of real or pretended legal title, in possession, actually conveyed, for value paid, and without notice, 62-102.

If defendant answer, he must answer fully, 26, 102.

Aliter in Courts of United States and Pennsylvania, *ib.*

Must be sustained by proof, and not merely by oath of defendant, 99, 103, 104.

Unless his oath is responsive to the bill, *ib.*

Plea must be full and explicit, 99, 100.

Burden of proving notice rests on complainant, 49, 99, 105.

Equity not only stands neutral, but will assist purchaser, 27.

Doctrine in this country, 27, 35.

Assistance given by Court to, against ancient statutes, 27.

Sleeping mortgages and encumbrances, *ib.*

Where person having a title, although covert or under age, encourages or permits purchaser to buy, *ib.*

Relieved against encumbrance, when encumbrancer conceals it, 28.

Or where trustee represents property as unencumbered, 29.

Secus, where encumbrancer, not being in contact with parties to a transaction, is merely silent, *ib.*

Entitled to relief when induced to purchase by person who was ignorant of his own right, when, *ib.*

Protection of purchasers in equity, agreeable to the wisdom of common law, 31.

Kept in view by the Legislature, *ib.*

As between two purchasers in good faith and for value, equity will give the first the benefit of those equities which are incident to his legal rights, although the effect may be to prejudice the second, 47.

In general, a purchaser's title is limited by that of his vendor, 46, 47.

As between two purchasers of the same thing, he will have preference who is first in point of time, 31, 45, 50.

Unless holder of antecedent equity has been guilty of negligence or fraud, 53, 54, 55.

This rule applies to purchase of equitable, as well as legal, interests, 44, 45.

Between equal equities possession prevails, 53.

In United States, unregistered deeds and mortgages are, by statute, invalid against subsequent purchasers, 37.

But notice is equivalent to registration, 37, 98, 149, 213, 299.

Ground of decisions, 38.

When constructive notice amounts to knowledge, 38, 39, 40.

Position of grantees in unregistered deed similar to owners of an equity, 39.

But in some States, between two successive grantees of the same premises, precedence is given according to priority of registration, 40.

When registered deed is not notice to grantor it is not notice to those claiming under him, 40-42.

A purchaser who buys what he believes and is justified in believing to be a good legal title, will be freed from all equities of which he had no notice at the time of the purchase, 33, 55, 209.

Application of this principle to the purchase of choses in action, 50-61.

Subsequent assignee of chose in action cannot assert defence of, against prior assignee, 50, unless latter has been negligent, 50, 54.

or former has obtained legal rights, 50-53.

Whether subsequent assignee liable to latent equities, the existence of which he had no means of ascertaining, 55.

Subsequent assignee takes subject to defences available between original parties, 56.

When notice necessary to perfect assignment, *ib.*

Bona fide assignee of mortgage, by assignment passing legal title, is purchaser, 57-60.

Aliter in New York, 56.

Application of this principle to the purchaser of chattels, 61-63.

The same result follows from purchase with notice from purchaser without notice, or by purchase without notice from purchaser with notice, 33, 34, 40, 95, 119, 225.

PURCHASER BONA FIDE WITHOUT NOTICE, continued.

And from bona fide purchase from a purchaser who has bought in fraud of the grantor, or the creditors of the grantor, 34, 53.

Aliter in case of fraudulent sale and reconveyance, 34, 40.

In Pennsylvania, a creditor who obtains a judgment against the holder of an equity will have a preference over a purchaser who claims title through subsequent conveyance of the legal title to the defendant in the judgment, 44.

But this is unsound, ib.

To constitute a bona fide purchase, the purchase must be of a real or pretended legal title, believed to be such by the vendee, 66-73.

Form of deed immaterial, 72-73.

And the conveyance must be executed, and the purchase money actually paid before notice, 73-79.

Rule on these points in the United States, 75, 76.

Payment must be made in money or negotiable instrument, and not in bonds or other securities not negotiable, 79, 82.

Payment must be in full and not merely partial, 75-79.

When receipt in deed is evidence of payment of purchase money, 106-109.

Relief may be given to the extent of partial payments, 75-79, 85.

Improvements may give right to compensation, 81.

Doctrine in Pennsylvania, ib.

The conveyance must be for a valuable consideration, and not merely as security for an antecedent debt, 82, 217.

What constitutes a valuable consideration, 82, 182, 217.

Creditors are not purchasers even when their debts have passed into judgment, 89-92. See Vol. I, 843.

And the same rule applies to assignees for creditors, 88.

But a purchaser at a sale under a judgment will stand on the same footing with other purchasers, 94, 225.

And a pledge on a mortgage for an advance made at the time will constitute a purchase for value, 84, 85.

Acceptance of deed in satisfaction of precedent debt, or as security for fresh advances, purchase for value, 84.

Rule in New York, 86.

Secus, where conveyance is made as collateral security for precedent debt, 86.

Or to trustee for benefit of creditors, 87.

Unless they have released on faith of conveyance, 88.

When forbearance is valuable consideration, 84-87.

No right can be acquired by a purchase, as against an antecedent right, of which the purchaser has notice, 36.

But the rights given by statute to judgment creditors, over unrecorded deeds and mortgages, cannot be restrained by notice, 38, 225.

Unless the notice is given when the debt is contracted, ib.

And when judgment creditor is entitled to priority, his superiority will extend to purchasers under the judgment, although with notice, 33, 225.

The purchaser of an equity takes subject to all prior equities, whether with or without notice, 70, 71.

This rule applies to purchasers of choses in action, 50-61.

Unless fortified by the legal title, ib.

As when the assignment of a debt is attended by an assignment of the mortgage by which it is secured, 50, 58.

Or the holders of the prior equities have been guilty of laches, 50, 54. See EQUITABLE ASSIGNMENT.

Purchase of an equity does not affect the purchaser with notice of prior equities of which he is, in fact, ignorant, nor preclude him from protecting himself against them, by taking a conveyance of the legal title, 68-72.

And a recorded conveyance of an equity will, as it seems, have priority over prior equities not placed on record, 43, 63, 69.

Cases on those points in Pennsylvania, 69.

Purchaser for value by deed duly recorded will take free from unrecorded deeds and mortgages, of which he has no notice at time of record, 37.

Whether payment in full necessary to constitute such a purchase, 119.

Notice will supply the want of a record, 37, 98, 213.

Unless an opposite rule is established by statute, 215. See REGISTRATION - NOTICE.

Purchaser of equitable title without notice may buy in legal title for protection against prior equity after notice, 47, 48, 49, 68, 71.

PURCHASER BONA FIDE WITHOUT NOTICE, continued.

But not when he knew of its existence at the time of his purchase, ib.

No subrogation against, 280, 285, 286.

When entitled, as against vendor, to subrogation to rights of lien creditor, 283, 285.

When liable for payment of encumbrance upon land purchased, 272, 291-305, 341-346.

See MARSHALLING, 6.

REAL ESTATE.

When liable to be taken in execution for payment of debts of decedent, 255, 323, 359.

See MARSHALLING.

When applicable for payment of legacies and debts, 257, 326, 330, 348, 353, 376.

Sold in parcels, order of application to payment of common incumbrance, 291-305. See MARSHALLING, 6.

When release of one of several parcels of land covered by mortgage, releases all, 307-310.

Distribution of proceeds of sale of land belonging to husband and wife and mortgaged for debt of husband, 318.

By whom mortgage upon land sold subject thereto should be paid, 341-346.

When devise of, for payment of debts, bars statute of limitations, 383, 384.

Damage to, falls upon purchaser under executory articles, 1089, 1108-1110, 1112.

Sale of, belonging to minor, 1504.

When equitable assets. See ASSETS.

Payment of legacies charged upon. See MARSHALLING, 5.

Marshalling in favor and against devisees. See MARSHALLING, 4.

Specific performance of contract relating to. See JURISDICTION—SPECIFIC PERFORMANCE.

See PERFORMANCE OF A COVENANT—PURCHASER BONA FIDE WITHOUT NOTICE.

RECEIPT.

When parol evidence admissible to explain, 947, 948.

When bill for new trial entertained on account of loss of, 1380, 1381.

RECEIVER.

Of partnership assets when appointed, 403, 404.

When liable for acts of co-receiver, 1793.

See PARTNERSHIP—TRUSTEES AND EXECUTORS, LIABILITIES OF.

RECITAL.

When constructive notice, 39, 124. See NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE.

RECORD.

Constructive notice by, 140. See NOTICE—REGISTRATION.

REDEMPTION.

Equity of. See MORTGAGE.

REFORMATION.

Of policy of insurance, 957.

Of sealed instruments, 957-960.

Of voluntary deeds containing no power of revocation, 1251-1260.

Of instrument not drawn in accordance with intention of parties, 979-994.

When subject matter is erroneously designated, 988, 1001.

On account of mistake of law, 987.

Against whom decreed, 989, 990.

Of mortgage by proof that debt exceeds sum named, 1002.

On ground of fraud or mistake, 1003-1009.

See DEED—SPECIFIC PERFORMANCE.

REGISTRATION. See NOTICE, 8.—PURCHASER BONA FIDE WITHOUT NOTICE.

Doctrine of tacking has no application under recording acts.

Necessary in the United States by statute, to validity of deeds and mortgages against subsequent purchasers whose deeds are recorded, 37, 202.

Judgment creditors are not purchasers, and have no priority over unrecorded deeds unless it is given to them by statute, 89-92.

But a purchaser at a sale under a judgment, will stand on the same footing with other purchasers, 94.

And in some of the states, registry is necessary by statute to the validity of mortgages against subsequent judgments, 93, 94.

The want of registry may be supplied by notice in the case of purchasers, 37-40, 98, 149, 213, 299.

REGISTRATION, continued.

- This construction of Registry Acts only applied in England by equity, 214.*
Generally adopted in the United States both at law and in equity, ib.
But will not be adopted when statute express to the contrary, 215-221.
In some of the States notice must be express and actual, to defeat priority of registry, 221-223.
But constructive notice held sufficient in others, 37-40.
When registered deed is not notice to grantor, it is not notice to those claiming under him, 40-42.
A recorded conveyances of an equity will, as it seems, have priority over prior equities which are not placed on record, 40, 68, 69, 204.
At all events, when they arise by deed or writing, and are susceptible of being recorded, 204.
When and how far equitable estates and interests are within the recording acts, 204, 226, 227.
Whether a purchaser of an equity by deed duly recorded it, will be subject to prior unrecorded equities of which he is ignorant, 50-61, 70, 71.
A recorded deed subject to an unrecorded defeasance, will be viewed as an unrecorded mortgage, and be postponed to subsequent purchasers and judgment creditors, 206, 207.
Whether payment in full necessary to a purchase within the recording acts, 74-79.
Registration operates as notice of all instruments which the law requires to be recorded, and which are recorded in compliance with the law, 204, 205, 206.
Purchasers not bound by a record made before the title vested of record in the grantor whose deed is recorded, or after he had parted with his title, 208, 211.
But a judgment against an unrecorded equity will have priority in Pennsylvania over a subsequent deed by the grantor, after he has acquired the legal title, 44, 212.
And as between two deeds, that will have the preference which is first recorded, although not placed on record until after the execution of the other, 40.
Subsequent registration not notice to holder of prior incumbrance, 310-312.
Whether obligation exists on part of creditor to perfect lien of collateral security by registration, 309, 313.

RELEASE.

- By retiring partner, effect of, 406.*
Consideration of, may be shown by parol, 946.
Of surety, by giving time to principal debtor. See SURETY.
See MORTGAGE—REAL ESTATE.

RELIGION.

- Of ward of Court. See INFANTS, 1.*

RENTS.

- Relief given in equity where lands out of which they are payable cannot be discovered, 859.*
Liability of mortgagee in possession for, 2010.

REPAIRS.

- Liability of mortgagor for, 2010.*

REPETITION OF LEGACIES.

- 1. Same specific things cannot be twice given, 725.*
2. Legacies of quantity given by different instruments simpliciter, legatee takes both, 725, 737.
Whether the subsequent legacy be the same amount as former, ib.
or less, ib.
or larger, ib.
A fortiori, where there is any variation as to time and mode of payment, ib.
Or they are given for different trusts and purposes, ib.
Or are not ejusdem generis, 726.
Effect of one legacy being expressed to be in addition to another, where the same expression does not occur before in other legacies, ib.
Or in lieu of another, 727.
Legacies of the same amount given by a different instrument, not simpliciter, but with the same motive expressed, the latter is a repetition, ib.
Secus, where there is no motive, or a different or additional motive, though the sums be the same, ib.
Or where the motive is the same, if the sums differ, 728.

REPETITION OF LEGACIES, *continued*.

- Repeated gifts held substitutionary from changes among the legatees, when, *ib*.
 From intrinsic evidence, a legacy of different amount by a subsequent instrument, may be construed as a substitutionary, 729, 737.
 Or if it appears the testator was thereby revising, explaining, or qualifying his will, *ib*.
 Or, according to *Coote v. Boyd*, if it be a mere copy of the former instrument, *ib*.
Secus, where a sum is appointed out of a particular fund, and a similar fund is given by codicil out of the general assets, 730.
 Decision of *Coote v. Boyd* not applicable if the latter instrument does not extend to all legatees, and there is no explanation of the omission, *ib*.
 Where instruments are exactly the same, probate given only to the latter, 731.
 Not where there are some discrepancies between, as equity must determine whether the legacies are cumulative or substitutional, *ib*.
 3. Legacies of quantity in the *same instrument*, of equal amount, given simpliciter, the latter substitutionary, 731, 739.
 Although there are small differences in the mode of conferring the legacies, *ib*.
Secus, if of unequal amount, 732, 741.
 4. The intention from internal evidence will be carried into effect, *ib*.
 Effect given to incomplete codicil made before the late Wills Act, only so far as it goes, 733.
 Although it contain internal evidence of an entirely new disposition, *ib*.
 Two writings, proved as will and codicil, considered different instruments, though on same paper, *ib*.
 So, two instruments admitted to probate as one, will be so considered; *ib*.
 So, where testator declares codicil shall be part of will, *ib*.
 Tendency to hold legacies cumulative, *ib*.
 Revocation of substituted legacy does not revive former legacy, *ib*.
 5. Opinion of Sir J. Leach as to admission of extrinsic evidence, 733, 734.
 Of *V. C. Wigram*, 734, 735.
 Admissible to rebut presumption raised by Court, and in support of apparent intention of the testator, 735.
 Not in opposition to apparent intention, *ib*.
 Extrinsic evidence of circumstances admissible, *ib*.
 6. Substituted legacy, how far liable to incidents of former legacy, 735, 741.
 Additional legacy, how far subject to incidents and conditions of first legacy, 736, 741.

REPUBLICATION.

Of will by codicil does not revive bequest previously adeemed or satisfied, 813.

REPUTED OWNERSHIP. *See* EQUITABLE ASSIGNMENT.

RESCISSION.

When vendor entitled to rescind, 1124.

RESIDUE.

What constitutes residuary bequest, 333.

Whether residuary bequest is specific or general, 619. *See* CONVERSION OF RESIDUE.

When bequest in satisfaction of, is satisfied by a portion, 758, 760, 796. *See* SATISFACTION, 1, 2.

Conversion of. *See* CONVERSION OF RESIDUE.

RESULTING TRUST.

Parol evidence admissible to establish, 965.

RETAINER.

Right of, by executor or administrator, out of legal assets, 367.

For a legal or equitable debt, *ib*.

Equitable retainer, when recognized at law, *ib*.

Cannot be enforced against creditors of superior degree, *ib*.

Not lost by payment of assets into court, *ib*.

Prevails against plaintiff's costs, *ib*.

May be enforced by administrator *durante minoritate* or *dementia*, 368.

An executor of an executor, *ib*.

or administrator, *ib*.

Not by one of several surviving executors, *ib*.

Not allowed against co-executors or co-administrators who are creditors, *ib*.

Allowed out of balance found due to the estate, *ib*.

RETAINER, continued.

- Creditor to whom administration granted may retain, when, *ib.*
- Husband, if executor, may retain for debt due to his wife *dum sola*, *ib.*
- When wife is executrix, *ib.*
- By representative of debtor and creditor, *ib.*
- Partner, if executor, may retain, when, 369.
- Obligee executor to one of two joint obligors, *ib.*
- Surety executor of principal, *ib.*
- Though debt barred by the Statute of Limitations, *ib.*
- When assets are equitable, *ib.*
- When legal and equitable, *ib.*

REVERSIONER.

- Apportionment between tenant for life and, 695, 696, 713-716, 721. *See* CONVERSION OF RESIDUE.

REVOCATION.

- Of legacy. *See* REPETITION OF LEGACIES.
- When voluntary deed reformed on ground of absence of power of, 1250-1266.

RIGHT OF ENTRY.

- When assignable, 1609.

ROLLING STOCK.

- Covered by mortgage of railroad though acquired subsequently thereto, 1615.

SALARY.

- When assignable, 1628, 1630.

SALE.

- When time essence of, 1107.
- Of property not owned, 1610, 1619. *See* EQUITABLE ASSIGNMENT, 1—PURCHASER BONA FIDE WITHOUT NOTICE.

SATISFACTION. *See* ADEMPMENT.

- Definition of, 754.
- Distinctions between satisfaction, ademption and revocation, 782, 803.
- Ademption of specific bequest. *See* ADEMPMENT.
- BETWEEN PARENT AND CHILD.
- 1. Of a legacy by a subsequent portion given by parent, 754, 784-786.
 - or one in loco parentis, 755.
 - Satisfaction where testator is not under parental obligations, 801.
 - Presumption does not extend beyond parental relation, 791, 792, 819, 827.
 - Total, if the portion be equal to, or greater than legacy; partial if it be less, *ib.*
 - Presumption not repelled by slight difference between legacy and a portion, 755, 786.
 - As by their being payable at different times, *ib.*
 - Or from the limitations being different, *ib.*
 - Observation of Lord St. Leonards on Lord Durham v. Wharton, 956.
 - Legacy to a mother and children as a class satisfied pro tanto by a gift of a promissory note to the father and mother, *ib.*
 - Gift to a son-in-law after marriage not ademption of a legacy given to the daughter, 756, 757, 786.
 - No presumption that payment of a sum is to go against a subsequent legacy, 757, 814.
 - Even where the gift and legacy are from parent to a child, *ib.*
 - Secus, where there is a contract, when, *ib.*
 - Prior advancements not satisfaction of subsequent legacy unless so agreed by legatee, 814-816.
 - Legacy adeemed, revoked, or satisfied, by settlement or advancement, not revived by codicil confirming the bequests in the will, 757, 813.
 - Doctrine in North Carolina and New York, 813, 814.
 - Presumption of satisfaction may be repelled by intrinsic evidence, 758.
 - As where bequest and advancement are not ejusdem generis, 758, 797, 799.
 - But if it appears that testator intended gift to be in lieu of bequest, legatee must elect, 798.
 - Advancement may operate as ademption though put in form of loan and security taken, 789.
 - Where legacy is certain, and advancement depends on a contingency, *ib.*
 - Unless, perhaps, it be remote, *ib.*

SATISFACTION, *continued.*

- Bequest of residue is satisfied by a subsequent portion, 758, 796.
 Either in full or pro tanto, ib.
 Legacy to child limited over on contingency, adeemed by subsequent advancement to child, 759.
 Share of residue not to be augmented by advances to children, in satisfaction of their share of the residue, ib.
 And person entitled under the limitation over deprived of all benefit, ib.
 Advancement may be made at other times than on marriage, ib.
 As, if in writing, it be described as a portion, ib.
 If not in writing, may be proved to be intended as such, ib. *u*
 Court will not add up small sums for a portion, ib.
 Small gifts will not be considered, 759, 760.
 Or sum given for wedding outfit, 760.
 Or wedding trip, ib.
 Stock held as a satisfaction of a legacy to be valued as at the time of gift, ib.
Pecuniary legacy adeemed by expenditures for use of legatee, 793, 795, 800.
Ademption may be entire or partial, 800, 801.
When limitation over on bequest for life is satisfied by advance to first taker, 786.
Value given by testator in lieu of testamentary provision binding upon legatee, if accepted, 802.
 Satisfaction of a portion by a legacy from a parent or person in loco parentis, 760, 818.
Presumption does not arise, unless parties stand in relation of parent and child, and covenant is voluntary, 791, 792, 819, 827.
 Total, if the legacy be equal to, or greater than the legacy; pro tanto, if less, ib.
 Bequest of residue will be a satisfaction wholly or pro tanto, according to its amount, 760.
 Presumption not repelled by considerable differences between portion and legacy, 761, 828.
 Repelled where portion is vested, and legacy is contingent, ib.
 Repelled by a charge of debts before the gift in the will, ib.
 Where the husband and children take an interest under the settlement, but nothing under the will, ib.
 Presumption more easily arises where the settlement precedes the will, 761-764.
 Presumption repelled where legacy and portion are not ejusdem generis, 764.
 Effect of declaration in a settlement, that advancement by the parent in his life shall be a satisfaction, ib.
 In such a case legacy considered an advancement in parent's lifetime, ib.
 But not a share under a parent's intestacy, ib.
 When a provision by a settlement is considered as a satisfaction of a provision by a former settlement, 764, 765.
 Presumption when father, donee of a power, advances money to a child, 765, when rebutted, ib.
 What evidence of intention admissible, 765, 819, 827, 828.
 Presumption of, does not arise according to the law of Scotland, ib.
 Will do so where portion is covenanted to be paid by Scotch deed, and legacy is given by a domiciled Englishman, ib.
 3. An advance subsequent to a legacy will be a satisfaction without reference to the wishes of the donee, 765, 784.
 Where the bequest is subsequent to the advance, it will raise a case of election, 766, 819.
 4. Admission of evidence, where advance is not evidenced by writing, to show the nature of the transaction, 767-769, 818.
Extrinsic evidence inadmissible to show purpose of bequest, 809.
But admissible to show purpose of gift, ib.
To prove that gift for different purpose was intended as satisfaction, 810.
 To rebut presumption of satisfaction, 769, 781, 803-807, 812.
 And then to fortify it, ib.
Contemporaneous declarations admissible, 810.
As to subsequent declarations, 810-812.
 Not admissible in contradiction to a written instrument, 770, 806.
 What is sufficient to put a person in loco parentis, 770-773, 793.
 Mere relationship, except that of a parent, not sufficient, 773, 791, 792.
Case of grandfather, 795, 796.

SATISFACTION, continued.

Presumption of satisfaction, where the natural or assumed relation of parent does not exist, arises where bequest and advance are for the same purpose, 773, 803.
Evidence admissible to rebut or strengthen the presumption, 774, 803.

Presumption does not arise where legacy and advancement are given for different purposes, *ib.*

Or on different contingencies, 774, 758, 797, 799.

When book entries referred to in will are competent evidence, 816, 818.

5. BETWEEN DEBTOR AND CREDITOR.

Presumption of satisfaction of a debt by legacy, where legacy is greater than or equal to debt, 774, 820.

Censured by eminent judges, 774.

Leaning against it, 775, 821.

Slight circumstances sufficient to rebut, 821.

Will not arise, unless legacy be in all material particulars the same as or equivalent to debt, 820, 821, 824.

Legacy less in amount, no satisfaction of a debt *pro tanto*, 775, 822-824.

Except by arrangement with creditor, 775, 825, 826.

Legacy not a satisfaction of a debt when payable at a different time, although greater, *ib.*

Or to different trustees, *ib.*

Or when not ejusdem generis, *ib.*

Or when legacy is of a different nature, or not co-extensive with debt, 776.

Or where a motive is assigned for legacy, *ib.*

Or debt is contracted after making of the will, 776, 825.

Or where legacy is contingent or uncertain, *ib.*

As a residue, *ib.*

Though the amount should be greater than debt, *ib.*

Or where the debt is contingent or uncertain as a debt due on an open or running account, 777.

Or on a negotiable bill of exchange, *ib.*

Secus, where debt is on account of deposits made with the testator is only liable to be reduced by the creditor drawing upon him, *ib.*

Marriage of female creditor to whom legacy is left, *ib.*

No presumption of, where there is a direction for payment of debts and legacies, *ib.*

But when will declares or manifests the intention of the testator that a legacy shall operate as satisfaction of a debt, the legatee will be put to an election between them, 821.

As to effect of a direction to pay debts alone, 777.

Whether a charge of debts includes liability for payment of a sum after decease. 778.

Legacy from parent to child, as regards a satisfaction of a debt, upon the same footing as that to a stranger, 778, 828.

So is a legacy to a wife, 779.

Advancement to a child during the life of the parent, equal to or greater than the debt, a satisfaction, 779.

Though made in consideration of natural love and affection, *ib.*

Or of property settled by the other party, *ib.*

Or though husband of a daughter be ignorant of the debt, *ib.*

Review of the authorities by Sir J. Wigram, V. C., in *Plunkett v. Lewis*, 779-781.

Previous advances by a father no satisfaction of a subsequently incurred debt, 781.

Presumption of, only arises where party making a payment is bound to pay, *ib.*

Or is owner of an estate charged with payment, *ib.*

Legacy to wife does not satisfy debt due to husband, *ib.*

Or to cestui que trust does not satisfy debt to trustees, *ib.*

When bequest is satisfaction for services performed upon the expectation of remuneration by will, 825.

Legacy from creditor to debtor not release of debt unless so intended, 829-831.

What sufficient evidence of such intention, 831, 832.

Relief must be sought in equity, 832, 833.

6. Evidence admissible to rebut and then to fortify presumption of satisfaction of debt, 769, 781.

Not to show intention to satisfy debt where presumption does not arise, *ib.* See PERFORMANCE OF A COVENANT.

SECURITIES. See CREDITOR—MARSHALLING—SUBROGATION—SURETY.

SEPARATION OF HUSBAND AND WIFE.

- Conditions annexed to gifts for the purpose of effecting, void, 499.
Aliter, where there is bequest to husband and wife if living separate on testator's death, 500.
 Mere agreement for, invalid, 1696.
 Distinction between a deed actually executed and an agreement for, 1697.
 Trusts of deed for, though not for value, carried into effect, *ib.*
 Contract to execute deed for, enforced, *ib.*
 Must be founded on valuable consideration, 1698.
 Agreement by wife to indemnify husband against debts will not amount to, when, *ib.*
 Contract not enforced if there be any illegal stipulation in it, *ib.*
 As that wife should have sole custody of children, *ib.*
 Or an agreement by husband to withdraw from suit for dissolution in consideration of money, 1699.
 Distinction where separation deed is actually executed, *ib.*
 Deed of, in contemplation of illicit intercourse, void, *ib.*
 Deed of separation answer to husband seeking his wife by habeas corpus, *ib.*
 Deed of separation no bar to proceedings in an Ecclesiastical Court, *ib.*
 But equity would enjoin parties from proceeding in the Ecclesiastical Court, *ib.*
 And will restrain husband from molesting wife contrary to a covenant in deed of separation, *ib.*
 Or a wife from molesting her husband, *ib.*
 Necessary that wife should accept provisions of separation deed, when, *ib.*
 Relation of husband and wife not altered by contract for separation, 1700.
 Husband remains liable to wife's debts, unless her allowance is ample, and paid regularly, *ib.*
 Deed of separation no bar to action by husband for the seduction of his wife, *ib.*
 Nor, in the absence of express stipulation, to wife's claiming her share under the Statute of Distributions, *ib.*
 Contract for, founded merely on a voluntary separation, not binding against husband's creditors, *ib.*
 Or subsequent purchasers or mortgagees, *ib.*
 Secus, where the consideration is valuable, *ib.*
 As an indemnity against wife's debts, *ib.*
 The relinquishment of alimony by wife, *ib.*
 Or the compromise of a suit, *ib.*
 Distinction between contracts for immediate, and for future separation, *ib.*
 Contracts for future separation invalid, *ib.*
 Unless, perhaps, an allowance when it is to take place with the approbation of trustees, 1701.
 Where no separation takes place, deed for void, when, *ib.*
 Reconciliation by cohabitation avoids contract for separation, *ib.*
 Secus, where there is merely a reconciliation by letter without cohabitation, *ib.*
 Or the parties live in the same house without reconciliation, *ib.*
 Trusts for continuing payment to wife in the event of reconciliation not illegal, *ib.*
 And parol contract to continue a payment to wife on reconciliation, enforced, *ib.*
 Adultery of wife no bar to proceedings under contract for separation, *ib.*
 Family arrangement in *Joddrell v. Joddrell*, 1701, 1702.
 As to construction of deeds of separation, 1702.
 Judicial separation of husband and wife, how now regulated, *ib.*
 Deed for, not acted upon, no ground for refusing of relief to the wife deserted by her husband, 1703.

SET OFF.

- What constitutes equitable*, 1338—1347.
Effect of declaration of no, 1673. *See* Volume I, 876—880.
See CREDITOR.

SETTLEMENT.

- Reformation of*, 959.
 When provision is satisfaction of legacy. *See* SATISFACTION, 1, 2.
 On marriage of ward of Court, 1467—1471. *See* INFANTS, 2.

SHERIFF'S SALE.

- When purchaser at, is affected with notice of prior equity*, 33, 92, 94, 95.
Purchaser of undivided share at, may maintain partition before entering, 896.
No trust arises from promise to buy land at, for defendant, 1016.

SHIPS.

When part owner, master, carpenter, etc., entitled to commission as ship's broker.
519, 520.

SOLICITOR. *See* ATTORNEY 1—TRUSTEE.

SPECIFIC LEGACY. *See* ADEPTION—LEGACY—SATISFACTION.

When assets marshalled in favor of. *See* MARSHALLING, 4.

SPECIFIC PERFORMANCE.

Of lands out of jurisdiction. *See* JURISDICTION EN PERSONAM.

Often decreed in equity where damages could not be had at law, 1050.

WHEN TIME THE ESSENCE OF A CONTRACT.

Not ordinarily so, when right of property or title passes, 1105–1119.

Unless made a condition by agreement of parties, 1105, 1106, 1119–1129.

Reasons of doctrine, 1060–1061, 1110–1112.

Time not essence of contract unless unequivocally so declared, or property is fluctuating, unstable or perishable, 1062, 1126–1129.

Time of the essence of contract if value of property varies with effluxion of time.
1062.

As in contracts for a reversion, *ib.*

Or for release from ecclesiastical corporation, *ib.*

Or where property fluctuates in value, *ib.*

Or if it be wanted for commercial purposes, *ib.*

Or with view to immediate residence, 1063.

Or it is sold for purpose of paying debts bearing high interest, *ib.*

Not where land is bought for the purpose of building a house, *ib.*

Secus, on sale of a public house as a joint concern, *ib.*

Compensation for possession delayed, *ib.*

Though time not originally essence of contract yet it may subsequently become so, 1061, 1138.

Where contract not completed at the time mentioned, 1050.

As to delay arising from the conduct of either party, 1051.

Party seeking specific performance must have shown himself ready, desirous, prompt and eager, 1051, 1117, 1136–1141, 1143.

Continual claim for, not sufficient, 1051.

Rule when relaxed, *ib.*

Purchaser may at law recover his deposit, unless abstract and title-deeds are ready at the time appointed, *ib.*

In equity, time will be considered as waived, unless the purchaser then asks for them, 1052.

Or at a day which will leave sufficient time to complete contract, *ib.*

Time of delivery of abstract, not essence of contract, 1061.

Objection as to time may be waived, *ib.*

Notice to complete must be reasonable, 1062.

Time waived by not objecting to take abstract after the appointed day, *ib.*

If abstract not sent at specified, purchaser not bound to take objections by the time limited, *ib.*

Though time for doing so made of the essence of the contract, *ib.*

When objections shall be considered as waived, *ib.*

Specific performance not decreed where there has been laches on the part of the vendor, and the defendant has demanded his deposit, 1052.

Secus, if he has endeavored to make out his title, *ib.*

Although repairs to house cannot be finished in time according to contract, *ib.*

Or lease be not expired when purchaser was to be put into possession, *ib.*

Unless it be shown that purchaser wanted house for his own occupation, *ib.*

Specific performance not decreed where purchaser delays completing, *ib.*

Though he has paid part of his purchase-money, *ib.*

Or where he has taken trifling objections, especially if value of property has increased, 1053.

Or he has not been able to pay the purchase-money, *ib.*

Inadequacy or exorbitancy of price taken into consideration, 1053.

As a general rule, delay arising from the state of the title no objection to specific performance where time not of the essence of the contract, *ib.*

Title shown when the Master makes his report, sufficient, *ib.*

Vendor allowed further time occasionally, *ib.*

To get in term or take out administration, *ib.*

SPECIFIC PERFORMANCE, *continued*.

Or obtain an Act of Parliament, 1054.

Purchaser cannot object on account of outstanding title which he has bought in, 1054, 1145.

If title not shown until after a bill filed, vendor liable to costs up to time when he showed a title, 1054.

Unless suit was occasioned by conduct of purchaser, *ib*.

Or where requisitions were not made until after bill filed, *ib*.

Or where abatement or compensation improperly claimed by purchaser, *ib*.

Exception where vendor might have discovered defect in title before bill filed, *ib*.

Rule not to be extended, 1055.

Time not allowed where a suit is necessary, *ib*.

Or an account of debts remains to be taken in a suit, *ib*.

Further time given where purchaser is aware of objections, *ib*.

Or receives abstract after appointed day, *ib*.

Or proceeds with purchase after time to complete has elapsed, *ib*.

Purchaser extending time at the request of vendor, *ib*.

Purchaser proceeding under protest, *ib*.

Dormant contract not abandoned, sometimes decreed to be performed, 1056.

Acquiescence in notice to rescind contract, *ib*.

Time to make objections may be enlarged, *ib*.

Where vendor may insist on contract being rescinded, *ib*.

Omission to require repayment of deposit does not affect right to rescind contract, *ib*.

Where vendor's bill is dismissed for laches in instituting the suit, deposit not ordered to be returned, *ib*.

Party must show on his pleadings how he means to use facts alleging waiver of title, 1057.

If circumstances excuse delay, great lapse of time no bar to, 1116.

But mere delay unexplained may preclude right, 1136-1139.

When interest given as compensation, 1112.

Purchaser complaining of punctuality must himself have been prompt and willing, 1117.

If purchaser prompt and willing, and vendor cannot make title or deliver possession at appointed time, specific performance refused, 1117.

When time essential cannot be excused by showing that delay arose from causes beyond vendor's control or not injurious to purchaser, 1105.

Nor by laches or want of means, 1124.

Mere change in value not of itself sufficient to refuse relief, 1139-1142.

What sufficient hardship to refuse relief, *ib*.

When equity will relieve against forfeiture caused by delay, 1133-1135.

Will not readily construe contract to create a forfeiture, 1129.

Compensation for delay, 1057.

General rule, that, from the time when contract should have been completed, purchaser is entitled to rents and profits, *ib*.

Vendor entitled to interest on purchase money from the same time, *ib*.

Even if money be lying dead, if delay be through purchaser's fault, *ib*.

Secus, if vendor's, *ib*.

Purchaser should give notice that money is lying dead, *ib*.

But he must pay interest if he has not appropriated money for vendor, *ib*.

Or has profited by it, *ib*.

Where default made in paying purchase money vendor not bound to give possession, *ib*.

Nor to pay occupation rent, when, *ib*.

Though purchaser bound to pay interest, *ib*.

Where no time fixed for completion, in ordinary contracts, interest payable from the time purchaser takes possession, 1058.

Especially if he has received the rents and profits, *ib*.

Not bound to do so, nor to pay interest, while there is a weighty objection to title, *ib*.

Upon the sale of a reversion, interest payable from the time appointed for completing, *ib*.

When payable on sales by order of Court, *ib*.

When the estate is in possession, *ib*.

When it is in reversion, *ib*.

Interest when payable if there be a stipulation that it is to be payable "from whatever cause delay arises," 1059.

SPECIFIC PERFORMANCE, *continued*.

De Visme v. De Visme overruled, ib.

Compensation for deterioration of property, where allowed to purchaser, ib.

Where timber is blown down or felled by vendor, after contract, ib.

Fall of ornamental timber by vendor, ground for rescinding contract, ib.

Purchaser cannot be called upon to pay for improvements after contract, ib.

Expenses and outgoings until what period borne by vendor, ib.

Vendor of manor entitled to what fines after the contract, ib.

WHERE VENDOR SEEKS SPECIFIC PERFORMANCE.

Where vendor has not same interest as he contracted to sell, purchaser may recover deposit at law, 1063.

But, in equity, vendor may compel specific performance with compensation, 1064.

Aliter, if the failure to perform does not admit of compensation, ib.

As where vendor has a much shorter term than he contracted to sell, ib.

Or contracting to sell a lease, he has only an under lease, ib.

Unless it be simply described as a lease, 1065.

When time is essence of contract, delay cannot be excused by showing that it was from causes beyond vendor's control, or not injurious to purchaser, 1105.

Nor by want of means, 1124.

If purchaser prompt and willing, and vendor cannot make title at appointed time, specific performance will be refused, 1117.

Purchaser not bound to take lands of different tenure, 1065.

As leaseholds instead of freeholds, ib.

Nor copyholds instead of freeholds, ib.

Unless compelled by conditions of sale, ib.

Nor freeholds instead of copyholds, ib.

Unless represented as copyholds equal in value to freeholds, ib.

Or there be a stipulation, to the contrary, in the conditions, ib.

Purchaser not forced to take perpetual rent-charge instead of fee, ib.

Objections to tenure may be waived, ib.

If not, purchaser entitled to compensation, if specific performance be decreed, ib.

Purchaser of entirety not compelled to take undivided share, 1066, 1147-1149.

Nor a remainder, instead of estate, in possession, 1066.

Nor, if not mentioned in particulars, an estate subject to right of sporting, ib.

Or to an undisclosed right of digging for mines, ib.

Or reservation of minerals, ib.

Nor a sheepwalk instead of freehold, ib.

Nor estate subject to repairs of chancel, ib.

Nor land tax wrongly described as charged on particular property, ib.

But specific performance, with compensation, will be decreed where there are undisclosed quit-rents, when, ib.

Or rent-charge, in lieu of tithes, where lands are sold as tithe-free, ib.

Mistake as to amount of quit-rents a matter of compensation in equity, ib.

Fatal objection at law, ib.

Not decreed where there were undisclosed leases for lives, ib.

Vendor must, in general, be prepared to make title to every part of land, 1143.

But specific performance, with compensation decreed, where title to small portion of estate cannot be made, 1066, 1144.

Especially where vendee has prevented vendor from perfecting title, 1145.

Unless material to the enjoyment of the rest, 1067, 1144.

So where good title cannot be made, to an adjunct to the estate, ib.

Secus, where vendors have contracted to make a good title to all the lands in the contract, 1068.

Or where two distinct estates are purchased for one sum, 1068, 1144.

As to title not being made to some of the lots purchased at a sale, ib.

Decreed, if variation from terms of agreement immaterial, and admit of compensation, 1145.

So, of deficiency of quantity, 1146.

Purchaser entitled to compensation for deficiency in acreage, when, 1068, 1069, 1146.

Vendor cannot compel specific performance where acreage is greater than described, on payment of larger price, 1069.

How to prevent objections waived before suit, being raised upon an inquiry as to title, ib.

When decreed of contract to sell what was not, at date of contract, owned by vendor, 1117, 1118.

SPECIFIC PERFORMANCE, continued.*Not decreed when title doubtful, 1118.**When encumbrance defeats right to, 1119.**Purchaser desiring to complain of delay must have been prompt and willing, 1117.**No relief afforded to purchaser fraudulently concealing defect of title, ib.**Duty of purchaser, in default, where consideration consists of goods or services, 1129.***WHERE PURCHASER SEEKS SPECIFIC PERFORMANCE.***Purchaser can generally obtain specific performance, with compensation for deficiency, ib.**Though vendor could not, ib.**Unless there be a stipulation making the agreement in such event void, 1070.**Or purchaser knew of the limited interest of the vendor, 1071.**Especially if contract is in fraud of a power, ib.**Is the result of a mistake, 1072.**Or but for neglect the purchaser might have ascertained defect of title, 1073.**Vendor must perform as much of contract as he can, and make compensation for residue, 1146.**Right of purchaser to compensation may be excluded by express contract, ib.**Contract, how construed, ib.**Right of purchaser to compensation excluded by vendor's rescinding contract under a condition, when, ib.**Partial performance not compelled to the prejudice of third parties, when, 1074.**Or there has been misrepresentation on the part of the purchaser, ib.**Nor if purchaser were aware of facts which he ought to have disclosed to the vendors, 1075.**Neither vendor nor purchaser compelled to take or give an indemnity, ib.**Purchaser's bill, where vendor cannot make a title, dismissed without costs, he being left to his remedy at law, 1076.**Vendor filing bill, ordered to return deposit with interest, ib.**Purchaser not allowed to pay money into Court until acceptance of title, ib.**Purchaser may pay purchase money into Court, when, ib.**When purchaser entitled to indemnity against dower, 1149-1151.**Rights and liabilities of vendors and purchasers under executory articles, 1089, 1108-1110, 1112, 1138-1143.**Vendor not compelled to perform different contract, 1151.**Where defect existed at time of agreement, entire failure of title bar to, 1151.**Conveyance to third person subsequent to contract, ib.**Complainant filing bill in ignorance of vendor's inability to perform contract, not precluded from pecuniary relief, 1151-1154.**Aliter, if bill filed with knowledge, ib.**Remedy of vendee under executory articles, against subsequent purchaser from vendor, 1154.**Effect of alienation pendente lite, 1155.**Compensation for acts done under contract which cannot be specifically enforced, ib.**When vendor entitled to rescind, 1125, 1135.**When vendor entitled to forfeit, ib.**When equity will relieve from forfeiture, 1133-1135.**Either party may notify other to fulfill or abandon contract in reasonable time, 1135, 1136.***UNILATERAL CONTRACTS.***Mutuality unnecessary at law, 1078.**Doctrine of, in equity, 1077.**Sufficient if obligation mutual at the time of decree, 1099-1101.**Time presumably essence of unilateral contract, 1129-1132.**Performance not too long deferred if within prescribed time, 1079-1082.**Compliance with promise operating as continuing request sufficient consideration for promise, 1082.**Promiser liable for act done at his instance by which promisee will lose if agreement unfulfilled, ib.**Marriage on promise to make settlement, ib.**To afford means of payment, ib.**Existence of debt sufficient consideration for promise to transfer property, 1082, 1083.**Effect of vendor's refusal to accept tender of purchase money, 1083, 1038-1088, 1089. covenant to convey, ib.**Instrument may only name vendor, yet bind vendee, 1087, 1088.*

SPECIFIC PERFORMANCE, *continued*.

No obligation until precedent condition performed, 1089.

Promise to convey, sell, lease or renew, may be specifically enforced, though other party has option of acceptance, 1089-1091.

When relief should be granted, 1091.

Signature of party to be charged is sufficient, 1091-1105.

Doctrine in Kentucky, 1094.

Party signing entitled to decree for, 1097-1099.

Immaterial where or how signature appears, if intent be clear, 1102.

Agent, to sign, need not be authorized in writing, *ib*.

Effect of stamped signature, or telegraphic message, *ib*.

Cases of oral acceptance of written offer, 1094-1097.

Effect of part performance, by feme covert, 1040, 1101.

Husband's contract, for sale of wife's land, not enforced, *ib*.

But married woman's agreement, separately acknowledged, to sell, may be, *ib*.

Unequal contract not specifically enforced, 1103.

Contracts for partnership not enforced, 1104.

Rule where contract liquidates the damages, 1104, 1105.

DISTINCTION BETWEEN PLAINTIFF SEEKING AND DEFENDANT RESISTING SPECIFIC PERFORMANCE, 926.

Rule of law, that parol evidence, independent of Statute of Frauds, is not admissible to contradict written instrument, 927, 944, 971, 1011.

But may suspend its operation, *ib*.

Rule binding before statute, on plaintiff in equity, *ib*.

Foundation of rule, *ib*.

Parol evidence on part of plaintiff seeking specific performance with a variation rejected, 928.

When parol evidence of fraud or mistake admissible on behalf of complainant, 991-993, 1010.

Though difference of the written from the real agreement may be the result of fraud, accident, or surprise, 928.

As a parol agreement to omit lands comprised in written agreement to lease, *ib*.

To prove verbal declarations at a sale, in opposition to written conditions, *ib*.

To prove that written agreement to sell to two jointly, was an agreement to sell to one, 928, 994.

Variation by parol, where there are acts of part performance, decreed to be specifically performed, 928, 1019.

Parol evidence before Statute of Frauds, admissible as a defence to specific performance, 929.

Not rendered inadmissible by the statute, *ib*.

Admissible as a defence, to show that written agreement by fraud, accident, or mistake, does not contain the real terms, 929, 930, 995-999.

Illustration of distinction in Lord Townshend v. Stangroom, 930.

Ambiguity in written agreement, 931.

Sir Thomas Plumer disposed to overrule distinction, *ib*.

Parol evidence of a fraud, accident, surprise or mistake used as a defence in contradiction to written agreement, 931, 944, 950-958, 971, 978, 1011.

Not merely as collateral to, and independent of, *ib*.

In absence of fraud or mistake specific performance ordered on plaintiff submitting to perform omitted provision, 932.

Observation of Lord St. Leonards on Croome v. Lediard, 934.

Inadvertent omission of intended terms of agreement no bar to, *ib*.

Nor a mistake as to purpose for which property was to be used, 935.

Or as to legal consequences of an act, *ib*.

As to mistake of law, 985.

Parol waiver of written contract, bar to specific performance, when, 935.

Specific performance of agreement decreed where defendant declines to elect to perform it with or without parol variation, *ib*.

Evidence not admissible where agreement is correctly put into writing to show term added at same time by parol, 935, 944, 963.

Doctrine in Pennsylvania, 966-973.

Where parol variations have been acted upon, the agreement with them will be enforced, 935.

Effect of part performance, 1019.

SPECIFIC PERFORMANCE, continued.

Where parol variation is proved by defendant, plaintiff's bill dismissed or specific performance with parol variation decreed, *ib.*

Specific performance of written contract subsequently varied by parol, 1020-1025.

When complainant may elect to have contract performed with variation, 1026.

In cases of fraud or mistake compensation may be substituted for performance, 1018.

Specific performance discretionary, but discretion governed by rules and principles, 936, 999, 1000.

And not decreed unless complainant has acted with propriety and been ready and willing to perform, 936, 1039.

But right of complainant not defeated by change of circumstances for which he is not responsible, 1039.

Not decreed in case of material variation between bill and proofs, 1027.

And not decreed, unless the agreement be certain, fair and just, 936.

Contract must appear, with reasonable certainty, from written evidence, 1028-1030.

But need only be certain to common intent, 1030.

Without definite misrepresentation, *ib.*

Waiver, by plaintiff, of part of contract, affected by misrepresentation, not allowed, 937.

Mere indefinite misrepresentation no bar to specific performance, when, *ib.*

When misrepresentation by complainant, bar to, 1017.

A suppressio veri *is*, 938.

Not where the acts suppressed must have been known by the plaintiff, 939.

Agreement made by person intoxicated, when enforced by, 939, 1036.

Inadequacy of price no defence to specific performance, *ib.*

Except in cases of fraud or undue advantage, *ib.*

Or on sale of reversionary interests, when, *ib.*

Adequacy of consideration, when inquired into, 1031-1036.

Refused where it would subject the defendant to great hardship, 939-941.

But the hardship of the contract is not of itself ground for refusing specific performance, 1038.

Refused when unreasonable, 941.

Or would occasion a forfeiture, 941, 1038.

Where there is uncertainty or mistake as to subject-matter of contract, *ib.*

Or it is doubtful whether party meant to bind himself as far as the plaintiff seeks to charge him, *ib.*

Or surprise, 942.

Or where agent enters into contract not authorized by his principal, *ib.*

Or one executor sells, erroneously believing he had authority from the other, *ib.*

Or where performance of contract would involve breach of trust, *ib.*

Or render a person liable for a devastavit, *ib.*

Or profit a person, in a fiduciary position, at the expense of his cestui que trust, *ib.*

Or lead to an unlawful act, 943.

Where title is bad or doubtful, *ib.*

Or would involve purchaser in litigation, *ib.*

Where acts of forfeiture have been committed, *ib.*

Or it would be impossible to perform the contract, *ib.*

Or where the Court could not enforce it, *ib.*

Where there is a want of mutuality in the contract, *ib.*

Or it is illegal, *ib.*

Or ultra vires, *ib.*

When intoxication, at time of executing contract, defence to, 939, 1036.

Insolvency, 1040.

Contract in depreciated currency, 1039.

Sale by husband, or husband and wife, of wife's land, not enforced, 1040-1101.

STATUTE.

Public Act of Parliament notice, 140.

Aliter if private, *ib.*

even though made public, *ib.*

STATUTE OF FRAUDS.

Deed might be set aside at common law by parol evidence of fraud in procuring its execution, 950-958.

But not on the ground of fraud in the consideration, 960.

Contracts not under seal may be invalidated by evidence of fraud of any kind, 963.

STATUTE OF FRAUDS, continued.

But cannot be varied or contradicted at law or in equity by parol evidence, unless showing fraud or mistake, 944, 974, 1011.

And in order to reform and enforce contract, on the ground either of fraud or mistake, recourse must be had to equity, 961.

Contracts in writing and under seal may be varied in equity by proof that writing was not drawn in accordance with intention of parties, 979-994, 1014.

Or by proof of false representations or fraud, 975-978.

But not by evidence of contemporaneous parol agreement, 944, 963.

doctrine in Pennsylvania, 966-973.

Reformation of contract within, 1001-1010.

Parol evidence of fraud or mistake may be given for purpose of reforming an executed conveyance of land and enforcing it as reformed, notwithstanding statute, 979-994, 1001-1010, 1014.

Application of this rule to specific performance of executory contract. See SPECIFIC PERFORMANCE.

When contract is required to be in writing subsequent modification must also be in writing, 1020-1025.

Unless rendered valid by part performance, 969, 1018.

Or they have been so far acted upon as to raise an equitable estoppel, ib.

Promise to give writing, or promise that writing shall have larger signification than terms import, will not take case out of, 974.

Nor will admission by defendant that contract does not contain whole agreement, 978.

One of two joint purchasers cannot show other to be surety, 994.

Vendor of chattels bound by contract though purchaser may not be, 1093.

Contract relating to realty valid, if signed by party to be charged, 1091-1105.

Immaterial where or how signature appears, if intent clear, 1102.

Agent to sign need not be authorized in writing, ib.

Stamped signature, ib.

Telegram, ib.

doctrine in New York, ib.

See PAROL EVIDENCE—SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS.

When a bar to right of subrogation, 281.

When bequest or devise for payment of debts bars statute, 383, 384.

Inapplicable between testamentary guardian and ward, 1437.

When bar to equity of redemption, 2006.

STOCK.

When bequest of, specific, 608, 647. See LEGACY.

When specific legatee entitled to accrued dividends on, 632.

When transfer on books of corporation necessary to complete title to, 1661-1664.

STOP ORDER.

Priority gained by, 1591.

SUBROGATION. See MARSHALLING.**IN FAVOR OF DEBTORS.**

Does not exist between principal debtors, 312.

Whenever as between two parties who are liable for a debt in estate or person, the debt should be paid by one rather than the other, payment by the former will operate as a purchase of the debt, entitling him to all the rights and remedies of the creditor against the latter, 279, 281, 282.

Principle is one of equity, and does not depend upon contract, 282.

Application of it in favor of sureties and guarantors, 279, 282. See MARSHALLING, 3—SURETY, Vol. i.

Those whose liability for a debt is or becomes secondary, are for this purpose sureties, as it regards those whose liability is relatively primary, 282.

As when one partner assumes all the debts of the firm on its dissolution, or the withdrawal of another partner, 277, 281.

As between successive purchasers of land charged with a lien or mortgage, 291-305. See MARSHALLING, 6.

Not as against bona fide purchasers, 280, 285, 286.

Aliter, as to purchasers with notice, 280.

Generally in favor of every one who has bought a debt, either expressly or by paying it under circumstances which render the payment equivalent to a purchase, 286. See PAYMENT.

SUBROGATION, continued.

Not enforced in favor of volunteers, 287.

In favor of vendee of land sold subject to encumbrance, 283, 341-346.
vendor, 285, 341-346.

When right of, barred by statute of limitations, 281.

Sale of part of a tract of land, free from lien or mortgage covering whole tract, or with express or implied warranty against encumbrances, renders the mortgage primarily binding on the residue, as between the vendor and purchaser, and entitles the latter to subrogation on payment to the mortgagee, 296.

When land, subject to encumbrance, is sold successively in parcels, each will be liable in the inverse order of alienation, 291-305. See MARSHALLING, 6.

And this equity cannot be defeated by release from encumbrancer, 302.
rule in Kentucky, 303.

Equities of successive purchasers, as between themselves, depend upon and grow out of contract of sale, and when land is sold, subject to an encumbrance, payment to the encumbrancer will entitle the vendor, and those claiming under him, to subrogation against the purchaser, 272, 303, 341-346.

The right of the first purchaser to throw the burden of encumbrances on the second, is an equity, and consequently only binding on those who have actual or constructive notice of its existence, 297, 298.

And the failure of the first purchaser to record his deed or mortgage will consequently postpone him to the second, unless the want is supplied by actual or constructive notice, 299-302.

What will amount to such notice, ib.

Land sold contemporaneously in parcels contributes ratably to a common encumbrance, 305.

But date of contract, not deed, prevails, ib.

A creditor is bound to have due regard to the right of subrogation of the debtor, and the debtor will be discharged pro tanto, if this right is impaired or destroyed by the act or neglect of the creditor, 305, 312.

This rule applies in favor of sureties, 304, 306. See SURETY.

And in general of any debtor who is deprived wrongfully of a means of indemnity or safety by the creditor, 312.

And between incumbrancers, and successive purchasers of parcels of the land bound by the incumbrance, 291-305.

But not if the incumbrancer is without notice of the purchase, 297, 299, 302 309.

The notice should, as it would seem, be actual, ib.

Subsequent registration is not notice to the holder of a prior incumbrance, 310-312.

Whether creditor is bound to perfect title of collateral security by registration, 309.

The creditor will, as it seems, be responsible for neglect in the management of the securities for the debt, as well as for actual misfeasance, 306.

Equity will not ordinarily restrain a creditor from proceeding against a surety or other party whose liability is secondary, until he has exhausted his remedies against another who is primarily liable, 286, 314-322.

Not decreed till creditor is paid in full, 278.

A creditor is entitled to enforce all his liens or remedies for the debt against the same or different persons simultaneously, 286, 314-322.

As well after as before insolvency, 322.

Even to exclusion of other creditors, ib.

Secus, in bankruptcy in England, and in distribution of estates of insolvents in Massachusetts and Iowa, 257, 322.

AS BETWEEN AND IN FAVOR OF CREDITORS.

When equity will subrogate a creditor who has but one fund to remedies of another who has two, 262, 264-266, 314, 316, 322.

As between creditors of the same person. See MARSHALLING, 1.

Not as to creditors of different persons unless on special grounds of equity, 239, 273-277, 316.

Nor to prejudice of third persons, 252, 270, 280, 285, 286.

The relief given will generally be limited to subrogation, 262, 318.

Will not extend to restraining other creditors, except in special cases, ib.

Legatee may be subrogated to vendor's lien paid out of personality, 341.

SUBSTITUTIONAL LEGACIES. See REPETITION OF LEGACY—SATISFACTION SUIT.

Jurisdiction to prevent multiplicity of, 859.

When compromise of, sustained, 1723, 1724.

SURETY. See PAYMENT—SUBROGATION.

Paying debt entitled to assignment of collateral, 261.

May, before payment, file bill against principal to compel fulfillment of obligation on maturity, 278, 280, 283, 306.

When discharged by laches of creditor in management of collateral securities, 306.

On paying debt subrogated to rights of creditor, ib.

When entitled to restrain creditor from proceeding primarily against surety, 317-322.

Marshalling as between joint judgments against principal and surety and several judgment against surety, 275.

When writing reformed against, 990.

Discharged from contract of suretyship, by misrepresentation or concealment of material facts with assent of the creditor, 1871.

How far creditor is bound to acquaint surety with circumstances of debtor, 1871, 1872.

Discharged by a departure from contract, when, 1872-1874, 1906-1915.

By contract giving time to debtor, 1874, 1875, 1900-1916.

Whether retiring partner surety for carrying on contract, 1875.

Custom of trade when guarantee not expressly limited in point of time, 1876.

Released by bond-creditor receiving interest by anticipation, ib.

Voluntary promise to give time not acted upon, does not discharge surety, 1876, 1908, 1909.

A binding contract with a stranger to give time to principal will not discharge surety, 1876.

Nor will an agreement upon a condition not performed, ib.

Reason why giving time discharges, ib.

Creditor withdrawing execution without the knowledge of sureties discharges them, 1877.

After levy, but not before, 1900-1902.

Or where he loses the benefit of an execution under a power of attorney by neglect of statutory formalities, 1877.

Semble, surety not discharged if remedies are accelerated by giving time, 1877, 1909.

Nor by his accepting a payment, afterwards invalidated as a fraudulent preference, 1877.

Nor if time be given with surety's consent or approval, 1878, 1910, 1916.

After a decree against the surety, he is not released by time, given to principal, 1878, 1914, 1915.

Nor if creditor giving time to principal reserves right to proceed against surety, 1878.

Immaterial that surety has not been informed thereof, ib.

Consequence of the reservation of the creditor's remedies against the surety, 1879.

Parol evidence admissible to show reservation of remedies against surety, 1879, 1880.

Unless time be given to principal by deed, 1880.

And the reservation must be clearly made, ib.

Creditor entering into any new arrangement, altering the situation of the surety without his consent, discharges him, 1880, 1881.

Creditor agreeing with principal debtor to give time to the surety discharges the surety, ib.

Surety for officer discharged by alteration in his duties, when, 1882.

Secus, where language of security is sufficient to comprehend the alteration, ib.

Surety not discharged by dealings of creditor in which he concurs, ib.

Guarantee for a possible pecuniary liability not revoked by death of surety, ib.

Whether guarantee be continuous, or for a particular period, it may be revoked before liability incurred, ib.

Continuous guarantee for honesty of a servant not ordinarily revocable, ib.

Surety not liable for any acts done by the servant, after acts of dishonesty have been condoned by the master, ib.

A fortiori, surety on discovering such dishonesty may revoke his guarantee, 1884.

Guarantee not revocable while there is no misconduct on the part of the servant, ib.

Guarantee may be continued after knowledge of the dishonesty of the servant, ib.

Surety discharged by creditor releasing or compounding with debtor, 1885.

Though it be done by mistake, ib.

Or for the benefit of the surety, ib.

SURETY, continued.

- May be done by one partner in a firm, ib.
- Exception where surety, previous to the release, has paid part of the debt and given security for the remainder, ib.
- Creditor, after giving an absolute release for the debt, cannot reserve his right against the surety, ib.
- Whether the release be legal or equitable, ib.
- Unless release can be construed as a covenant not to sue, 1886.
- Surety obtaining release by the fraud of third parties cannot avail himself of it, when, 1887.
- Deed under the one hundred and ninety-second section of the Bankruptcy Act, 1861, valid without reserving rights against sureties, when, 1888.
- Surety may by contract become principal debtor, ib.
- Not discharged where creditor only signs bankrupt's certificate, ib.
- Secus, if principal creditor releases estate of bankrupt without proving debt, ib.
- Security discharged, pro tanto, by appropriation of security, ib.
- Or by any act or default of the creditor, which results in a loss of remedies or securities, which would revert or belong to the surety on payment of the debt, 1901-1903.*
- Not by mere passiveness of the creditor in not taking proceedings, 1889, 1898, 1899.
- Unless there be a stipulation to sue without delay, ib.
- Surety not discharged by creditor taking further security, 1889, 1916.
- Unless it be in satisfaction of the first, ib.
- The receipt of a bill or note, payable at a future day, suspends the debt, and consequently discharges those who are sureties for payment, 1915.*
- But this implication may be rebutted by proof of opposite understanding, 1915, 1916.*
- On payment of debt entitled to all securities, 1890.
- Whether he was aware of them or not, ib.
- And though given after contract of suretyship, ib.
- Surety discharged, pro tanto, by creditor losing or giving up securities to debtor, ib.
- Or if he cannot give to surety the securities in the same condition, ib.
- Held not discharged, by surrender of policy and proof, against estate of debtor, 1891.
- Or by transfer of security without notice to surety, when, ib.
- Not discharged by security becoming worthless, 1892.
- Unless it became so by the act of the creditor, ib.
- Security of co-sureties not to be wasted, ib.
- A release of one surety at law discharges the others, ib.
- But in equity not a mere composition, 1892-1894.
- Remarks of Parke, B., in *Kearley v. Cole*, on Lord Denman's decision in *Nicholson v. Revill*, 1894.
- Release of surety will not discharge co-surety when construed as a covenant not to sue, ib.
- May be so by reservation of remedies against co-sureties, ib.
- A promise by surety to pay, after he is discharged by time given to the debtor, revives his liability, ib.
- Liabilities of sureties governed by the same principles in law and in equity, ib.
- But party suing in equity will not be sent to law, ib.
- At law, a party appearing on an instrument to be a principal debtor, formerly could not prove he was only surety, 1895.
- Secus, in equity, where, on proving that, he might be discharged by the creditor giving time, though he would be held bound at law, ib.
- Evidence admissible now at law, to show that a person appearing to be a principal is only a surety, 1895, 1916, 1917.
- In order that surety may be released by time granted to principal, creditor must be aware of the relation between them, 1895, 1918-1921.
- At law, instrument can only be dissolved by one of equal force, 1895.
- When the instrument of suretyship is under seal surety not discharged by mere parol agreement to give time, ib.
- Nor where it is matter of record, ib.
- Secus, in equity, when the agreement is binding, ib.
- Semble, creditor releasing debtor by deed, with the consent by parol only of surety at law discharges surety, 1896.
- Secus, in equity, ib.
- Surety may, when debt is due, take proceedings in equity to compel principal to discharge him from his liability, ib.

SURETY, *continued.*

Secus, where creditor has not a present right to sue, *ib.*

Cases on the Roman-Dutch and old French law, *ib.*

Wife's estate considered only as, when mortgaged for the benefit of her husband, 1922, 1938. See MORTGAGE OF WIFE'S INHERITANCE.

Relation of principal and surety is independent of form of contract, 1897.

Exists whenever obligation of contract is incurred, without sharing in consideration for benefit of others, *ib.*

Equity of surety dependent upon relations between himself and principal, *ib.*

Has no direct operation on contract with creditor, *ib.*

But creditor cannot adopt any course of a nature to impair recourse of surety against principal, 1898.

Surety, and not creditor, answerable for performance by principal, *ib.*

Failure to proceed against principal does not discharge surety, 1898, 1899.

Even when in pursuance of gratuitous promise, 1899.

Or where it results in loss of lien, 1900, 1902.

Suspension of execution before levy, no discharge, *ib.*

Aliter, after levy, 1877, 1901, 1902.

Discharged by surrender of property or securities received from principal, *ib.*

Or their value is impaired by negligence or misfeasance, *ib.*

Surety only exonerated to extent of actual loss, 1902.

Distinction between duty of creditor, with regard to the remedies on the contract itself, and those which are collateral to it, and intended as securities for its performance, 1902, 1903.

Misfeasance as to either, discharge of surety, 1903.

Statutory provisions, 1904.

Creditor not bound to take active measure for collection of debt, even when estate of insolvent principal vested in the hands of trustees or commissioners for distribution, 1904.

Surety not entitled to compel principal to collect the debt by request in pais, or even by bill in equity, unless under special circumstances, 1904-1906.

Secus, in New York, and some of the other States of this country, 1904, 1905.

Surety will be discharged, by anything which precludes or impairs his right to compel the performance of the contract in its original form by the principal, or to perform it himself, and obtain an indemnity, 1906.

A variation of the original contract as it regards the time of performance, or in any other material particular, is, therefore, a discharge of the surety, *ib.*

Even when the change produces no actual injury, 1907, 1908.

And though indemnified by principal, 1908.

And whether the surety or guarantor has made himself answerable at the request of the debtor, or solely that of the creditor, 1907.

But to produce this effect, the variation must be legally binding, and founded on sufficient consideration, 1908, 1909, 1911.

what constitutes valid consideration, 1912.

And not void for usury or illegality, 1913.

But actual payment of usurious interest may be binding on creditor and discharge the surety, *ib.*

Effect of parol agreement varying sealed instrument in discharging surety, 1914.

Time given to principal is a discharge of surety, even when the delay is but momentary, and the surety not injured, 1907, 1908.

Not when the period at which the performance of the contract can be compelled, is accelerated, 1909.

Gift of time will not discharge surety, unless it is for some definite period, and not merely during the pleasure of the creditor, *ib.*

Nor when the surety has assented to the delay expressly or by implication, 1910, 1916.

Nor when the agreement contains a reservation of the rights of the surety, or of the right of the creditor to proceed against him, *ib.*

Nor when the fact of suretyship is unknown to the creditor, 1918-1921.

Whether the information must be given to him when the contract is executed, or may be delayed until a subsequent period, *ib.*

Effect of judgment against surety, 1914, 1915.

Surety will not be discharged on the ground of the variation of the contract, without doing equity, and surrendering securities or property received on account of the debt for the benefit of the creditor, 1908.

Party, who has bound himself as co-contractor, not estopped from showing that he is only a surety, 1916, 1917.

SURETY, continued.

- Aliter, where he has expressly assumed a primary liability, 1917, 1918.*
And the maker of a note or acceptor of a bill, falls within this principle as it regards his relation with those who are secondarily liable for the payment of the instrument, 1915.
Remedy of the surety was formerly solely in equity, 1921.
Relief will now be afforded at law, in many of the States of this country, ib.
Liability of surety on official bond, 1913.
Mortgage of wife's property for benefit of husband, renders her a surety. See MORTGAGE.
When entitled to injunction against proceeding at law, 1336, 1363.
When entitled to equitable set off, 1345.
Marshalling assets in favor of. See MARSHALLING, 3.
When joint purchasers become. See JOINT PURCHASERS.
When partner becomes. See PARTNER.

SURPRISE.

- In action at law when ground for equitable interference, 1368, 1369.*

SURRENDER.

- When instrument ordered to be surrendered and canceled, 1353-1356.*

TACKING.

- Doctrine of, 10, 36, 37.*

TELEGRAMS.

- When within Statute of Frauds, 1102.*

TENANCY.

- Constructive notice by, 130. See NOTICE, 4.*

TENANT FOR LIFE.

- What income entitled to, 695, 696, 713-716, 721. See CONVERSION OF RESIDUE—PARTITION.*

TENANT IN COMMON. See PARTITION.**TENDER.**

- Effect of vendor's refusal to accept, 1083, 1086, 1088, 1089.*

TESTAMENTARY GUARDIAN.

- Powers and duties of. See INFANTS, 1.*

TESTIMONY. See EVIDENCE—PAROL EVIDENCE.**TIMBER.**

- Devise of property, with trust to devise it to a class, in y fell, 1856.*

TIME.

- When essence of contract. See SPECIFIC PERFORMANCE.*

TITLE PAPERS. See DEEDS.

- Constructive notice from. See NOTICE, 2.*

TRUST.

- Cannot be delegated, 1630.*
When implied from use of precatory words. See IMPLIED TRUST.
When raised by parol. See DEED—PAROL EVIDENCE—STATUTE OF FRAUDS.

TRUSTEE.

- Conveyance from trustee and cestui que trust passes good title notwithstanding prior grant of cestui que trust in which the trustee did not join, 47.*
Constructive notice in dealing with, 140.
When assets marshalled in favor of, 288.
When transaction between trustee and cestui que trust set aside, 1228. See UNDUE INFLUENCE—VOLUNTARY DONATION.
As a general rule shall have no allowance for care and trouble, 514.
Nor shall an executor or administrator, ib.
Aliter in the United States, 538.
Not even for carrying on the trade of a testator by his direction, 514.
Or of a deceased partner, 515.
Nor for professional business, ib.
A, for instance, a factor, ib.*
Commission agent, ib.
Auctioneer, 515.

TRUSTEE, continued.

An attorney or solicitor can only charge his cestui que trust expenses and costs out of pocket, *ib.*

So of his partner, *ib.*

But costs of town agent will be allowed, *ib.*

Under peculiar circumstances remuneration given, *ib.*

Assignee of bankrupt acting as solicitor to fiat, only entitled to costs out of pocket, *ib.*

Chairman or director of railway company allowed no profits beyond his salary, *ib.* Except under stipulations in the articles of association, 516.

Mortgagee with power of sale employing firm of auctioneers in which he is a partner not allowed to profit thereby, *ib.*

Either jointly with his partners, or alone, *ib.*

Nor will a mortgagee who is a solicitor be able to profit by sale, *ib.*

Or by the employment of another solicitor to act in sales on agency terms, *ib.*

And profits will arise for benefit of persons entitled to equity of redemption, *ib.*

Settled accounts of solicitor, when opened after general release, *ib.*

Solicitor party to a cause as a trustee acting for himself, allowed only costs out of pocket, 517.

Doctrine in this country, 547, 567, 574, 581, 583, 589.

Or when he employs his partner, 517.

Rule according to *Craddock v. Piper*, not extended to a solicitor acting in a suit for his cestui que trust, *ib.*

Or for himself and co-trustee, or cestui que trust, if the costs are not thereby increased, *ib.*

Craddock v. Piper, disapproved of, *ib.*

Doctrine of Craddock v. Piper, not applicable to case where solicitor acts for himself and co-trustee in the administration of trust estate out of Court, *ib.*

Taxation of costs of solicitor, defendant as trustee, *ib.*

Costs of mortgagee acting as his own solicitor in defence of his title, *ib.*

Semble, solicitor who is trustee is entitled to costs from the mortgagor, to whom he advances trust-money, *ib.*

Trustees and guardians of West Indian proprietors, excepted from the rule, when, 518.

And formerly executor appointed in the East Indies, 519.

Unless he had legacy for his trouble, *ib.*

Could not, after lapse of time, claim commission by renouncing legacy, *ib.*

Law now altered, *ib.*

Agent intrusted with money cannot make profit out of it, *ib.*

Case of clerk of the patents employing public money for his own benefit, *ib.*

Of master of ship loading ship with cargo of his own, *ib.*

Part-owner or partner in ship not entitled to commission as ship's husband, 519, 520.

Semble, managing owner of a ship entitled to commission as ship's broker, *ib.*

But not if serving as ship's chandler, *ib.*

Or ship's carpenter, *ib.*

Agent of landholder acting as agent of Land Drainage Company, not entitled to profits as agent of landholder, *ib.*

Trustee or executor may be entitled to compensation by the direction of the creator of the trust, *ib.*

Or by contract with cestui que trust, 521.

And in solvent estates the compensation established by testator ordinarily governs, 541, 557, 590, 596, 598.

But not if it is obtained by undue pressure, 521, 522.

Or if the terms of the contract be not completely fulfilled, 522.

Or if the contract does not in distinct terms take the trustee out of the general rule, 523.

Nor if it be excessive in amount, and procured under circumstances which justify the belief that it was the result of undue influence, 554, 555.

But contract may be implied, *ib.*

What are included in solicitors' professional charges, *ib.*

Contract for compensation with the Court, *ib.*

Contract by solicitor, being a trustee under the Bankruptcy Act, 1869, for remuneration, 523, 524.

Allowance in special cases for agents, 524.

TRUSTEE, continued.

Although recompense given by creator of trust, *ib.*

Trustee, being a solicitor, may employ another solicitor, *ib.*

Or an accountant, *ib.*

Or an agent, to collect debts, *ib.*

Trustee not appointed receiver with a salary, 524.

Except in a case of necessity, *ib.*

Even where he refuses to act without a salary, *ib.*

Except trustee to preserve contingent remainders, *ib.*

Court may appoint executor or trustee consignee, with usual profits, *ib.*

Sale of property by fiduciary to cestui que trusts, when and on what terms set aside, 525, 526.

Trustee charged interest on trust-mones, improperly in his possession, 254.

Or if employed in a trade or an adventure, with interest or the profits at the option of the cestui que trust, 526-529.

Although mixed with his own monies, *ib.*

Compound interest on trust monies in property retained, when charged, 530.

Sale of office of trustee, set aside, *ib.*

A mere constructive trustee allowed for his time and trouble, 530, 543.

Case of a surviving partner carrying on a business, *ib.*

Persons to whom trust monies are lent not liable to account for profits, 531.

Trustee not allowed sporting over an estate, *ib.*

Not allowed to renew a lease to himself, 532.

Or to purchase from his cestui que trust, *ib.*

Principle applicable to receivers, *ib.*

And committees of lunatic's estates, 532.

And to registrar of colonial Court receiving fees on proceedings instituted by himself, *ib.*

Member of British legislature allowed to make profit by withdrawing opposition to a bill, when, 532, 533.

But not the member of a body not of a governing or legislative character, 533, 534.

Trustees and executors entitled to an allowance for expenses out of pocket, 535.

As the expense of traveling, *ib.*

Fees of counsel, *ib.*

Costs of a law-suit, *ib.*

Unless expenses were improper, *ib.*

Or litigation occasioned by his own negligence, *ib.*

Counsel fees and other necessary expenses allowed when for apparent benefit of estate, 547, 551, 564, 567, 569, 570, 573, 578, 582, 588, 591, 593, 598.

But not allowed interest on his costs, *ib.*

Not disentitled by not keeping accounts, *ib.*

But they should do so, *ib.*

And they have, but not their agents, a lien on trust estate for, *ib.*

And in equity, may proceed against cestui que estate personally, *ib.*

Trustee may profit by his trust, on cestui que trust dying intestate, without heirs, *ib.*

Where there is a trust to convert under a will, for purposes which fail, and testator dies without heirs, 536.

But a trustee must convey to trustees appointed by cestui que trust, although the trust may have failed, *ib.*

Whether on pardon of cestui que trust attainted he could enforce trust, *ib.*

Quere, whether heir of person executed for felony could sue trustee, *ib.*

Forfeiture of lands and goods for treason and felony, abolished, *ib.*

Heir of trustee has no equity, on failure of heirs of cestui que trust, to compel lord to admit him, *ib.*

Court of Queen's Bench will compel the lord to admit heir of trustee, 537.

Quere, whether there was a resulting trust for creditor of trust on attainer of cestui que trust, *ib.*

Question of no importance since passing of 33 & 34 Vict. c. 23, *ib.*

Crown entitled to chattels of cestui que trust dying intestate, or if his executor be a mere trustee, *ib.*

Secus, if executor be beneficial owner, *ib.*

Trustee for alien could not hold lands discharged of trust, *ib.*

The trusts thereof executed for the Crown, *ib.*

TRUSTEE, *continued.*

- Aliens entitled to proceeds of lands directed to be sold, *ib.*
 may, under Naturalization Act, 1870, hold every kind of property, *ib.*
In the United States, trustees are generally allowed a reasonable compensation for risk and trouble, 538.
Same rule prevails with regard to executors, administrators and guardians, and in general, all persons entrusted with the care of the property of others, in a fiduciary capacity, ib.
Compensations usually awarded by means of commissions, 542, 555, 566, 573, 588.
English doctrine originally held in New York, ib.
But set aside by statute, 539.
Still prevails in Delaware, in regard to voluntary trustees, 571.
In New York, compensation, being a statutory right, is not forfeited by misconduct, and will be allowed on one side of account, even when compound interest is charged against trustee on the other, 543.
But generally, compensation awarded of grace, rather than of right, and refused in cases of mismanagement, or when no services have been rendered, or risk incurred, 550, 560, 570, 577, 589, 592, 594.
Necessary expenditures, including counsel fees, costs, salaries, &c., liberally allowed when for apparent benefit of estate, but refused when either unnecessary, or for benefit of fiduciary, 547, 551, 564, 567, 569, 570, 573, 578, 582, 588, 591, 593, 598.
Where statutes conferring compensation only specifically mention trustees, their provisions, by equitable construction, are generally extended to all acting in a fiduciary capacity, 540, 549, 565.
Doctrine in New York, 539-549; Pennsylvania, 549-563; Alabama, 587-590; Arkansas, 593; California, 598, 599; Connecticut, 568; Delaware, 571; Georgia, 585-587; Illinois, 596; Indiana, ib.; Iowa, 597; Kentucky, 594-596; Louisiana, 591-593; Maine, 563; Maryland, 572-575; Massachusetts, 565-568; Mississippi, 590, 591; Missouri, 597; Nebraska, ib.; New Hampshire, 563, 564; New Jersey, 569-571; North Carolina, 577-580; Ohio, 596; South Carolina, 540, 595; Tennessee, 594; Texas, 593; Vermont, 564; Virginia, 575-577; Wisconsin, 597.
Compensation in case of several executors or trustees, 548, 562, 579, 599.
As to costs and expenses incurred by executors and administrators in sustaining the will of decedent, 552, 554, 572, 573.
Rate of compensation established by testator ordinarily prevails in solvent estates, 541, 557, 590, 596, 598.
Commissions on reinvestments, 559, 567.
No distinction between realty and personally as to trustee's commission thereon, 541.
Interest on commissions, 562.
Double compensation in cases of fiduciary occupying double position, or performing extra services, when allowed, 547, 567, 574, 581, 583, 589.
Commissions on legacy, 561, 586, 596.
Resume of doctrines, 599, 600.
Duties of, on bequest for life. See CONVERSION OF RESIDUE.
See PURCHASER BONA FIDE WITHOUT NOTICE.

TRUSTEES AND EXECUTORS, LIABILITIES OF.

- Liability of trustees and executors to their *cestui que trust*, 1748.
 Though trust were voluntary and the gift from themselves, *ib.*
Liable only for actual or constructive negligence or wilful misconduct, 1791.
 Liability of persons assuming to act as, *ib.*
 Agent of, how far liable, *ib.*
 1. *As to getting in outstanding property, 1749.*
 They must exert themselves to get it in, *ib.*
 When in the hands of a co-executor, *ib.*
 Where debt payable by instalments, *ib.*
 Direction to convert speedily is a duty implied in the office of executor, *ib.*
 Executor cannot carry on trade of testator without express authority, 1950.
 Except for the purpose of winding up the concern, *ib.*
Nor generally continue testators' investments if made in illegal securities, 1803, 1804.
 Time allowed to executor for breaking up an establishment, *ib.*
 Not liable for loss occasioned by the exercise of discretion in not converting assets, 1750-1752.
 Liable for loss where no steps taken to get in trust property at a proper time, 1753.
 Where they are liable for a loss, no fixed period from which it is to be calculated, *ib.*

TRUSTEES AND EXECUTORS, LIABILITIES OF, *continued.*

- Onus on executors, to show why they did not convert at the end of the year from the testator's death, *ib.*
- Discretion, when given to trustee to get in outstanding trust funds, how to be exercised, *ib.*
- Unless wanted for payment of debts, executor not obliged to call in a mortgage, when, *ib.*
- Even if it be a second mortgage, 1754.
- Unless security be not good.
- Executor or administrator not liable if any attempt to get in money would have been useless, *ib.*
- Trustee's power to release or compound a debt, *ib.*
- Trustees compounding with a bankrupt, liable to make good the full amount, when, *ib.*
- Power given by statute to trustees to compound debts, *ib.*
- Or to submit claims to arbitration, *ib.*
- Liability of trustees for neglecting to realize securities when ordered by the Court, 1755.
- For neglecting to secure property by giving notice of trust, *ib.*
- Or register settlement, requiring registration, *ib.*
- As to the liability of a trustee who is abroad, *ib.*
2. *As to the custody of trust property, ib.*
- Trustees or executors must take same care of it as of their own, *ib.*
- Not liable for accidental loss, *ib.*
- As by a robbery, 1755, 1791.
- Even when in the possession of another, to whom it was properly intrusted, 1755.
- As when deposited properly in a bank, 1756, 1805.
- For payment of debts, *ib.*
- Or of investing upon a mortgage, *ib.*
- Or when in the hands of an auctioneer, in the case of a deposit on a sale, *ib.*
- Or invested in Exchequer bills, pending preparation of a mortgage, *ib.*
- Liability incurred by leaving money at a banker's unnecessarily, *ib.*
- Or in the hands of solicitor, *ib.*
- Or for leaving deed executed with receipt indorsed in the hands of a solicitor, *ib.*
- Or for leaving Exchequer bills, undistinguished, in the hands of a broker, 1757.
- Or if mixed with his own monies, he becomes bankrupt, *ib.*
- Or bankers have a set off against him, *ib.*
- Trustee liable if he parts with exclusive control of trust fund by associating with himself another person, *ib.*
- Trust fund must not be left under the entire control of a co-trustee, 1757-1759.
- Though by rules of company in which fund is invested, it can only be in the name of one, 1759.
- When trust is at an end, payment may be made to executor of person absolutely entitled, 1760.
3. *As to investment of trust funds, ib.*
- Must not be lent on personal security when, 1760, 1801.
- Although joint, *ib.*
- Or with sureties, *ib.*
- Unless with express authority, *ib.*
- Mere general expressions not sufficient, *ib.*
- Not to be lent without express authority to co-trustee, *ib.*
- Or to a relation for purposes of accommodation, *ib.*
- Terms of authority must be strictly complied with, 1761.
- Authority not exhausted by one loan, when, *ib.*
- Taking a bond in lieu of a bond not necessarily a breach of trust, *ib.*
- Until recently, in the absence of authority, trustees could not invest in real securities, *ib.*
- But in Government or bank annuities, *ib.*
- Consols was the proper fund, 1762.
- Whether liable for fluctuation in other Government stock, *ib.*
- Trustees having power to invest in the public funds or Government securities, not confined to 3 $\frac{1}{2}$ per cents, *ib.*
- But cannot invest in terminable securities to favor a tenant for life, *ib.*
- Investments in exchequer bills, *ib.*
- Power of investment increased by recent legislation, 1762-1766.

TRUSTEES AND EXECUTORS, LIABILITIES OF, *continued.*

- Power given to invest on the stock of the Bank of England or Ireland, when, 1763.
- East India Stock, 1763, 1764.
- Bank stock, 1763.
- Exchequer bills, *ib.*
- 2l. 10s. per cent. annuities, *ib.*
- Mortgage of freeholds and copyholds in England and Wales, *ib.*
- Not New East India loan, *ib.*
- What investments will be authorized by the Courts, 1763-1765.
- Trustees making an investment in East India stock, when protected by the Court, 1764.
- Meaning of "East India Stock," *ib.*
- How money received by trustees under the Settled Estates Act may be invested, 1765.
- As to what amount, in proportion to the value of property, ought to be advanced on a mortgage, *ib.*
- Trustees not justified in lending to one of themselves, 1766.
- Not liable for loss if property previous to mortgage were duly valued, *ib.*
- Second mortgage not a proper security, *ib.*
- Trustee liable for loss of money invested in mortgage through the ignorance or negligence of his solicitor, *ib.*
- Rent-charge under the Drainage Act does not preclude trustee from advancing money on mortgage, 1767.
- Unless he be forbidden expressly by the terms of the trust, *ib.*
- The omission of a power of sale in a mortgage not a breach of trust, *ib.*
- Investments, what authorized by various powers, *ib.*
- Court in the case of infants, does not approve of money in the funds being sold out to be invested on mortgage, 1768.
- Whether power to invest on real securities justifies continuance of investment on turnpike roads, *ib.*
- Further advance to secure former mortgage, where justifiable, *ib.*
- Trustees may invest on real securities in Ireland, when, *ib.*
- Trustees retaining money instead of investing in the funds, how to be charged, *ib.*
- When they have made no profit, interest how calculated, 1769.
- Where there is an express trust for accumulation, *ib.*
- Trustees how charged when they have improperly dealt with trust monies, *ib.*
- Cannot set off gains against losses by improper investments, *ib.*
- Trustees directed to invest on government or real securities, doing neither, how charged, *ib.*
- Trustees liable to a future loss traceable to improper investment, 1770.
- Executor when ordered by the Court, neglecting to invest money, *ib.*
- Wide powers of investment should be exercised with caution, *ib.*
- Bill may be filed in equity to recover trust money advanced in breach of trust, *ib.*
- In some of the States of this Country, trustees are bound to invest in real or Government securities, and not in bank or railroad stock, or in personal security, 1800.*
- Responsibility not lessened by fact that testator had, in his lifetime, invested in similar securities, 1801.*
- Or that trustee managed trust with same care as his own property, 1801.*
- Same rule applies where discretionary power of investment exists, 1801.*
- But in other States they may range through the whole field of investment without responsibility, except for negligence, 1802.*
- Where instrument designates the mode in which the funds are to be invested, its provisions are binding, unless impracticable, 1802, 1803.*
- In absence of express directions, trustee must invest in legal securities, and convert illegal assets, 1803, 1804.*
- No justification that testator himself had invested in illegal securities, 1803, 1804.*
- Aliter in those States wherein trustees' investments are only restrained by prudence, *ib.**
- Investment in confederate bonds, 1804.*
- Receipt of confederate notes, *ib.**
- Loss on investment made by trustee, in his own name, falls on fiduciary, individually, 1805.*
- 4. *How far persons are liable for the acts or defaults of co-trustees and co-executors, 1771.*
- Trustee not liable for the acts or defaults of a co-trustee, 1771, 1792.
- Same rule applicable as between executors, *ib.*
- Liable only for actual or constructive negligence or wilful misconduct, 1791.

TRUSTEES AND EXECUTORS, LIABILITIES OF, *continued.*

- Executor or trustee not bound to take charge of or administer every portion of the trust, ib.*
May, under ordinary circumstances, entrust the whole to the management of his associates, ib.
And will not be answerable for their default or misfeasance in matters which have passed solely through their hands, without his intervention, ib.
Unless he has notice that they are mismanaging the trust, or are unfit to manage it, 1792.
As where he permits the assets of the estate to be received or retained by an insolvent co-trustee or executor, 1793.
But an executor or trustee who enters upon the transaction of any part of the trust is bound to see that it is brought to a safe termination, 1794.
But joining in sale does not impose separate liability for subsequent misapplication of proceeds, 1800.
Trustee or executor liable if he permits co-trustee or co-executor to commit a breach of trust, 1771.
as by placing fund within sole power of co-trustees, 1792.
Trustee must exercise reasonable care and diligence, 1793.
So, of receivers, ib.
As to leave a debt due from co-trustee to remain outstanding, 1771.
Or permits him to receive assets without investing them, 1771-1773.
Executor under a decree for common accounts, liable only for actual or constructive receipts, 1773.
When trustees join each responsible, 1794.
Rule applies with greater force to executors, ib.
But joinder must not be merely nominal, 1795.
Effect of executor's joinder, ib.
Joining does not extend liability beyond particular transaction, 1800.
Trustees or executors accounting jointly are liable for acts of each other, 1796.
Iowa statute, ib.
So, where joint bond has been given, 1797.
So, where joint liability has been imposed by testator, ib.
Separate release by executor for joint deposit no discharge, 1798-1800.
Fiduciaries jointly liable when they expressly contract so to be, 1800.
But liability ceases on death of one, ib.
5. *As to joining with co-trustees in receipt, 1774.*
Trustee joining in receipts for mere conformity not liable for misapplication of the money by his co-trustee, 1774, 1795.
But he must prove that his co-trustee received the money, ib.
And he will be liable if he joins in a receipt unnecessarily, 1775.
Or allows his co-trustee to keep and deal with trust monies contrary to the trust, 1775, 1797.
And he should inquire for what purpose trust monies are wanted, ib.
6. *As to joining with co-executors in receipts, 1776.*
Executor joining with his co-executor in a receipt, answerable for the application of the money, 1776, 1795.
Unless the receipt has not the effect of putting the money in the hands of his co-executor, ib.
As where he has received the money previously, ib.
Lord Eldon's account of the distinction between the liability of an executor and a trustee, from joining in receipts, 1777.
Lord Redesdale's explanation of the distinction, ib.
Where it is necessary that an executor should join his co-executor in a receipt, the rule as to trustees is applicable, 1778, 1795.
As the indorsement of a bill by two executors, 1778.
Or their joining in a sale of stock, ib.
But executor liable if he neglects to inquire for what purpose a sale is required, 1778, 1779.
A debtor discharged by the receipt of one executor though he has also forged thereto the name of his co-executor, 1779.
7. *Executor paying assets over unnecessarily to co-executor, liable, ib.*
By his unnecessarily paying him part of the assets, 1779, 1792, 1793, 1794.
Handing to him a bag of money, 1780.
Joining in indorsing a bill, ib.
Or drawing a bill, ib.

TRUSTEES AND EXECUTORS, LIABILITIES OF, *continued.*

Or delivering securities to trustees known to be in pecuniary embarrassment, 1793.

Or with notice that fund will be misappropriated, ib.

Or by agreeing that each shall receive a certain part of estate, 1780.

But one fiduciary not bound to take adverse measures against another on mere suspicion, 1793.

Management of whole estate may generally be left to one, 1791.

But not where executor necessarily pays money to co-executor, 1781.

As to pay debts in his own neighborhood, ib.

Or to carry on a business directed by the testator.

Or where executor had no legal right to retain the fund from the other, ib.

Nor if, after disclaimer and renunciation, he applies money as agent, ib.

Secus, if he has once acted, 1781, 1794.

Distinction between legatee and creditor seeking to charge executor for joining in a receipt, 1782.

Effect of usual indemnity clause as to joining in receipts, ib.

Of indemnity clause in 22 & 23 Vict. c. 35, ib.

Ordinary indemnity clause, sometimes extended, 1783.

8. *Remedies against trustees and executors, ib.*

Remedies in equity for breach of trust against trustees or executors, ib.

Or their representatives, ib.

Cannot set up Statute of Limitations, 1786.

Nor can covenantor constituting himself trustee of money he has covenanted to pay, ib.

Secus, where he has simply covenanted to pay money to trustees, ib.

Trustees neglecting to enforce the covenant remain liable, ib.

And their representatives, ib.

Execution against one trustee after joint decree, ib.

Contribution or apportionment between, when ordered, ib.

Loss thrown upon one trustee, when, ib.

Trustees recouped by cestui que trust when not under disability, ib.

By married woman, when, 1787.

Charge of trustee has priority over creditors of cestui que trust, ib.

Cestui que trust receiving income from improper investment, bound to give credit for what, ib.

Merely instigating a breach of trust, not liable to recoup trustees, ib.

Proof against estate of bankrupt trustee, ib.

When money lent to his own firm, ib.

When bankrupt beneficially interested in trust funds, ib.

When trust money has been improperly invested, ib.

Original debt of bankrupt barred by his discharge, ib.

Not where he has neglected to prove, ib.

For keeping trust monies in hand, 1788.

Proof against estate of bankrupt, one of several trustees, ib.

Though the other be solvent, ib.

Proceedings in equity against solvent trustee to compel contribution, ib.

Proof when all trustees are bankrupt, ib.

9. *Remedy against trustee barred by concurrence, acquiescence, or release, ib.*

Concurrence by cestui que trust in breach of trust, ib.

Exception in the case of femes covert and infants, when, 1789.

Acquiescence of cestui que trust in improper investment binding, ib.

If made with his full knowledge, ib.

Without concealment on the part of trustees, ib.

Cestui que trust in such case primarily liable, ib.

Not affected by constructive notice, ib.

Not liable when he derives no profit, because he makes no complaint for a long time, 1790.

Especially if his interest be reversionary, ib.

Remedies against trustees barred by release, or confirmation, ib.

Except in the case of infant cestui que trust, ib.

Or married women, when, ib.

Acquiescence of person entitled in remainder, ib.

As to the punishment of trustees for fraudulent breaches of trust, ib.

Husband how far liable for devastavit of his wife. See HUSBAND AND WIFE.

See CONVERSION OF RESIDUE.

UNDUE INFLUENCE. See VOLUNTARY DONATIONS.

What amounts to, 1193-1196.

Deeds and contracts procured by the exercise of undue influence, set aside in equity, 1192. But a deed or will not set aside because the grantor or testator has been influenced, unless he has been influenced unduly, 1279, 1280.

Where the relation between the parties is such as to give an opportunity for the exercise of undue influence, and the result such as it would have been had undue influence been exerted, its exercise will be presumed and relief given in equity, 1206-1230.

Doctrine applied to relationship of parent and child, 1196.

Gift from parent to child, 1206-1212.

Guardian and ward, 1212.

Near relatives, 1213.

Husband and wife, 1215.

Attorney and client, 1216-1227.

Rule includes all obtaining confidence by advising, whether professionally or otherwise, 1222, 1224.

Principal and agent, 1227.

Trustee and cestui que trust, 1228.

Clergyman and parishioner, 1230.

Physician and patient, ib.

In absence of undue influence transaction may be set aside, as abuse of confidence, 1233-1237.

When inadequacy of consideration sufficient to warrant interference of equity, 1237.

Weakness of mind, arising from intoxication or other causes, 1243.

Ignorance, 1244.

Need and duress, 1245.

When one party is relatively or absolutely unable to protect himself, the other will be bound not to injure him, and equity may restrain, on proof of undue advantage, even in absence of deceit, or undue influence, 1230, 1233-1237.

Application of these principles to wills, 1267.

A testamentary gift may be good, when it would have been bad inter vivos, 1273, 1276.

And a bequest or devise will not be set aside merely because it is in favor of one for whom the testator felt an extreme and unreasonable, or even an illicit, affection, 1266-1273.

Or is result of advice or persuasion of those by whom he is surrounded, 1269.

Resumé of doctrines, 1273.

Will prepared by legatee, 1285-1290.

The mental and physical condition of the testator, the state of his feelings and affections, and the res gestæ generally, may be given in evidence to prove or rebut the exercise of undue influence, 1276, 1282.

And the declarations of testator are admissible as evidence of his mental and physical condition, 1282.

And even to show that he was influenced unduly, ib.

But not to contradict the will, nor when so remote as to be irrelevant, ib.

Deeds and contracts vitiated by constructive fraud or undue influence, set aside only so far as may be requisite for the purposes of justice, 1259.

When deed to creditor ordered to stand as security for amount due, 1260.

Third parties cannot profit by donation fraudulently obtained, 1189, 1261, 1262.

Upon whom burden of proof rests, 1193, 1211, 1275, 1280-1282.

Effect of confirmation or acquiescence, 1263-1265.

Use of instrument obtained by, may be enjoined, 1353.

UNILATERAL CONTRACT.

When subject of specific performance. See SPECIFIC PERFORMANCE.

VENDEE. See VENDOR.**VENDOR.**

Cannot withdraw offer to sell after acceptance, 1078.

Rights and liabilities of, under contract for sale of real estate, 1089, 1108-1110, 1112, 1138-1143.

When entitled to rescind contract, 1125, 1135. forfeit, 1125.

Seeking to rescind on ground of fraud must refund consideration, 1260.

Sale by, not in possession, when valid, 1631, 1632.

See DEED—EQUITABLE ASSIGNMENT—NOTICE—PURCHASER BONA FIDE WITHOUT NOTICE—REAL ESTATE—SPECIFIC PERFORMANCE.

VOLUNTARY BOND.

In what order paid in the administration of assets, 362.

VENDOR'S LIEN.

Legatee may be subrogated to, when paid out of personality, 341.

See MARSHALLING.

VOLUNTARY DONATIONS. See UNDUE INFLUENCE.

What essential to validity of, 1192-1196.

Obtained by undue influence set aside, 1174, 1193, 1230.

Entire gift generally set aside, 1259.

Abuse of confidence, 1233.

By person having spiritual ascendancy, 1174.

As to validity of gifts from nuns to their convents, *ib.*

To trustees for religious purposes, *ib.*

Voluntary donation without undue influence, not set aside, *ib.*

Doctrine in this country, 1192, 1251.

How far onus thrown upon donee of showing validity of donation, 1175, 1193, 1195, 1270, 1274, 1276, 1280-1282.

Where voluntary donations on the ground of public policy, *prima facie* presumed fraudulent from the relation of the parties, 1176.

As in the case of the relation of parent and child, 1176, 1196.

Of person *in loco parentis*, *ib.*

Transaction between parent and child when valid, 1177, 1204.

Of the relation of guardian and ward, 1178, 1212.

Near relatives, 1213.

Husband and wife, 1215.

Of the relation of trustee and cestui que trust, 1180, 1228.

Of the relation of legal adviser and client, 1180, 1216.

Donations from client to attorney, pending a suit, invalid, 1180.

Or whilst connection subsists between them, *ib.*

Secus, when no suit pending, 1181.

Evidence admissible to show that consideration expressed in a deed is fictitious, *ib.*

Semble, an attorney may take a gift by will from his client, 1181, 1276.

Though will prepared by the attorney, *ib.*

Donation by client to counsel set aside, 1181.

Rule does not apply to trivial gifts, 1227.

Party advising need not have been admitted to practice, 1222.

Attorney disqualified from purchasing subject matters of suit, 1233.

Clerk of attorney, ib.

Though in consideration of services, 1181.

Professional man cannot profit by his not having given full information to his client, *ib.*

Attorney formerly could not take security for future costs, 1182.

And security for costs good only for costs then due, *ib.*

Settled account between attorney and client, *ib.*

Acquiescence in security, *ib.*

Attorney may now take security for costs under the Attorneys' and Solicitors' Act, 1870, *ib.*

Agreement by solicitor to receive a fixed sum for costs, formerly invalid, *ib.*

Valid now under Attorneys' and Solicitors' Act, 1870, when, *ib.*

Clergyman and parishioner, 1230.

Physician and patient, ib.

Doctrine applied to wills, 1265.

Burden of proof, 1270, 1274, 1280-1285.

Resumé of doctrine, 1273.

What evidence sufficient to set aside will, 1276.

Weakness of mind, 1282.

Will prepared by legatee, 1285-1290.

Lord Brougham's summary of the law as to voluntary gifts to persons standing in these relations towards the donor, 1183.

Applicable to all relations where undue influence may be exercised, 1184.

Of medical man over patient, *ib.*

Medium over spiritualist, *ib.*

Of man over wife, being a deceased wife's sister, 1185.

Over woman to whom he is engaged to be married, *ib.*

VOLUNTARY DONATIONS, *continued.*

- Of elder over younger sister, *ib.*
- No rule as to what amounts to undue influence, *ib.*
- Depends on circumstances of each case, *ib.*
- Non-intervention of disinterested person, *ib.*
- Of professional adviser, *ib.*
- As age or weakness of donor, *ib.*
- Statement of consideration where there was none, 1186.
- Absence of power of revocation, 1186, 1251-1259.
- Improvvidence of transaction, 1186.
- Inadequacy of consideration, when a badge of fraud*, 1237.
- Weakness of mind*, 1242.
- Intoxication*, 1244.
- Ignorance*, *ib.*
- Need*, 1245.
- Duress*, *ib.*
- Undue influence must be proved, where no fiduciary relationship exists between the parties, 1186.
- But when ignorance, imbecility, or intoxication is shown to have existed on one side, and advantage has been taken of it on the other, fraud or undue influence will be presumed, and the deed or contract set aside by equity*, 1237-1245.
- Decision of Lord Brougham in *Hunter v. Atkins*, 1186-1189.
- Where great advantage obtained by a party, it must be shown transaction was fair, and that donor understood transaction, 1188.
- When deed to creditor decreed to stand as security for amount due*, 1260.
- Set aside even after death of donor and donee, 1188.
- Material that the donor had competent advice, when, *ib.*
- Deed executed under pressure of fear invalid, 1189, 1245.
- Deed in expectation of immediate death may be set aside on recovery of donor, *ib.*
- Semble, ordinarily deed making, cannot be rectified, *ib.*
- Except by agreement of the plaintiff, *ib.*
- Effect of absence of power of revocation in*, 1250-1266.
- Third parties cannot profit by donation fraudulently obtained, 1189, 1261.
- Creditor obtaining security from son for debt of father, *ib.*
- Or from ward for debt of guardian, 1190.
- Case of bona fide purchaser without notice, 1191, 1265.
- Acquiescence and confirmation, 1191, 1263-1265.

VOLUNTEERS.

- Subrogation not enforced in favor of*, 287.

WAGES.

- When assignment of future, valid*, 1628.

WARD OF COURT. *See* INFANTS.

WARRANTY.

- No presumption of notice of defective title arises from presence or absence of unlimited covenant of*, 72.
- Effect of covenant of, as regards payment of paramount encumbrance*, 296, 302, 303, 304.

WEAKNESS OF MIND.

- Gift obtained by reason of, when set aside, 1242, 1282. *See* UNDUE INFLUENCE.

WIDOW.

- When conditions in restraint of subsequent marriage valid. *See* MARRIAGE.

WILL.

- Defectively executed invalid*, 816.
- When book entries referred to in, are competent evidence on question of advancement, 816-818.
- Promise inducing bequest in may be proved by parol*, 978.
- Weakness of mind in executing*, 1282.
- Effect of legatee preparing will*, 1285.
- When provision in, set aside on ground of undue influence*, 1265-1282. *See* UNDUE INFLUENCE—VOLUNTARY DONATION.



Library of the United States
Treasury Department

Library of the United States
Treasury Department

K

.W584e

White, Frederick T.

AUTHOR

1876/77

TITLE

v.2

pt. 2

A selection of leading
cases in equity, by F. T.

White and O. D. Tudor.

4th Amer. ed.

BORROWER'S NAME

ROOM
NUMBER

Library Gen. Counsel

K

.W584e

1876/77

v.2

pt. 2

White, Frederick T.

A selection of leading
cases in equity, by F.T.

White and O. D. Tudor.

4th Amer. ed.

LIBRARY
of the
General Counsel
TREASURY DEPARTMENT
Set No.

